Indiana Law Review

Volume 46 **2013** **Number 1**

SYMPOSIUM

REFLECTING ON FORTY YEARS OF MERIT SELECTION IN INDIANA: AN INTRODUCTION

JOEL M. SCHUMM*

On April 5, 2012, nearly 200 people gathered in the Wynne Courtroom for a remarkable symposium reflecting on the merit selection[1] of Indiana Supreme Court justices and Court of Appeals' judges that began with voter approval of a constitutional amendment in 1970. The symposium brought together national and local presenters and attendees from the judiciary, academia, advocacy groups, and the broader bar. The agenda appears at the end of this article.

I. THE ARTICLES THAT FOLLOW

The symposium explored successes and concerns in the initial selection of judges, subsequent retention elections, and the impact of merit selection on the tenure of those judges. The symposium began with a keynote address from ABA President Wm. T. (Bill) Robinson, who focused on the ABA's goal of preserving "our Founding Fathers' vision of the judiciary as the third, non-political branch and the one safe haven Americans have to resolve a dispute: our courts."[2] He described the ABA's policy supporting merit selection of judges and guidelines for recusal of judges, two seemingly different but linked issues that "limit the impact, and perceived impact, of political contributions on the outcome of cases."[3]

Judge Edward Najam next offered a comprehensive and engaging history of the constitutional amendment beginning with the impressive work of the Judicial

---

* Clinical Professor of Law, Indiana University Robert H. McKinney School of Law. B.A., 1992, Ohio Wesleyan University. M.A., 1994, University of Cincinnati. J.D., 1998, Indiana Robert H. McKinney School of Law. Beau Zoeller, Class of 2012, masterfully planned and executed the symposium as the symposium editor.

1. The goal of the symposium was to reflect objectively on selecting judges through a seven-member commission comprised of the Chief Justice, three laypersons appointed by the Governor, and three lawyers elected by lawyers from around the state. However, some view the term "merit selection" as "propagandistic" and prefer "the more-neutral 'Missouri Plan'" to refer to a judicial selection system "that lacks confirmation by the senate or similar popularly elected body." Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 761-62 (2009).

2. Wm. T. (Bill) Robinson III, *Justice in Jeopardy: The ABA Perspective*, 46 IND. L. REV. 7, 10 (2013).

3. *Id.*

Study Commission that drafted the judicial article.[4] The article chronicles the efforts of the bar, the bi-partisan support and bi-partisan opposition in the General Assembly, and the campaign for ratification. The article concludes by reflecting on the effectiveness of four decades of merit selection that has brought "appellate decisions rendered without fear or favor by judges who are not controlled by, or accountable to, any political party or interest group but accountable only to justice and the rule of law."[5]

K.O. Myers of the American Judicature Society explains the benefits of a diverse judiciary.[6] At the time of the symposium the Indiana Supreme Court was all-male and had included just one female justice and only two persons of color among its 107 justices.[7] Mr. Myers' article surveys not only national statistics and surveys regarding diversity and judicial selection methods but also offers data regarding the diversity of the Indiana Judicial Nominating Commission and list of nominees it has forwarded to governors since 1985.[8] He concludes that diversifying nominating commissions and placing an institutional value on a diverse judiciary are reasonable and useful ways to improve merit selection systems.[9]

The remaining speakers focused on post-appointment issues, including retention elections and the effect on judging. Judge Melissa May moderated a panel discussion on retention elections after the 2010 Iowa election in which three justices were not retained after a well-financed campaign focusing on their 2009 opinion regarding same-sex marriage.[10] Judge May's article summarizes that and other retention battles before concluding with ways in which voters can become better informed about retention elections through "large scale education initiatives; judicial performance evaluations, and bar association participation in response to issues set forth in negative ads."[11]

James Bopp, Jr., whose article is entitled "The Perils of Merit Selection," explores many of the pitfalls of merit selection while acknowledging that Indiana has largely avoided those pitfalls "due to the luck of having been blessed with good leaders."[12] His article ends by advocating for partisan elections as "the best system for choosing judges because it openly and honestly acknowledges the judicial law-making function and encourages candidates to be forthright about their own political ideologies."[13]

---

4. Edward W. Najam, Jr., *Merit Selection in Indiana: The Foundation for a Fair and Impartial Appellate Judiciary*, 46 IND. L. REV. 15 (2013).

5. *Id.* at 38.

6. K.O. Myers, *Merit Selection and Diversity on the Bench*, 46 IND. L. REV. 43 (2013).

7. Governor Daniels appointed Justice Loretta Rush as the 108th justice effective November 7, 2012.

8. Myers, *supra* note 6, at 49.

9. *Id.* at 57.

10. Melissa May, *Judicial Retention Elections After 2010*, 46 IND. L. REV. 59 (2013).

11. *Id.* at 81.

12. James Bopp, Jr., *The Perils of Merit Selection*, 46 IND. L. REV. 87, 100 (2013).

13. *Id.* at 102.

The final two articles take different approaches to the issue of judicial recusals in light of recent Supreme Court opinions. A decade ago the Supreme Court held in *Republican Party of Minnesota v. White*[14] that a state could not prohibit judicial candidates from announcing their views. More recently, *Citizens United v. Federal Election Commission*[15] held the First Amendment prohibits the government from suppressing speech based on the speaker's corporate identity, finding unconstitutional a federal statute that prohibited independent corporate expenditures and leading to massive amounts of campaign spending. Professor White posits that "robust judicial qualification rules can remain a strong antidote to the toxic effects of *White* and *Citizens United* if individual judges consider the broad view of the public when ruling on disqualification motions."[16] Because the public's "perception of unfairness . . . promotes disrespect and erodes public trust and confidence in the courts,"[17] judges must view disqualification not in terms of personal fault or an attack on their integrity but rather by asking such questions as "'[w]ill the public's impression of justice be affected negatively if I decide the issue?'"[18]

In contrast, Professor Frank Sullivan, Jr. focuses on the viewpoint of a future litigant and concludes "the best way to assure judicial fairness and impartiality" in light of these decisions "is to use properly structured merit selection systems to select judges rather than popular elections."[19] Merit selection of judges is critical in his view because "the effort to bolster recusal will not solve the threats to due process caused by *White* and the big-money influence of judicial elections."[20]

II. THE IMPORTANCE OF AN OPEN AND TRANSPARENT PROCESS

As the symposium volume went to press in early 2013, the Indiana Supreme Court had gone through a significant change in membership with three new justices joining the Court in just over two years. I had the privilege to view the nearly 100 first and second-round public interviews for those three vacancies, providing extensive commentary to the Indiana Law Blog and media outlets. The open nature of the proceedings struck me as particularly impressive.

When then-trial judge Randall Shepard applied for the Indiana Supreme Court in 1985, the list of applicants was not public.[21] Twenty-five years later, the

---

14. 536 U.S. 765, 781 (2002).

15. 130 S. Ct. 876 (2010).

16. Penny J. White, *A New Perspective on Judicial Disqualification: An Antidote to the Effects of the Decisions in* White *and* Citizens United, 46 IND. L. REV. 103, 118 (2013).

17. *Id.* at 120.

18. *Id.* at 120-21.

19. Frank Sullivan, Jr., *Assuring Due Process Through Merit Selection of Judges*, 46 IND. L. REV. 123, 140 (2013).

20. *Id.*

21. Michael W. Hoskins, *Justice Selection Process Wasn't Always Public*, IND. LAW. (Aug. 4, 2010), http://www.theindianalawyer.com/justice-selection-process-wasnt-always-public/

Commission he chaired not only held public interviews but posted applications online.[22] The public nature of the process likely deters some highly qualified applicants from applying and taking the risk their employers or clients will take a dim view of their desire to leave their present employment. As Judge Najam aptly puts it, "[t]he application and vetting process is not for the faint-hearted. Each applicant runs a public and private gauntlet."[23]

A closed or secret vetting process would be damaging to the public's perception of a commission system. In the absence of information regarding proceedings, the public tends to think that the system is "closed," and that judges are selected through "the old-boy system" or some other process that has little to do with the qualifications of the candidate.[24] As recent commentary from Hawaii, which has one of least transparent processes of all merit selection states noted,

> [I]n many parts of the country, the judicial system is under attack by conservative groups seeking to undermine judicial independence. The shift to more transparent selection procedures seems to be a response to those attacks, as state judiciaries attempt to reassure the public that hard questions are asked and answered in a merit-based selection process.[25]

Although opening interviews to the public and posting applications online bring transparency and arguably legitimacy to the selection process, partisan or other political considerations nevertheless play a role as well. As the former counsels to five governors candidly discussed during the final panel of the symposium, some governors were more involved than others in the commission process. John Whitaker discussed Governor Orr's very different approach to two appointments, one in which he had a strong favorite at the outset, and the other in which he did not. A decade after those appointments, then-Chief Justice Shepard remarked that Governor Bayh's expression of public support for candidates during the nomination process discouraged others from applying.[26]

Not surprisingly, the applicant pool for vacancies since the process has been

---

PARAMS/article/24428.

22. *See generally* Najam, *supra* note 4, at 32-33 ("Applications are now posted online. The Commission conducts public interviews with the candidates that are reported in the traditional press as well as online and in the blogosphere." (footnote omitted)). Some slight redactions were made to applications, such as home addresses and names of children. Moreover, the many attachments to the application, including grade transcripts and writing samples, were not posted online. The entire applications are, however, available for public viewing, and a number of blog entries with such things as tables of applicants' law school grades were posted to the *Indiana Law Blog*.

23. *Id.* at 32.

24. Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 157 (2007).

25. Ian Lind, *Transparency in Judicial Selection Procedures Increasingly Common on the Mainland*, ILAND (Jan. 31, 2011), http://ilind.net/2011/01/31/transparency-in-judicial-selection-procedures-increasingly-common-on-the-mainland/#thash.OpNQQoV3.n9PolLe0.dbs.

26. Greg Kueterman, *Interest Peaks for State's High Court Opening*, IND. LAW., Apr. 17, 1996, at 1.

more public during the past two decades has largely mirrored the partisan affiliation of the governor, and the Commission "has largely deferred to the party holding the governor's office and has tended to provide the governor a pool of candidates identifying with the same political party as the governor."[27] That was not the case two decades earlier. Shortly after the new Judicial Article took effect in 1972, the Commission's Executive Secretary described the first process (a ninth judge on the Court of Appeals) as one where selections "were made without regard to their political backgrounds."[28] He quoted the following internal operational rule of the Commission: "judicial selection or recommendation shall not be based upon partisan political considerations, and at no time will the Commission request or consider information regarding the political affiliation of any person being considered as a nominee."[29]

Judge Najam views some amount of partisanship as inevitable, but suggests success "is not whether politics has been entirely eliminated but whether, and to what extent, merit selection has reduced and minimized the role of party politics and interest groups."[30] On that score, the past four decades can be viewed as a success not only by proponents of merit selection but also its critics. Upon the announcement of his retirement, Justice Frank Sullivan Jr. lauded Indiana's merit selection system, which "lifts up raging moderates."[31] Mr. Bopp's article correctly notes that, although the Commission "has largely deferred to the party holding the governor's office," the justices ultimately selected have later "upheld the results of popular elections in election disputes, ruling in favor of both Republican and Democratic candidates, and thereby avoided accusations of partisanship."[32]

In short, Hoosiers should take pride in our independent appellate judiciary where votes are not cast votes "along party lines for political purposes,"[33] and can look to neighboring states for embarrassing examples of the contrary.[34]

---

27. Bopp, *supra* note 12, at 100; *accord* Najam, *supra* note 4, at 30 ("Republican governors have appointed appellate judges affiliated more or less with the Republican Party, and Democratic governors have appointed appellate judges more or less with the Democratic Party.").

28. Norman T. Funk, *Creation of the First Judicial Nominating Commission*, RES GESTAE, Jan. 1972, at 8, 11.

29. *Id.*

30. Najam, *supra* note 4, at 36.

31. *Id.* (quoting Niki Kelly, *New Vacancy on Indiana's Highest Court*, J. GAZETTE (Apr. 3, 2012, 11:29 AM), http://www.journalgazette.net/article/20120403/NEWS07/304039978/1002/LOCAL).

32. Bopp, *supra* note 12, at 101.

33. Kelly, *supra* note 31 (again quoting Justice Sullivan).

34. *See generally* Elizabeth K. Lampier, *Justice Run Amok: Big Money, Partisanship, and State Judiciaries*, 2011 MICH. ST. L. REV. 1327, 1329 & n.3 (discussing the Michigan Supreme Court).

III. AGENDA

8:30 a.m. Welcome from Dean Roberts
8:40 a.m. Welcome and Introduction of Mr. Robinson by the Honorable Frank Sullivan, Jr., Indiana Supreme Court

9:00 a.m. **Keynote Speaker: ABA President Wm. T. (Bill) Robinson III**

9:30 a.m. The Honorable Edward W. Najam, Jr., Indiana Court of Appeals: "Merit Selection in Indiana: The Foundation for a Fair and Impartial Appellate Judiciary"
10:30 a.m. Mr. K.O. Myers, Director of Research & Programs, American Judicature Society, "Diversity in Merit Selection Systems"
11:00 a.m. "Retention Elections after Iowa 2010" (panel discussion)

- The Honorable Marsha Ternus, (former) Chief Justice of the Iowa Supreme Court
- The Honorable Theodore Boehm, Indiana Supreme Court (retired)
- Bert Brandenburg, Executive Director, Justice at Stake
- Professor Penny White, University of Tennessee College of Law

Moderator: The Honorable Melissa S. May, Indiana Court of Appeals

1:30 p.m. Mr. James Bopp, Jr., Bopp, Coleson, & Bostrom: "The Perils of Merit Selection"
2:15 p.m. Professor Penny White, University of Tennessee College of Law, "Recusal Reform: An Antidote to *Citizens United* and *White*"
3:15 p.m. "Should Indiana Merit Selection Be Trumpeted, Tweaked, or Trashed? – The Governors' Counsels" (panel discussion)

- Mr. John Whitaker, Citizen's Energy Group, (former) Counsel to Gov. Orr
- The Honorable Jane Magnus-Stinson, Southern District of Indiana, (former) Counsel to Gov. Bayh
- Mr. Jon Laramore, Faegre, Baker, Daniels, (former) Counsel to Gov. O'Bannon and Gov. Kernan
- Mr. David Pippen, Bose, McKinney & Evans, (former) Counsel to Gov. Daniels

Moderator: The Honorable Tim Oakes, Marion Superior Court

JUSTICE IN JEOPARDY: THE ABA PERSPECTIVE

WM. T. (BILL) ROBINSON III*

When we discuss merit selection, we are, in truth, discussing the very definition of judicial independence and how it can be accomplished in an age that our Founding Fathers could not have possibly envisioned. In 1780, nearly a decade before the United States Constitution was ratified, the Commonwealth of Massachusetts adopted a constitution of its own, which in large part was drafted by John Adams.[1] It says:

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.[2]

Those are more than just words; they are enduring principles that should guide us, even today. As we consider our extraordinary and unique history, we know that those principles have faced, and will continue to face, challenges that threaten a fair legal process. As we all know, the drafters of the Constitution specifically separated our government into three, co-equal branches to prevent the excessive accumulation of power by the legislative, executive, or judicial branches.[3]

Alexander Hamilton understood the inherent challenge for our courts in this organization of government. In Federalist Paper No. 78, Hamilton wrote that the judiciary "is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches."[4]

"Judicial independence is critical to sustaining our democratic form of government, established by the U.S. Constitution"[5] and state constitutions. "Judges must have the ability to make decisions to protect and enforce the rights of the [P]eople—including the rights of the minority against the tyranny of the majority."[6] Without those rights, as defended by our courts, authorities could kick down a door whenever they choose, record conversations on phones and computers at a whim, or prevent peaceful political demonstrations. When a judge makes a decision, it should be made without fear of intimidation or

---

* President, A.B.A., 2011-2012; Member-in-Charge, Frost Brown Todd LLC; J.D., 1971, University of Kentucky College of Law; B.A., 1967, Thomas More College.

1. LEONARD W. LEVY, SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS, AND HISTORY 307-08 (1995).

2. MASS. CONST. pt. 1, art. XXIX.

3. 16A AM. JUR. 2D *Constitutional Law* § 239 (2012).

4. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

5. Wm. T. (Bill) Robinson, *Why We Need an Independent Judiciary*, HUFFINGTON POST (Dec. 14, 2011, 5:00 PM), http://www.huffingtonpost.com/um-f-bill-robinson/why-we-need-an-indepen_/_b_1149531.html.

6. *Id.* *See also* James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 463-66 (1999).

retaliation.[7] It should be respected and enforced by the legislative and executive branches.[8] In return for its confidence, the public expects that the judiciary will not be unduly swayed by outside influence.[9] This is personal for me. I litigate and try cases for clients. I want a judge who will make decisions in each case based on the proven facts and the applicable law. The judge hearing my case—indeed hearing every case—should be guided by these principles.

As important as an independent judiciary is to the rule of law and our constitutional republic, public trust and confidence are equally so.[10] Without them, democratic institutions would become increasingly non-functional and potentially irrelevant.[11] We know that some Americans have lost faith that our system is just and fair.[12] They have the perception that certain judges are controlled by special interests, the wealthy, and the powerful.[13] Some Americans believe that judges are unconcerned about the rights of racial, ethnic, and political minorities.[14] Alternatively, people believe that our courts are too tolerant of those of a different color or creed.[15]

Some candidates in this campaign season are taking advantage of this lack of public trust to advance their own political agendas.[16] Abolish courts, ignore

---

7. *See* ROBERT A. KATZMANN, COURTS & CONGRESS 3 (1997).

8. *See, e.g.*, Francisco R. Angones, *Protecting Our Independent Judiciary*, 82-MAY FLA. B.J. 8, 8 (2008).

9. *See* Sandra Day O'Connor, *Judicial Independence and 21st Century Challenges* (2011), *in* BENCHER (July/Aug. 2012), *available at* http://home.innofcourts.org/news/featured-bencher-article-judicial-independence-and-21st-century-challenges.aspx; *see also* Robinson, *supra* note 5.

10. *See* Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion*, 99 AM. J. INT'L L. 102, 117-18 (2005) (recognizing the importance of perceptions of justice to the proper functioning of any legal system).

11. O'Connor, *supra* note 9, at 10; Robinson, *supra* note 5.

12. Anthony V. Curto, Op-Ed., *No Justice for All—How Our Civil Justice System is Failing Americans*, FOX NEWS (Aug. 10, 2012), www.foxnews.com/opinion/2012/08/10/no-justice-for-all-how-our-civil-justice-system-is-failing-americans/.

13. *E.g.*, Matt Cantor, *Special Interests Control Our Judges*, NEWSER (Oct. 31, 2011, 4:59 PM), http://www.newser.com/story/132213/special-interests-hold-sway-in-judicial-elections-adam-cohen.html; Adam Cohen, *Judges Are for Sale—and Special Interests Are Buying*, TIME (Oct. 31, 2011), http://ideas.time.com/2011/10/31/judges-are-for-sale-and-special-interests-are-buying/.

14. *See, e.g.*, ALFRED P. CARLTON, JR., JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 60 (2003), *available at* www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf; Elizabeth Neeley, *Racial and Ethnic Bias in the Courts: Impressions from Public Hearings*, 40 CT. REV. 26, 29 (2004).

15. *See, e.g.*, Panel Discussion at the Nat'l Conference on Public Trust and Confidence in the Justice System, *Public Opinion of the Courts: How It Has Been Formed and How We May Reshape It*, 24 CT. REV. 46, 51 (1999), *available at* http://aja.ncsc.dni.us/courtrv/cr36-3/CR%2036-3%20Crier.pdf (panelist Lawrence Dark stated, "I was stunned so many white people said that they saw racial bias in the system.").

16. *See* Newt 2012 Staff, Bringing the Courts Back Under the Constitution 27-28 (Oct. 7,

rulings, impeach judges—these are just a few of the ideas the nominees for president have suggested to win over voters during this primary season.[17] Judges are largely unresponsive to candidate claims that our courts are "grotesquely dictatorial,"[18] or when the candidate says he would consider dispatching U.S. Marshals to round up judges to testify before Congress.[19]

"The judiciary is not a powerful interest group. Courts cannot raise money or marshal voters. Our courts are easy targets because judges do not respond to these attacks. Nor should they."[20] As you all may know, this is not the first time the judiciary has faced these kinds of attacks. At the turn of the nineteenth century, Jeffersonian Republicans tried to impeach Supreme Court Justice Samuel Chase because they disagreed with his decisions.[21] Thirty years later, Jacksonian Democrats sought "to control and, in some cases, defy state and federal courts."[22] Even later in history, President Roosevelt made a public warning that he was willing and able to pack the Supreme Court if he continued to receive resistence to his policy agenda from the Court.[23] Then, there were the threats to remove justices or ignore rulings from the Warren Court, often accompanied by threats of violence,[24] and let's not forget the wave of virulent criticism against judges accused of "judicial activism" just fifteen years ago.[25]

With that historical perspective in mind, one could argue that our courts will be at risk time and time again depending on the political winds in state and

---

2011) (unpublished manuscript), *available at* http://www.newt.org/sites/newt.org/files/Courts.pdf.

17. *See, e.g.*, James Huffman, *Will Newt Neuter the Courts?*, DEFINING IDEAS (Jan. 26, 2012), http://www.hoover.org/publications/defining-ideas/article/106386 (discussing former presidential candidate Newt Gingrich's opinions on the judicial system); Naureen Khan, *Santorum: Abolish Courts that Are too Powerful*, NAT'L J. (updated Jan. 6, 2012, 10:37 AM), http://www.nationaljournal.com/2012-presidential-campaign/santorum-abolish-courts-that-are-too-powerful-20120105.

18. Nia-Malika Henderson, *Newt Gingrich Says U.S. 'Courts Have Become Grotesquely Dictatorial,'* WASH. POST (Dec. 15, 2011, 10:24 PM), www.washingtonpost.com/blogs/election-2012/post/newt-gingrich-says-us-courts-have-become-grotesquely-dictatorial/2011/12/15/gIQA7pe5wO_blog.html.

19. Michael Ono, *Gingrich: Activist Judges Should Be Arrested*, ABC NEWS (Dec. 18, 2011, 8:10 PM), abcnews.go.com/blogs/politics/2011/12/gingrich-activist-judges-should-be-arrested/.

20. Robinson, *supra* note 5. *See* Editorial, *The Judicial Independence and Accountability Task Force*, 88 JUDICATURE 108, 121 (2004) ("The judiciary is frequently not in a position to respond to unwarranted attacks from another branch or from the public.").

21. Emily Field Van Tassel, *Challenges to Constitutional Decisions of State Courts and Institutional Pressure on State Judiciaries*, *in* CARLTON, *supra* note 14, at app. E, p. 2.

22. CARLTON, *supra* note 14, at 2.

23. *Id.* at 2-3.

24. *Id.*

25. *See, e.g.*, Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 155 (2003) (discussing a Free Congress Foundation program implemented in the mid-1990s in opposition to judicial activism).

federal governments. The American Bar Association's goal—and that of everyone who believes in America's exceptional, constitutional design for its Government—is to preserve our Founding Fathers' vision of the judiciary as the third, non-political branch and the one safe haven Americans have to resolve a dispute: our courts.[26] As Justice Sandra Day O'Connor said so eloquently, "In our system, the judiciary, unlike the legislative and the executive branches, is supposed to answer only to the law and the Constitution. Courts are supposed to be the one safe place where every citizen can receive a fair hearing."[27] Courts are supposed to be the one safe place, and yet we are increasingly seeing judicial elections that are focused on specific issues, ranging from abortion to product liability or school funding.[28]

The message to the electorate is sometimes this simple: pick me, and I will make rulings that reflect your views regardless of the facts of the case. That message is antithetical to the principles of judicial independence, impartiality, and the rule of law. Then there are the issues that arise once a judge is elected. In *Caperton v. A.T. Massey Coal Co.*,[29] a 2009 Supreme Court case, the Court dealt with the issue of judicial recusal and campaign finance.[30] It dramatically demonstrated how litigants question whether they will receive impartial treatment when a judge hearing the case has received campaign contributions from the opposing party or its counsel.[31] The amount involved in *Caperton* was extraordinary, but even much smaller contributions can make an opposing party in a case understandably lose confidence and trust in the justice system and give rise to a perception of dependence.[32] Yet, a judge running for election or re-election will naturally turn to the legal community for support.

The ABA has guidelines for the recusal of judges and a policy for merit selection.[33] Although these are two different issues, they are linked: these policies limit the impact, and perceived impact, of political contributions on the outcome of cases.[34] Image has much to do with how the public respects our

---

26. *ABA Mission and Goals*, A.B.A., http://www.americanbar.org/utility/about_the_aba/aba-mission-goals.html (last visited Sept. 9, 2012).

27. Sandra Day O'Connor, Op-Ed., *Take Justice Off the Ballot*, N.Y. TIMES, May 23, 2010, at WK9, *available at* http://www.nytimes.com/2010/05/23/opinion/23oconnor.html.

28. *See* Adam Liptak, *Judges Mix with Politics*, N.Y. TIMES, Feb. 22, 2003, www.nytimes.com/2003/02/22/nyregion/judges-mix-with-politics.html?pagewanted=all&src=pm.

29. 556 U.S. 868 (2009).

30. *Id.* at 884, 887 (discussing an appellate court judge's failure to recuse himself when a party had donated $3 million to his election campaign).

31. *Id.* at 889.

32. *See Judicial Disqualification Based on Campaign Contributions*, AM. JUDICATURE SOC'Y 7 (last updated Mar. 8, 2012), http://www.ajs.org/ethics/pdfs/Disqualification Contributions.pdf.

33. CARLTON, *supra* note 14, at 70.

34. *See* Elaine E. Buckle & Jeffrey Cole, *Thoughts on Safeguarding Judicial Independence: An Interview with Justice Sandra Day O'Connor*, 35 NO. 3 LITIG. 6 (2009) (quoting Sandra Day O'Connor listing merit selection and stronger recusal rules as to ways to engender an independent judiciary).

courts.[35] That is partially why we expect judges to uphold the highest ethical standards. For many years, the ABA has supported merit selection of judges and encouraged the use of commissions to evaluate credentials and professional qualifications of prospective appointees.[36]

There are three important reasons for this policy, "First, the administration of justice should not turn on the outcome of [a] popularity contest[.]"[37] Second, the "appointment reduces the corrosive influence of money . . . by sparing candidates the need to solicit contributions from individuals and organizations with an interest in the cases the candidates will decide as judges."[38] And third, the rising cost of these campaigns could discourage qualified candidates from running at all, especially as it relates to a diverse bench.[39] While the ABA prefers that judges not stand for election at all, we respect that individual states value citizen participation in making decisions about the judiciary.[40]

Judges should be free from improper political influence, but they also should be accountable to the public for fairly and responsibly fulfilling their responsibilities.[41] That is why the ABA also prefers retention elections over contested partisan races when states choose to retain elective systems.[42] In keeping with the ABA's goals of improving our profession, eliminating bias, and advancing the rule of law, in 2000, the House of Delegates approved a set of model standards for the selection of state judges,[43] and in 2003, the House approved a clearly enunciated set of principles to "ensure judicial independence, accountability and efficiency."[44]

The standards and principles were conceived with the input of ABA members, bar associations, judges, and other interested organizations and are intended to help guide states as they consider a transition toward a merit

---

35. Kevin M. LaCroix, *Justice Kagan at the University of Michigan Law School*, LEXISNEXIS CMTYS. SEC. L. BLOG (Sept. 13, 2012, 9:11 AM), www.lexisnexis.com/community/corpsec/blogs/corporateandsecuritieslawblog/archive/2012/09/13/justice-kagan-at-the-university-of-michigan-law-school.aspx.

36. CARLTON, *supra* note 14, at 70.

37. *Id.*

38. *Id.*

39. *Id.* at 70-71.

40. *See* Steve Brown, *American Bar Association Offers New Guide for Choosing State Judges*, CNSNEWS (July 7, 2008), http://cnsnews.com/news/article/american-bar-association-offers-new-guide-choosing-state-judges ("While the ABA prefers appointment . . . 'Americans by and large prefer an elected to an appointed system.'").

41. CARLTON, *supra* note 14, at 71.

42. A.B.A. COMM. ON THE 21ST CENTURY JUDICIARY, PRINCIPLES AND CONCLUSIONS AUGUST 2003 (2003), *in* CARLTON, *supra* note 14, at app. A, p. 2.

43. A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, STANDARDS ON STATE JUDICIAL SELECTION, at iv (2000), *available at* http://www.lwvohio.org/assets/attachments/file/standards%20on%state%20Judicial%20selection.pdf [hereinafter A.B.A. STANDARDS ON STATE JUDICIAL SELECTION].

44. *See* CARLTON, *supra* note 14, at app. A.

system.[45] The standards, which recognize that the American public is the most important constituency and consumer of the judicial system,[46] "address two main questions: what are the qualifications needed for a state judge and what is the best method to assess those qualifications[?]"[47] These standards find common ground between the ABA's long-standing preference for merit selection and the appointive and elective processes in many states, but clearly this is an ongoing debate. For example, the Arkansas Bar Association created a task force to study reform of the judicial election process.[48] Pennsylvania also is considering whether to switch to a merit selection system.[49] Additionally, a proposal to give the Florida governor more say over judicial nominations died during the 2012 legislative session.[50]

"No one claims that judges [and the selection systems we have in place] are infallible. . . . [A]ppellate courts within the judiciary, and a [process] of checks and balances . . . among the branches" exist, in part, for this reason.[51] Further, "[w]e can, and should, pursue a thoughtful conversation about how to further improve and strengthen our judicial system," and we can do it "without denigrating individual judges," courts, or their decisions.[52] To paraphrase former California Supreme Court Justice Joseph Grodin: we do not want, and we cannot allow, judges to be seen as simply legislators in robes.[53]

While we will learn much from this Symposium about the current challenges facing the judicial selection process and strategies for its future, we must also address the underlying reality that there "is a pervasive lack of civics awareness in this country, going back at least two generations. . . . [W]orse [yet], the next

---

45. *See, e.g.*, *Judicial Selection*, MO. BAR 12-13, http://members.mobar.org/pdfs/about/judicial_selection.pdf (last visited Dec. 4, 2012).

46. A.B.A. STANDARDS ON STATE JUDICIAL SELECTION, *supra* note 43, at 2.

47. *Id.* at iv.

48. *See For the Public*, ARK. BAR ASS'N, http://www.arkbar.com/pages/for_public.aspx (last visited Nov. 29, 2012).

49. *See* Kaleena Laputka, *Merit Selection: The Right Path for Pennsylvania*, CHOOSE JUDGES ON MERIT (Sept. 24, 2012, 2:02 PM), www.judgesonmerit.org/2012/09/24/merit-selection-the-right-path-for-pennsylvania/; *see also* Robert Speel, Op-Ed., *It Seems Foolish to Elect Appellate Court Judges,* PATRIOT-NEWS (May 20, 2011, 4:16 AM), http://www.pennlive.com/editorials/index.ssf/2011/05/it_seems_foolish_to_elect_appe.html.

50. Katie Sanders, *House Won't Hear Revised, Crist-Friendly Bill Giving Scott More Power over JNCs*, TAMPA BAY TIMES (Mar. 7, 2012, 4:52 PM), http://www.tampabay.com/blogs/the-buzz-florida-politics/content/house-wont-hear-revised-crist-friendly-bill-giving-scott-more-power-over-jncs.

51. Robinson, *supra* note 5. *See, e.g.*, *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/removal_of_judges.cfm?state= (last visited Nov. 29, 2012) (discussing how states have established procedures for removing judges from the bench).

52. Robinson, *supra* note 5.

53. JOHN L. DODD ET AL., THE CASE FOR JUDICIAL APPOINTMENTS, at part II(3) (Jan. 2003), *available at* www.fed-soc.org/publications/detail/print/the-case-for-judicial-appointments.

generation of voters may know even less about what our courts do and why they are so essential in protecting fundamental rights and liberties [for] our citizens."[54] Such ignorance could have a much more damaging and lasting impact on the future of our judiciary and its selection processes.

"Right now, civics is one of the lowest priorities in" our nation's schools.[55] The No Child Left Behind Act of 2001 mandates that schools "test students on reading and math knowledge."[56] The law

> ties test scores to federal education dollars. If it is tested, as is the case with reading and math, it is taught—to the detriment of other subjects, such as civics. It is a sad commentary about our country that the federal government—of the people, by the people—has put civics on the endangered species list.[57]

In 2011, the Fordham Institute released a report card on state standards for the teaching of history.[58] Twenty-eight states scored "D's" or below on that report card.[59] Around the same time, *Newsweek* polled Americans using the U.S. citizenship test.

> Almost forty percent of Americans failed the test[,] and . . . Americans did very poorly on the questions related to law and our legal system. Two-thirds, for example, did not know that the Constitution is the supreme law of the land. The fact is, the next generation of voters is more likely to know the [first and last] names of the three judges on [the television show] *American Idol* than know [the names of] three Supreme Court justices. A large percentage polled cannot name the Chief Justice of the United States.[60]

---

54. Wm. T. (Bill) Robinson III, Keynote Address at the 2011-2012 Bellwood Lecture (Sept. 14, 2011), *Against Any Winds That Blow: The Special Role of the Judiciary in Protecting Rights and Securing the Rule of Law*, 48 IDAHO L. REV. 73, 83 (2011) [hereinafter Robinson, Keynote Address]. *See An Independent Judiciary*, 1997 A.B.A. COMM'N ON SEPARATION OF POWERS & JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY 62 (July 4, 1997), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/government_affairs_office/indepenjud.authcheckdam.pdf.

55. Robinson, Keynote Address, *supra* note 54, at 83.

56. *Id.*

57. *Id.* (internal footnote omitted); No Child Left Behind Act of 2001, Pub. L. No. 107-110, 20 U.S.C. §§ 6311(a)(1), (b)(1)(C) (2006). *See The Dangerous Consequences of High-Stakes Standardized Testing*, NAT'L CTR. FOR FAIR & OPEN TESTING (Dec. 17, 2007, 1:50 PM), http://www.fairtest.org/facts/Dangerous%20 Consequences.html.

58. JEREMY A. STERN & SHELDON M. STERN, FORDHAM INST., THE STATE OF STATE U.S. HISTORY STANDARDS 2011, at 12 (Feb. 16, 2011), *available at* http://www.edexcellencemedia.net/publications/2011/20110216_SOSHS/SOSS_History_FINAL.pdf.

59. *Id.*

60. Robinson, Keynote Address, *supra* note 54, at 83-84 (citing Andrew Romano, *How Dumb Are We?*, NEWSWEEK (Mar. 20, 2011, 10:00 AM), http://www.thedailybeast.com/newsweek/

An electorate ignorant about its own history and unaware of the historical struggle for freedom in this country has little interest in defending the institution that protects that freedom—our courts, one of the three co-equal branches of government.

The ABA urges every lawyer to participate in volunteer programs that teach our children about our national character.[61] Thanks to the work of the ABA Commission on Civic Education in the Nation's Schools, teachers and lawyers have resources, including a dynamic "Civics and Law Academy" curriculum, to help them make meaningful connections with students.[62] As a nation, we need our schools to educate the next generation of voters about the history we share. Our democracy and the rule of law will thrive with the informed leadership of future generations. As officers of the Court, it is our responsibility and our duty to uphold these principles.

The drafters of our Constitution were defined by the monuments they built. Will we be defined by the ones we destroy? Let's stand up for one of our most precious monuments—our judiciary—as a place of integrity and independence. Our liberty depends on it.

2011/03/20/how-dumb-are-we.html). *See also* Wm. T. (Bill) Robinson III, *Justice in Jeopardy: The Real Cost of Underfunded Courts*, 27-SUM. CRIM. JUST. 4 (2012); Steve Pendlebury, *Most Americans Can't Name Any Supreme Court Justices*, AOL NEWS (June 2, 2010, 4:27 PM), www.aolnews.com/2010/06/02/most-americans-cant-name-any-supreme-court-justices/; Michelle Croteau & Robyn Hagan Cain, *FindLaw Survey: Most Americans Can't Name Supreme Court Justices*, FINDLAW BLOG (Aug. 23, 2012, 12:02 PM), http://blogs.findlaw.com/official_findlaw_blog/2012/08/findlaw-survey-most-americans-cant-name-supreme-court-justices.html.

61. *See, e.g.*, *ABA Commission on Civic Education in the Nation's Schools*, A.B.A., http://www.americanbar.org/groups/civics/about_us.html (last visited Sept. 25, 2012).

62. *Id.*

MERIT SELECTION IN INDIANA: THE FOUNDATION FOR A FAIR AND IMPARTIAL APPELLATE JUDICIARY

EDWARD W. NAJAM, JR.*

INTRODUCTION

Forty years ago the people of Indiana amended their constitution to provide for the merit selection and retention of appellate judges.[1] After 120 years of partisan judicial elections, the amendment to article 7 of the Indiana Constitution was a significant, if not radical, departure. Under the Constitution of 1852, virtually all Indiana judges were elected on a partisan ballot, and appellate judges were swept in to office and out of office on political tides that had nothing to do with their judicial qualifications or performance.

The *Indiana Law Review* has invited us to reflect upon Indiana's forty years of experience with merit selection and to consider whether merit selection in practice has achieved its promise to remove appellate judges from partisan politics, to secure and retain able jurists, and to maintain a fair and impartial appellate judiciary.

This Article will consider (1) the national judicial reform movement that led to Indiana's revised Judicial Article, (2) the work of the Judicial Study Commission which recommended merit selection, (3) the debate in the Indiana General Assembly over adoption of the amendment to article 7 of the Indiana Constitution, (4) the campaign for ratification of the amendment, and (5) Indiana's experience with merit selection, including a brief comparison with judicial elections in other states.

The proper role of the courts has been an important topic since the earliest days of the republic. In *Democracy in America*, Alexis de Toqueville concluded, "Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate . . . ."[2] De Toqueville's observation reminds us that public interest in the business of the courts is woven into the fabric of the nation. Thus, as the American Judicature Society recently observed, "The debate over judicial selection, which began before the founding of the nation, is an ongoing conversation about the judicial function in a democratic society."[3]

---

* Judge, Court of Appeals of Indiana; B.A., Indiana University–Bloomington, 1969; J.D., Harvard Law School, 1972. The author wishes to acknowledge the valuable research and editorial contributions made to this Article by his judicial clerk, Jonathan B. Warner, B.A., Wabash College, 2003; J.D., Indiana University Maurer School of Law, 2006.

1. IND. CONST. art. VII, § 11.

2. ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 309 (Henry Reeve trans., Penn. State Univ. 2002) (1830), *available at* http://seas3.elte.hu/coursematerial/LojkoMiklos/Alexis-de-Tocqueville-Democracy-in-America.pdf.

3. RACHEL PAINE CAUFIELD, AM. JUDICATURE SOC'Y, INSIDE MERIT SELECTION: A NATIONAL SURVEY OF JUDICIAL NOMINATING COMMISSIONERS 5 (2012).

I. THE NATIONAL JUDICIAL REFORM MOVEMENT

The adoption of Indiana's revised Judicial Article was one chapter in a broad judicial reform movement that began in the early 20th Century. Three historic events shaped that movement. The first was an address by Roscoe Pound, a young law professor from the University of Nebraska, who would later become Dean of the Harvard Law School.[4] In August 1906, Pound spoke at the annual meeting of the American Bar Association.[5] His paper entitled, "The Causes of Popular Dissatisfaction with the Administration of Justice," was a rigorous critique of contemporary legal institutions and an indictment of the status quo.[6] Pound assailed "the putting of our courts into politics" and contended that "compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."[7] Pound's remarks caught the delegates by surprise and caused a stir. Dean Wigmore, who was present, reported that Pound's address was "something different" than "the typical Bar Association address of that period" and described the speech as "the spark that kindled the white flame of high endeavor . . . [which] spread[] through the entire legal profession and . . . the administration of justice."[8] Pound planted the seeds for reform, and today his address is widely recognized as the seminal event in the modern judicial reform movement.

The second significant event was the founding of the American Judicature Society.[9] AJS became the epicenter of judicial reform and the preeminent private institution dedicated to promoting the integrity of the judiciary and fair and impartial courts.[10] The impact that the American Judicature Society has had on the administration of justice in the United States for almost 100 years cannot be overstated.

And the third significant event occurred in 1940 when Missouri became the first state to approve a constitutional amendment adopting a merit selection plan.[11] This plan had been first proposed by the American Judicature Society in

---

4. *See Who Is Roscoe Pound?*, POUND CIV. JUST. INST., http:/www.roscoepound.org/whoisroscoe.aspx (last visited Dec. 20, 2012).

5. *See ABA Timeline*, A.B.A., http://www.americanbar.org/utility/about_the_aba/timeline.html (last visited Dec. 20, 2012).

6. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 395-417 (1906), *reprinted in* Roscoe Pound, *Proceedings in Commemoration of the Address*, 35 F.R.D. 241, 273, 290 (1964).

7. *Id.* at 289, 290.

8. John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y 176, 176 (1936-37).

9. *See About AJS*, AM. JUDICATURE SOC'Y, http://www.ajs.org/ajs/ajs_about.asp (last visited Dec. 20, 2012).

10. *See Strategic Plan Overview*, AM. JUDICATURE SOC'Y (2007), http://www.ajs.org/ajs/pdfs/AJS%20Strategic%Plan%20-%20version.pdf.

11. *See Judicial Selection in the States: Missouri*, AM. JUDICATURE SOC'Y, http://www.judicialselection.com/judicial_selection/index.cfm?state=MO (last visited Dec. 20, 2012).

1913, and in 1938, it was approved by the American Bar Association.[12] The A.B.A. or Missouri Plan became a blueprint for judicial reform in many states, including Indiana.[13]

II. THE JUDICIAL STUDY COMMISSION

The 1965 session of the Indiana General Assembly approved an act creating a twelve member Judicial Study Commission.[14] The Commission would include four (4) members from the Senate, four (4) members from the House of Representatives and four (4) members appointed by the governor.[15] Not more than 50% within each group of appointees would be affiliated with the same political party.[16]

The Commission was chaired by Evansville attorney and State Senator F. Wesley Bowers and included other leaders of the legal profession.[17] Indiana University Chancellor and former President Herman B Wells served as Director of the Commission.[18] The legislature charged the Commission with, among other things, the duty "to study the needs of this state for revision of its judicial system" and to report its recommendation "as to needed changes in the organization of the judicial department or the courts."[19] Litigation to enjoin creation of the Commission delayed the work of the Commission by six months.[20]

---

12. REPORT OF THE JUDICIAL STUDY COMMISSION 121 (1966) [hereinafter JUDICIAL STUDY COMMISSION REPORT].

13. *Id.*

14. *Id.* at 1-2.

15. *See* John Dean, *Judge Funk Rules Judicial Study Commission Is Unconstitutional*, INDIANAPOLIS STAR, July 24, 1965, at 17.

16. *Id.*

17. Commission members included Sen. F. Wesley Bowers, Rep. Robert V. Bridwell, Rep. Robert D. Anderson, Rep. John W. Donaldson, C. Ben Dutton, Sen. William W. Erwin, William M. Evans, Carl M. Gray, Sen. A. Morris Hall, Gilmore S. Haynie, Rep. David F. Metzger, and Sen. Leonard Opperman. *See* JUDICIAL STUDY COMMISSION REPORT, *supra* note 12, at report cover.

18. *Id.* at 2.

19. 1965 Ind. Acts, chs. 47, 75, 77.

20. JUDICIAL STUDY COMMISSION REPORT, *supra* note 12, at 1. The reason for the six-month delay is interesting. In early 1965, Indianapolis attorney Leo L. Kriner, on his own behalf, filed a lawsuit in the Marion Superior Court to enjoin the formation of the Commission. *See Rumors of Court Involvement in Suit Told Legislators*, INDIANAPOLIS STAR, July 15, 1965, at 7. In July, Judge Glenn W. Funk issued a fourteen-page order and temporary injunction prohibiting officials from creating the Commission. *See* Dean, *supra* note 15. Judge Funk indicated that he would consider making the injunction permanent, which was Kriner's stated goal. *Rumors of Court Involvement in Suit Told Legislators*, *supra*.

Attorney General John J. Dillon announced that he would appeal Judge Funk's decision directly to the Indiana Supreme Court, but there were "widespread reports" that the Indiana Supreme Court justices were behind Kriner's suit. *Id.* All five justices—Chief Justice Jackson, Justice Achor, Justice Myers, Justice Landis, and Justice Arterburn—denied such involvement. *Id.*

Significantly, the Commission itself agreed that any recommendation would be unanimous, that before "becoming a proposal of the Commission it must be the opinion of each and all Commission members that a proposal is wholly justified by the needs of the judicial system and the interests of the public."[21]

The research design for the Commission's work included three areas of inquiry: (1) an analysis of Indiana's judicial system, (2) a systematic program for gathering the opinions of others, and (3) an analysis "of current trends in judicial modernization."[22] When the Commission began its work, all but a few Indiana judges at both the state and local level were elected in partisan contests. The Commission's overarching purpose was to evaluate Indiana's system of selecting judges in a partisan political election and to consider alternatives to that system.[23]

The Commission noted that, under the Constitution of 1816, the governor had appointed the judges of the supreme court, subject to ratification by the Senate, and that that system had "provided Indiana with a first-rate [Supreme] Court," which "gained such renown that its decisions were cited throughout the United States and even in Great Britain."[24] The Commission observed that the Constitutional Convention of 1851 was "convened mainly to consider changing"

Nonetheless, Attorney General Dillon informed the General Assembly of the possible involvement of the Indiana Supreme Court justices, and the General Assembly, in a special session, passed a bill that required the following: (1) appeals from the grant of a temporary injunction lie with the appellate court, not the supreme court; (2) upon removal by the attorney general to the appellate court, the presiding justice shall fix a date within three to seven days of the removal for oral argument; (3) the appellate court must hear the oral argument en banc; (4) "on the day of such argument" at least five of the judges at the oral argument must "sign an order . . . continuing the restraint . . . in effect as originally issued"; (5) if such order is not signed in accordance with the law, "all restraint . . . shall thereupon stand dissolved by operation of law." Kriner v. Bottorff, 216 N.E.2d 38, 40-41 (Ind. App. 1966) (memorandum of Presiding Justice Smith) (discussing Ch. 7 of the Acts of the Indiana General Assembly of 1965, 2nd Special Session). That is, the General Assembly required five appellate court judges to immediately ratify Judge Funk's temporary injunction in order for that injunction to have continued effect. *See id.*

On November 22, 1965, the appellate court, en banc, held oral argument on the attorney general's removal of Judge Funk's order. Following oral argument, five judges failed to ratify the order and, as a result, this "negative action, according to the provisions of the [special session law], had the effect of dissolving the temporary injunction . . . by operation of law." *Id.* at 41. Judge Mote later filed a memorandum opinion in his own name dissenting from the court's negative action on the grounds that he believed the special session law to be an unconstitutional encroachment of the legislature into the functions of the judiciary. *Id.* at 39-40.

With the temporary injunction dissolved, the Judicial Study Commission met on December 9, 1965. *See* McCullough v. State, 900 N.E.2d 745, 747-48 (Ind. 2009) (discussing the first meeting of the Judicial Study Commission).

21. JUDICIAL STUDY COMMISSION REPORT, *supra* note 12, at 2.

22. *Id.* at 3.

23. *Id.* at 1-3.

24. *Id.* at 15.

that system, which was no longer able to cope with the problems of the rapidly growing state.[25] Thus, the Commission began its research by examining the debates from the Constitutional Convention of 1851, which was responsible for "[t]he organization and structure" of Indiana's courts.[26] The Convention of 1851 had been influenced by Jacksonian Democracy and the Populist movements, which fueled demand for the election of all public officials, including judges.[27] "Many of the delegates to the Constitutional Convention of 1851 were Jacksonians and Populists, and it was primarily through their efforts that the partisan election of judges was brought to Indiana" in the Constitution of 1852.[28]

The Commission directed a questionnaire to all members of the Indiana Bar, and nearly 53% of attorneys returned the questionnaire.[29] A different questionnaire was directed to Indiana judges.[30] The attorneys were identified by income, years of practice, the counties where they practiced, and other criteria.[31] The three most significant questions on judicial selection and tenure posed in the Indiana attorney survey included:

1. "Can the present system of judicial selection continue to obtain the best qualified judicial personnel?"

2. "Do political influences enter into judicial determinations in your experience?"

3. "Under what selection system would you be most inclined to accept judicial office?"[32]

The Commission's report is impressive in its sophistication, detail and scope. The Commission's survey showed that Indiana attorneys were "almost unanimous in their criticism of the . . . system" in which Indiana's judges were selected in a partisan political election.[33] The Commission found that 79% of the attorneys surveyed "felt that the present system could not continue to provide . . . highly qualified trial judges," and 85% of the attorney-respondents "felt the present system could not continue to provide highly qualified [appellate] judges."[34] The Commission found that Indiana lawyers believed there was a direct correlation between judicial selection and judicial independence,[35] and "[m]ost disturbing of all," that 87% of attorney-respondents "felt that politics had . . . influenced decisions to some degree," and 32% felt that politics "frequently influenced [judicial] decisions."[36]

---

25. *Id.* at 9.
26. *Id.* at 3, 80.
27. *Id.* at 106.
28. *Id.*
29. *Id.* at 17.
30. *Id.* at 105.
31. *Id.* at 17.
32. *Id.*
33. *Id.* at 105.
34. *Id.*
35. *Id.*
36. *Id.*

The Commission also discovered that two-thirds of the attorney-respondents were unwilling to run in a partisan contest for judicial office, which created a shortage of qualified candidates.[37] Further, the Commission identified the existence of an inverse correlation between success in the legal profession and willingness to become a judge.[38] The Commission determined from its survey "that those [attorneys] who earn the least income are most willing to become a judge and those who earn the most income are least willing."[39] Thus, the Commission concluded, "It is unlikely that a lawyer who has built up a lucrative practice will be willing to give up his practice with no assurance that he will be a judge for more than four or six years."[40]

"Judges criticized the system almost as strongly as attorneys."[41] Of the participating judges, 63% opposed partisan elections.[42] The "judges indicated that they considered campaigning for office and engaging in partisan political activity undesirable for judges."[43] And the judges confirmed "that it is practically impossible to run for political office without incurring political debts."[44] The Commission found the survey opinions of attorneys and judges on the current system "thoroughly shocking."[45]

> The fact that attorneys were not willing to run, that they almost unanimously doubted that the present system could continue to provide good judges, that both attorneys and judges consider court decisions to be affected by political influences, and that judges had to incur political debts all thoroughly appalled the Commission.[46]

The Commission observed that the organization and structure of Indiana courts was designed with the problems of the nineteenth century in mind, and concluded that "[j]ust as the solutions of 1816 were no longer applicable in 1851, so the solutions of 1851 are no longer applicable today."[47]

The Commission considered three basic plans for judicial selection: (1) non-partisan elections, (2) executive appointments, and (3) the A.B.A. or "Missouri Plan."[48] The Commission recommended the "Missouri Plan," which, as previously noted, was first implemented in Missouri in 1940.[49] A majority of the

---

37. *Id.*
38. *Id.* at 117.
39. *Id.* at 18.
40. *Id.* at 27.
41. *Id.*
42. *Id.* at 105.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 80.
48. *Id.* at 106-21.
49. *Id.* at 121.

attorneys surveyed favored this plan.[50] The Commission explained:

> The plan is essentially a combination of executive appointment and non-partisan election. The genius of this system is its ability to retain the advantages of both these systems while *excluding* the disadvantages. Under this plan three separate groups are involved in the selection of judges: the judicial nominating commission, the governor, and the public.[51]

The Commission proposed draft legislation to abolish terms of court, to create a Judicial Conference of Indiana, and to remedy shortcomings in the judge's retirement system.[52] But on the matter of judicial selection and retention, the Commission determined that "[t]he best solutions cannot be enacted by statute because they conflict with methods of judicial selection, tenure and court organization contained in the present constitution."[53] The Commission further concluded that "[t]he only way to achieve a unified, cohesive judicial system was to adopt an entirely new judicial article which would permit our judicial system to meet the needs generated by a rapidly expanding Indiana."[54] Thus, the Commission drafted a resolution amending article 7 of the Indiana Constitution to provide for the merit selection of both appellate judges and circuit court judges and for a unified judicial system that included the supreme court, the court of appeals, and the circuit courts.[55] Under the new article 7, the Chief Justice of the Indiana Supreme Court would become the Chief Justice of Indiana, who would be not only the titular head, but the actual leader of the State's entire judicial system.[56]

III. THE GENERAL ASSEMBLY CONSIDERS THE AMENDMENT TO ARTICLE 7

The Indiana Constitution requires that a majority of both houses of the General Assembly approve a proposed constitutional amendment and, if agreed to, the amendment shall be referred to the legislature chosen at the next general election for re-enactment.[57] In other words, an amendment must be passed by the House of Representatives and the Senate twice by successive, separately elected General Assemblies before the amendment is submitted to the electorate to be either rejected or ratified.[58] Thus, a proposed constitutional amendment must clear five hurdles before it may become law.[59]

---

50. *Id.* at 122.
51. *Id.* at 121 (emphasis added).
52. *Id.* at 134-51.
53. *Id.* at 136.
54. *Id.*
55. *Id.* at 137-51.
56. *Id.* at 137-39.
57. *See* IND. CONST. art. 16, § 1.
58. *Id.*
59. *Id.*

At that time in the General Assembly, there was both bi-partisan support for and bi-partisan opposition to the revised Judicial Article. For example, an *Indianapolis Star* headline, "Hot Floor Fight Expected on Judge Selection Issue," accurately predicted the January 1969 debate on the proposed amendment in the House of Representatives.[60] Proponents argued that the measure would eliminate politics from the selection of judges on "the state['s] highest courts and would lead to better judges."[61] Opponents, however, argued that the resolution would deprive the people of "their right to pick their judges."[62]

The debate was all about "men."[63] One advocate for the resolution argued, "We need qualified men. At the present time, good men are reluctant to run because they must give up the practice of law and then be subject to partisan elections."[64] A co-author of the resolution noted that the plan was supported by the Indiana Judges Association and argued that the plan had worked well in Missouri, had been adopted in other states, and that the purpose of the plan was "to get the finest legal talent we can find."[65] However, a leader of the opposition countered that "the proposal violated the 'things our forefathers fought for,'" alluding to the grievance in the Declaration of Independence against judges appointed by the King,[66] and he asked, "'How many of the countries behind the Iron Curtain elect their judges?' . . . 'Not a one.'"[67] Another leader of the opposition reported that "he had been bombarded with letters and telegrams from the League of Women Voters since his attack on the [resolution] in an earlier debate . . . and that compared to me, Cain who slew his brother [Abel] was a rather upright guy."[68]

Before the vote, House Speaker Dr. Otis R. Bowen, from Bremen, described the sentiment as "just about a standoff," and Speaker Bowen and House Minority Leader Frederick T. Bauer from Terre Haute agreed that the parties were "split down the middle on the issue."[69] Both leaders said that neither party would take

---

60. *Hot Floor Fight Expected on Judge Selection Issue*, INDIANAPOLIS STAR, Jan. 24, 1969, at 12. The newspaper reported, "The hottest floor fight of the 96th General Assembly so far is expected to explode in the Indiana House of Representatives today over a resolution to adopt a modified 'Missouri Plan' for selection of judges of the Indiana Supreme and Appellate courts." *Id.*

61. *Id.*

62. *Id.*

63. J.P. Cadou, Jr., *Court Reform Measure Given House Approval*, INDIANAPOLIS STAR, Jan. 25, 1969, at 8.

64. *Id.* (quoting Evansville Representative John C. Cox).

65. *Id.* (quoting Kokomo Representative Ellwood H. Hillis).

66. *Id.* (quoting Monticello Representative Glenn R. Slenker). Among the grievances enumerated in the Declaration of Independence is the charge that, "He [the King] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

67. *Id.* (quoting Representative Slenker).

68. *Id.* (quoting Seymour Representative John M. Lewis).

69. *Hot Floor Fight Expected on Judge Selection Issue*, *supra* note 60.

a stand on the resolution.[70]

During the 1969 session, the resolution was sponsored in the House by attorneys Ellwood H. Hillis, a Republican from Kokomo, and Adam Benjamin, Jr., a Democrat from Gary, who had both also assisted with the passage of the resolution during the 1967 session.[71] Other lawyers in the General Assembly were on both sides of the question.[72]

After a rigorous, and sometimes contentious, debate in the legislature, the revised Judicial Article was approved by majority votes in both houses during the 95th session of the General Assembly in 1967[73] and the 96th session of the General Assembly in 1969.[74] In the end, the measure passed both houses in both sessions by substantial margins. In 1967, the House vote was 61-37, and the Senate vote was 28-19. In 1969, the House vote was 58-37, and the Senate vote was 34-16. Aggregating all four votes in the legislature, 62% of the votes were cast in favor of revising the Judicial Article.[75]

IV. THE CAMPAIGN FOR RATIFICATION

The Commission's recommendation that merit selection and retention include circuit court judges was a bridge too far and did not survive the General Assembly.[76] Nevertheless, the revised Judicial Article was a paradigm shift from 120 years of partisan judicial elections for Indiana's appellate judges.

Arthur L. Hart, an attorney from Vincennes, was President of the Indiana State Bar Association (ISBA) when the proposed constitutional amendment

---

70. *Id.*

71. *Judicial Amendment Is Moved Towards Second Passage in the House*, 13 RES GESTAE, Jan. 1969, at 5, 5, 27 [hereinafter RES GESTAE, *Judicial Amendment*].

72. Cadou, *supra* note 63, at 7. Among the eighteen attorneys in the House of Representatives, eleven voted for adoption and seven voted against. Indiana lawyers had been divided on the role of politics in judicial elections for many years. Articles published in the *Indianapolis Times* on successive days illustrate the point. Don Baker, *Why Some Attorneys Want Judges Removed from Politics*, INDIANAPOLIS TIMES, Feb. 1, 1961, at 13 and Don Baker, *Why Some Attorneys Want Judges to Stay in Politics*, INDIANAPOLIS TIMES, Feb. 2, 1961, at 17 appeared in the *Indianapolis Times* on February 1, 1961, and February 2, 1961, respectively.

73. IND. HOUSE J. of 1967, at 1482 (Roll Call 359); IND. SENATE J. of 1967, at 1454 (Roll Call 480).

74. IND. HOUSE J. of 1969, at 1365 (Roll Call 29); IND. SENATE J. of 1969, at 1340 (Roll Call 496).

75. One of the Senate votes for the Resolution in 1967 and again in 1969 was that of Senator Frank O'Bannon from Corydon, who later served Indiana as Lieutenant Governor and Governor. *See* IND. SENATE J. of 1967, at 1454 (Roll Call 480); IND. SENATE J. of 1969, at 1340 (Roll Call 496). The *Indiana Law Review*'s Symposium Editor, Beau Zoeller, is the grandson of Governor O'Bannon and Judy O'Bannon.

76. *Compare* JUDICIAL STUDY COMMISSION REPORT, *supra* note 12, at 143-44, *with* IND. CONST. art. VII, § 9.

passed the 1969 General Assembly.[77] In his April 1969 report to the ISBA membership, Mr. Hart declared,

> [W]e are committed to the constitutional amendment . . . . [W]e are formulating plans for a grass roots campaign throughout the State of Indiana . . . . We shall leave no stones unturned in such efforts. We shall furnish the public the truth and the facts and shall confidently await the decision of the electorate, which has the same deep and abiding interest in the improvement of our judicial system as we have.[78]

The Indiana State Bar Association's House of Delegates had supported the judicial amendment, and the Association's leadership had promoted its passage. The next step was to secure ratification by the public. To that end, the "Indiana Citizens for Modern Courts of Appeal" was established as a not-for-profit foundation.[79] Its honorary chairmen were two former governors, Roger D. Branigin, a Democrat from Lafayette, and Harold W. Handley, a Republican from Indianapolis.[80] The organization's twenty-member Board of Directors "include[d] judges, legislators and representatives of the League of Women Voters of Indiana and the Indiana State Bar Association."[81]

In July 1970, the Second Citizens Conference on Indiana Courts was held in Indianapolis and was hosted by former Governors Branigin and Handley.[82] The conference was co-sponsored by Indiana Citizens for Modern Courts of Appeal, the League of Women Voters of Indiana, and the Indiana State Bar Association, which organizations were cooperating on a state-wide educational campaign in support of the proposed Judicial Amendment to the Indiana Constitution.[83] The conference sessions were conducted by the American Judicature Society, and the two-day conference ended with the adoption of a lay citizens "consensus statement" which concluded, in part, that: "[M]embers of the Indiana appellate judiciary must be removed from the political arena in order to assure their independence, and to increase the public respect and confidence upon which the effectiveness of the judicial branch of government depends."[84]

Indiana Supreme Court Chief Justice Donald H. Hunter from Anderson was

---

77. Arthur L. Hart, *A Report to the Membership of the Association Pertaining to the 1969 Legislative Program*, 13 RES GESTAE, Apr. 1969, at 5, 5.

78. *Id.*

79. *Citizens for Modern Courts of Appeal Organize to Conduct a Broad Public Information Program*, 14 RES GESTAE, Jan. 1970, at 12, 12.

80. *Id.*

81. *Id.*

82. The first such citizens conference was held in Indianapolis in 1964, at which former United States Supreme Court Justice Tom C. Clark had described Indiana's judicial system as "deficient and archaic by modern standards." *July 23-24 Citizens Conference to Study Court System*, 14 RES GESTAE, July 1970, at 6, 6.

83. *Judicial Merit Plan is "On the March" Through Nation*, 14 RES GESTAE, Sept. 1970, at 19, 19-21.

84. *Id.* at 19 (quotation marks omitted).

a strong advocate for judicial reform.[85] He, along with fellow supreme court Justice Richard M. Givan from Camby and appellate court Judge Patrick D. Sullivan from Indianapolis had testified in favor of the revised Judicial Article before the 1969 legislature.[86] Givan had voted for the revised Judicial Article in 1967 as a State Representative.[87] Hunter was elected to the supreme court in 1966, Givan was elected in 1968, and Sullivan was elected to the appellate court in 1968.[88]

In 1959, Justice Arch N. Bobbitt announced his support for merit selection.[89] A native of Crawford County, Bobbitt was elected to the supreme court in 1950 and is one of the best known of all Indiana Supreme Court justices.[90] As the Republican Party chairman, Bobbitt was a powerbroker and is known to have run the legislature from his suite at the Claypool Hotel.[91] He had worked diligently to sabotage the administration of Democratic Governor Henry Schricker in the 1940s.[92] Notwithstanding his vigorous partisanship, Bobbitt announced his support for the nonpartisan election of appellate court judges stating that judicial "records amount to nothing in a statewide election."[93]

The active support of Justices Hunter and Givan represented the culmination of a remarkable turnaround in the attitude of the supreme court's leadership. In 1950, just ten years before Bobbitt announced his support for merit selection, Chief Justice James A. Emmert from Shelbyville had advocated for traditional elections and opposed both the Missouri Plan and another merit selection plan that was defeated in the 1949 legislature.[94] Justice Emmert wrote that he could not recommend any change for the election of judges; he proclaimed that the Indiana constitutional requirement that the judges of the supreme court be elected from the judicial districts where they reside "is sound, since it encourages each judge to keep in touch with the legal thinking of his district," and "[t]his provision should never be changed."[95] It was unclear how Justice Emmert believed a judge should ascertain the "legal thinking of his district," or whether

---

85. *See Supreme Court Justices' Hall of Fame*, COURTS.IN.GOV, http://www.in.gov/judiciary/citc/2724.htm (last visited Dec. 22, 2012).

86. *See* RES GESTAE, *Judicial Amendment*, *supra* note 71, at 27.

87. *See* Brent E. Dickson, *A Tribute to Richard M. Givan, 1921-2009 Justice, Indiana Supreme Court, 1969-1994 Chief Justice of Indiana, 1974-1987*, 43 IND. L. REV. 1, 2-3 (2009).

88. *Supreme Court Justices*, COURTS.IN.GOV, http://mycourts.in.gov/JR/default.aspx (last visited Dec. 22, 2012); *Courts of Appeals Judges*, COURTS.IN.GOV, https://mycourts.in.gov/JR/Default.aspx (last visited Dec. 22, 2012).

89. *Bobbitt Backs Nonpartisan Judge Ballot*, INDIANAPOLIS STAR, July 11, 1959, at 11.

90. Frederic C. Sipe, *Arch N. Bobbitt*, *in* JUSTICES OF THE INDIANA SUPREME COURT 323, 323-24 (Linda C. Gugin & James E. St. Clair eds., 2010).

91. *Id.*

92. *Id.* at 324.

93. *Bobbitt Backs Nonpartisan Judge Ballot*, *supra* note 89.

94. James A. Emmert, *People Should Choose Judges, Emmert Holds*, INDIANAPOLIS TIMES, Aug. 6, 1950, at 20.

95. *Id.*

he believed a judge should rely on popular sentiment to decide cases.[96]

An attorney from Hammond, Peter C. Bomberger, was President of the Indiana State Bar Association when the revised Judicial Article was presented to the electorate.[97] In his July 1970 President's Message published in *Res Gestae*, Mr. Bomberger stated the case and delivered an impassioned plea for its passage. His message was entitled, "A Crisis in our State Judicial History."[98]

Mr. Bomberger explained that the importance of the Judicial Amendment "came into sharper focus last month with our political party conventions. This year the 'entrance fee' for supreme court candidates reached an all time high of $3,725.00 with the Appellate Court not far behind."[99] Bomberger asked,

> Is this the picture of an independent, impartial judiciary our system of government requires for fair and just decisions under the law? Does it produce a judiciary which can carry out the mandate of our constitution that
>
> > "Justice shall be administered freely, and without purchase; completely and without denial; speedily and without delay" . . .
>
> Why should a judge with a good record, in the highest traditions of the Bench, be required to buy his way into a convention to seek another term? Certainly this system is below the dignity of a true judicial officer. . . .
>
> This is not to deny that our present system has produced some good judges. They have emerged in spite of it. Likewise, it has produced some poor ones, selected merely by the whims and machinations of politics. . . .
>
> We are approaching a crisis in our state judicial history. We have an opportunity which may not be ours for generations to come if we do not obtain approval of this amendment in November. We cannot remain indifferent. We must take affirmative action now.[100]

In his final report as President to the ISBA House of delegates just a few days before the public referendum, President Bomberger summarized the run-up

---

96. Emmert was better known, if not notorious for, sleeping on a couch in his office during the week, and he was often seen in the early morning walking the upstairs hallways of the Statehouse in his bathrobe. He also enjoyed inviting guests to his chambers for "'a cup of tea'—bourbon and branch water served in heavy, china tea cups." Joel Rosenbloom, *James A. Emmert*, *in* JUSTICES OF THE INDIANA SUPREME COURT, *supra* note 90, at 315, 318.

97. Charles G. Bomberger, *Bomberger: A Crisis in Our State Judicial History*, 14 RES GESTAE, July 1970, at 5, 5.

98. *Id.*

99. *Id.*

100. *Id.* at 5-6.

to the election as follows:

> [T]he campaign has risen toward the climax which will come on November 3. Intensive use has been made of all news media—the distribution of editorial and press releases, television and radio interviews and debates, and also seminars, speeches to service clubs and many other groups.[101]

Bomberger concluded, "We believe this amendment affords Indiana its finest opportunity in 100 years to promote good government in the judicial branch."[102]

In October 1970, the *Indianapolis Star* published a lengthy editorial explaining the revised Judicial Article.[103] The editorial discussed what it called the "imponderables" of electoral politics and the purely political factors that tend to make the partisan selection and tenure of judges "essentially 'a lottery.'"[104] The *Star* concluded that the Judicial Amendment would take "a vital step in the institution of an improved judiciary" and recommended that voters vote "yes" on the issue.[105] In a second editorial two days before the election, the *Star* reaffirmed its support for the revised Judicial Article.[106]

There is no better example of the judicial "lottery" under the former system of partisan elections than the career of Justice James Emmert, previously mentioned.[107] Emmert was twice elected mayor of Shelbyville, served for twelve years as Shelby Circuit Court judge and was twice elected as Indiana's attorney general.[108] He was elected to the Indiana Supreme Court as a Republican in 1946 and again in 1952.[109] He held degrees from Northwestern and Harvard Law School, where he was an assistant to Professor Felix Frankfurter, who "once said that Emmert was 'the best research student' he had ever had."[110] In 1958, after serving two, six-year terms on the Indiana Supreme Court, Emmert lost his bid for re-election when there was "a Democratic sweep of statewide offices."[111] Emmert was highly partisan but also well respected for his integrity and intelligence. If Indiana had used a merit selection system in 1958, James Emmert would have been retained in office. Instead, he lost his seat on the Indiana Supreme Court simply because he ran on the Republican ballot in a Democratic year.

The referendum on the revised Judicial Article was held on November 3,

---

101. *ISBA's Past President Presents His Report*, 14 RES GESTAE, Nov. 1970, at 12, 12.

102. *Id.* at 13.

103. Editorial, *Who Shall Judge?*, INDIANAPOLIS STAR, Oct. 24, 1970, at 18.

104. *Id.*

105. *Id.*

106. Editorial, *Blank Check*, INDIANAPOLIS STAR, Nov. 1, 1970, at § 2, p.2.

107. *See* Emmert, *supra* note 94 and accompanying text.

108. Rosenbloom, *supra* note 96, at 315-16.

109. *Id.*

110. *Id.* at 316. Professor Frankfurter later became a United States Supreme Court Justice and "a leading figure in President Franklin D. Roosevelt's New Deal administration." *Id.*

111. *Id.* at 318.

1970.[112] The total votes cast on the question was 914,633, and the referendum passed by 141,323 votes, representing 57.7% of the votes cast.[113] In his December 1970 message, ISBA President John A. Kendall from Danville reported, "The election day response was the greatest vote in the history of Indiana referendums on constitutional amendments."[114] President Kendall recounted that, as a member of the General Assembly in the early 1940s, he and another legislator had "introduced on two occasions a bill similar to the Missouri Plan" and had been "unable to even get the bill out of committee."[115] Kendall thanked the fifteen state-wide organizations, particularly the League of Women Voters of Indiana, for their "wholehearted support" in the 1970 educational campaign.[116] He declared that "[a] new course is charted for the Indiana Bench and Bar. Now our efforts must be directed toward helping make the system work effectively and equitably."[117]

Even before the amendment had been ratified in the general election, a class action was filed in the Clay Circuit Court seeking to have the revised Judicial Article declared illegal.[118] The plaintiffs challenged the amendment on three grounds, including the contention that the language adopted by the State Election Board and used on the ballot was insufficient.[119] In *Roeschlein v. Thomas*, the appellate court, sitting en banc, rejected all claims and held on a motion for summary judgment that the constitutional amendment revising article 7 was valid.[120] The Indiana Supreme Court then granted transfer and adopted the per curiam opinion of the appellate court on February 24, 1972.[121]

V. INDIANA'S EXPERIENCE WITH MERIT SELECTION

In 2010, the American Judicature Society stated the case for merit selection as follows: "An independent judiciary is one of the hallmarks of American democracy. For our judicial system to function independently and effectively, it is imperative that qualified judges be free to make appropriate decisions under the law."[122] In the minds of some, the term "judicial independence" suggests that

---

112. *See* IND. CONST. art. 16, § 1(b).

113. John A. Kendall, *New Course Charted for Indiana Bench and Bar*, 14 RES GESTAE, Dec. 1970, at 5, 5.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Roeschlein v. Thomas, 273 N.E.2d 554, 568 (Ind. App. 1971) (en banc) (per curiam), *superseded by* 280 N.E.2d 581 (Ind. 1972).

119. *Id.*

120. *Id.*

121. *See Roeschlein*, 280 N.E.2d at 582.

122. Brief for Am. Judicature Soc'y, Amicus Curiae, in Support of Appellees & Affirmance of the Judgment of the District Court at 3, Kirk v. Carpeneti, 623 F.3d 889 (9th Cir. 2010) (No. 09-35860).

an independent judiciary is not accountable to the public.[123] But as the former Chief Justice of Indiana Randall T. Shepard has explained, "Judicial independence is the principle that judges must decide cases fairly and impartially, relying only on the facts and the law."[124]

Since her retirement after twenty-four years on the United States Supreme Court, Justice Sandra Day O'Connor has become the most visible and formidable critic of judicial elections and an advocate for merit selection in the states.[125] In numerous speeches and publications she has expressed her concern about "'increased partisan activity in judicial elections,' with 'large sums of money spent by special interests.'"[126] Speaking at a summit sponsored by the ABA Presidential Commission on Fair and Impartial Courts, Justice O'Connor stated that "how we select our judges is crucial to a fair and impartial judiciary" and that "[t]he public is growing increasingly skeptical of elected judges in particular."[127]

Writing for the *Missouri Law Review*, Justice O'Connor said,

> While the debate about judicial selection has persisted for centuries, the climate has changed dramatically. In states that elect their judges, the expense and volatility of judicial campaigns have risen to obscene levels. Money is pouring into our courtrooms by way of increasingly expensive judicial campaigns. Litigants are attempting to buy judges along with their verdicts, and the public's trust in our courts is rapidly deteriorating as a result.[128]

Justice O'Connor has also lamented her vote with the 5-4 majority in the

---

123. *See, e.g.*, Frank B. Cross, *Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195, 198-99 (2003) ("There is little reason to expect that a wholly independent, unaccountable judiciary would appropriately restrain itself and sincerely seek to apply neutral legal principles to the cases they decide.").

124. AM. C. OF TRIAL LAWYERS, JUDICIAL INDEPENDENCE: A CORNERSTONE OF DEMOCRACY WHICH MUST BE DEFENDED 1 (2006), *available at* http://www.actl.com/AM/Template.cfm?Section= All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=2548.

125. *See, e.g.*, Sandra Day O'Connor, Op-Ed., *Take Justice Off the Ballot*, N.Y. TIMES, May 23, 2010, at WK9; Sandra Day O'Connor, Opinion, *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25 [hereinafter O'Connor, *Justice for Sale*]; Sandra Day O'Connor, Opinion, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

126. Bob Egelko, *Former Justice Warns of Threat to Judiciary*, S.F. CHRON. (Nov. 4, 2006, 4:00 AM), http://www.sfgate.com/bayarea/article/SAN-FRANCISCO-Former-justice-warns-of-threat-to-2467339.php.

127. James Podgers, *O'Connor on Judicial Elections: "They're Awful. I Hate Them,"* A.B.A. J. (May 9, 2009, 7:09 AM), http://www.abajournal.com/news/article/oconnor_chemerinsky_sound_warnings_at_aba_conference_about_the_dangers_of_s/ (internal quotation marks omitted).

128. Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 480 (2009) (footnote omitted) [hereinafter O'Connor, *The Essentials and Expendables of the Missouri Plan*].

Supreme Court's 2002 opinion in *Republican Party of Minnesota v. White*.[129] Speaking at a 2006 appellate judges and attorneys conference in Dallas, Justice O'Connor stated she was "having second thoughts about [her vote in *Minnesota v. White*] because it 'has produced a lot of very disturbing trends in state election of judges.'"[130]

These sentiments were recently echoed in a *New York Times* editorial entitled, "No Way to Choose a Judge," observing that, "choosing judges in partisan elections, rather than through a system of merit selection, can create a serious problem of quality control."[131] The *Times* summarized the corrosive effect of politics and the taint of special interest money on the selection of judges as follows:

> Requiring would-be judges to cozy up to party leaders and raise large sums from special interests eager to influence their decisions seriously damages the efficacy and credibility of the judiciary. It discourages many highly qualified lawyers from aspiring to the bench. Bitter campaigns—replete with nasty attack ads—make it much harder for judges to work together on the bench and much harder for citizens to trust the impartiality of the system.[132]

The *Times* article stated that, while merit selection and retention are not a "perfect fix," it would be a start toward ridding courtrooms of politics and campaign cash, concluding that "[t]he country certainly does not need any more bad examples of justice for sale."[133]

Article 7, section 10 of the Indiana Constitution requires that a vacancy on the supreme court or the court of appeals "shall be filled by the Governor, without regard to political affiliation, from a list of three nominees presented to him by the judicial nominating commission."[134] And the General Assembly has provided by statute that the Commission shall recommend to the Governor "only the three (3) most highly qualified candidates" for each vacancy.[135]

But one criticism of Indiana merit selection has been that it is not really non-partisan. In truth, Republican governors have appointed appellate judges affiliated more or less with the Republican Party, and Democratic governors have appointed appellate judges affiliated more or less with the Democratic Party.[136]

---

129. 536 U.S. 765 (2002).

130. Linda P. Campbell, *Replace State's Partisan Judicial Elections*, VICTORIA ADVOC., Nov. 23, 2006, at B5 (quoting U.S. Supreme Court Justice Sandra Day O'Connor).

131. Editorial, *No Way to Choose a Judge*, N.Y. TIMES, March 16, 2012, at A26, *available at* http://www.nytimes.com/2012/03/16/opinion/no-way-to-choose-a-judge.html?_r=0.

132. *Id.*

133. *Id. See also* Editorial, *Judicial Elections, Unhinged*, N.Y. TIMES, Nov. 19, 2012, at A20 (noting that "special interest money . . . has severely weakened the principle of fair and impartial courts").

134. IND. CONST. art. VII, § 10.

135. IND. CODE ANN. § 33-27-3-2(a) (West 2012).

136. *See, e.g.*, Emily Geiger, *Iowa's Partisan Judicial Selection Process*, IOWA REPUBLICAN

Of course, the Governor's ultimate authority is derived from his own election. In making these judicial appointments, the Governor represents by proxy the will of the voters who elected him. Nevertheless, the Governor's discretion is limited: he must appoint from a list of three nominees presented to him by the Judicial Nominating Commission.[137]

There are many variables in the selection process, and the first is the applicant pool. Qualified individuals must first be motivated and, in some cases, recruited to apply.[138] Before the Commission can investigate an applicant, the applicant must give written consent to the public disclosure of information,[139] and some potential applicants have undoubtedly been discouraged by the fact that the names of all candidates who have applied are disclosed as soon as the application period is closed "but before the Commission has begun to evaluate any of the candidates."[140] Attorneys in private practice concerned about the possibility of jeopardizing relationships with colleagues and clients may be discouraged by the reputational risk inherent in submitting an unsuccessful application.[141]

And some applicants have tended to self-select, assuming at the outset that political affiliation is either a qualifier or a disqualifier. That has not always been true, however. In 1972, when merit selection was first used to select the ninth member of the newly created court of appeals, the Commission nominated two Republicans—Charles W. Cooper, a Madison attorney, Robert B. Lybrook, a Nashville attorney and former appellate court judge—and one Democrat, Addison M. Beavers, a Warrick Circuit Court judge. Governor Edgar Whitcomb appointed Lybrook.[142] Again, in 1977, the first time merit selection was used to fill a supreme court vacancy, the Commission sent the names of Republicans Albert Pivarnik and V. Sue Shields and Democrat Jonathan J. Robertson to Governor Bowen, who appointed Pivarnik.[143] In 1986, the Commission nominated Lafayette attorney Brent E. Dickson, a Republican, and Indianapolis

---

(Aug. 18, 2010), http://theiowarepublican.com/2010/iowa%E2%80%99s-partisan-judicial-selection-process/ (referring to Iowa's system, which similar to Indiana's).

137. IND. CONST. art. 7, § 10.

138. Jessica M. Karmasek, *Twenty-Two Apply for Open Seat on Ind. SC*, LEGAL NEWSLINE (July 9, 2012, 11:40 AM), http://legalnewsline.com/news/236655-twenty-two-apply-for-open-seat-on-ind-sc (stating the Judicial Nominating Commission's duty is to "recruit and select candidates to fill vacancies on Indiana appellate courts").

139. IND. CODE ANN. § 33-27-3-2(b) (West 2012).

140. *Id.* § 33-27-3-2(d).

141. *See, e.g.*, Associated Press, *Daniels Has Third Chance to Appoint Female Justice*, HERALD BULLETIN (Aug. 9, 2012), http://heraldbulletin.com/breakingnews/x1555256955/Daniels-has-third-chance-to-appoint-female-justice.

142. *Judge Robert B. Lybrook*, COURTS.IN.GOV, http://www.in.gov/judiciary/appeals/2438.htm (last visited Dec. 27, 2012).

143. *Justice Biographies: Justice Alfred J. Pivarnik*, COURTS.IN.GOV, http://www.in.gov/judiciary/cite/2827.htm (last visited Dec. 27, 2012); *Bowen Appoints Valparaiso Judge to Supreme Court*, EVANSVILLE PRESS, May 16, 1977, *available at* http://local.evpl.org/views/viewarticle.asp?ID=414670.

attorney Lila J. Cornell, a Republican, as well as court of appeals Judge Robert H. Staton, a Democrat, for a seat on the Indiana Supreme Court.[144] Governor Robert Orr appointed Dickson.[145]

It is important to remember that the non-partisan features of the revised Judicial Article are not limited to merit selection. Under article 7, section 11, justices and judges are "subject to approval or rejection by the electorate" in retention elections conducted without any party affiliation, and section 11 also provides that Indiana's appellate judges cannot "run for an elective office other than a judicial office, directly or indirectly make any contribution to, or hold any office in, a political party or organization, or take part in any political campaign."[146] The constitutional provisions for selection and retention found in article 7, sections 9, 10 and 11 of the Indiana Constitution, including the outright prohibition against participation in partisan political activity, remove Indiana appellate judges from the political arena and from any obligation to political parties.[147]

Since 1972, the seven-member Indiana Judicial Nominating Commission established under article 7, section 9, has played a critical role in the success of merit selection in our state. The Commission has constitutional authority and responsibility to evaluate candidates for vacancies on the supreme court and the court of appeals and statutory authority to do the same for the tax court.[148] The constitutional provisions have been supplemented by statutes, which require the Commission to evaluate each candidate's qualifications in writing based on seven enumerated criteria, including, among others, legal education, legal writings and reputation, and to consider "[a]ny other pertinent information that the commission feels is important in selecting the most highly qualified individuals for judicial office."[149]

The application and vetting process is not for the faint-hearted. Each applicant runs a public and private gauntlet. Completion of the application itself is a major undertaking. The application thoroughly and systematically explores each candidate's personal and professional life.[150] Applications are now posted

---

144. Adrienne Meiring, *The Role of the Judicial Nominating Commission in Judicial Selection*, IND. COURT TIMES (Sept. 3, 2010), http://indianacourts.us/times/2010/09/the-role-of-the-judicial-nominating-commission-in-judicial-selection/.

145. *See Brent E. Dickson, Chief Justice*, COURTS.IN.GOV, http://www.in.gov/judiciary/cite/2829.htm (last visited Dec. 27, 2012).

146. IND. CONST. art. VII, § 7.

147. IND. CONST. art. VII, §§ 9-11.

148. *See About the Commissions*, COURTS.IN.GOV, http://www.in.gov/judiciary/jud-qual/2380.htm (last visited Dec. 27, 2012).

149. IND. CODE ANN. § 33-27-3-2(a)(7) (West 2012). Specifically, 33-27-3-2(a) requires the Commission to consider a candidate's legal education, legal writings, reputation in the practice of law, physical condition, financial interests, activities in public service, and any other pertinent information. *Id.* § 33-27-3-2(a)(1)-(7).

150. *Id.* § 33-27-3-2(c).

online.[151] The Commission conducts public interviews with the candidates that are reported in the traditional press, online, and in the blogosphere.[152] And the Commission "inquire[s] into the personal and legal backgrounds of each candidate by investigations made independent from the statements on an application . . . or in an interview with the candidate," including information provided by "a law enforcement agency[,] any organization of lawyers, judges or individual practitioners[,] or any other person or association."[153] "The Commission may not consider a communication other than an attributable communication in evaluating a candidate."[154] The Commission concludes its work when it submits the list of three nominees to the governor with its written evaluation of each nominee based on the considerations set forth in the statute.[155] The governor then has sixty days to interview the candidates, to conduct his own inquiry, which includes a background investigation by the Indiana State Police, and to make the appointment.[156]

To fully appreciate the success of Indiana merit selection, we need only compare Indiana's experience with the recent experience of other states with contested elections. In its most recent report, "The New Politics of Judicial Elections 2009-10," Justice at Stake, a national nonpartisan partnership created with a purpose of keeping courts fair, impartial and independent, along with its partners, the Brennan Center for Justice and the National Institute on Money in State Politics, documents the flow of special interest money into judicial elections during the 2009-2010 reporting period.[157] The report describes a "hostile takeover of judicial elections" by outside groups not accountable to the candidates that contributed nearly 30% of all money spent in judicial elections.[158] According to the report, our own neighbors, Michigan, Ohio and Illinois, were three of the top ten states in total spending on supreme court elections.[159]

Michigan easily ranked first, Ohio ranked third and Illinois ranked fifth, in total expenditures, all in the millions of dollars.[160] Justice at Stake reports that

---

151. *See, e.g.*, *Application for the Indiana Supreme Court: Loretta H. Rush*, IND. JUDICIAL NOMINATING COMM'N (June 28, 2012), *available at* http://www.in.gov/judiciary/jud-qual/files/jud-qual-sc-108-rush-app.pdf (providing access to the application of Indiana's most recent supreme court justice, Loretta H. Rush).

152. *See, e.g.*, *Supreme Court Finalists' Interview Before the Judicial Nominating Commission*, ADVANCE IND. (Aug. 9, 2012), http://advanceindiana.blogspot.com/2012/08/supreme-court-finalists-interview.html (providing access to video recordings of the interviews).

153. IND. CODE ANN. § 33-27-3-2(c) (West 2012).

154. *Id.* § 33-27-3-2(i).

155. *Id.* § 33-27-3-2(f).

156. *See id.* § 33-27-3-4(a).

157. ADAM SKAGGS ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON MONEY IN STATE POLITICS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10 (2011).

158. *Id.* at 1.

159. *Id.* at 5.

160. *Id.*

independent expenditures by state parties and special interest groups have resulted in "a greater use of attack adds by groups not affiliated with candidates on the ballot,"[161] and "[s]o great was the independent spending in Michigan that the four supreme court candidates . . . at times seemed like bystanders in their own elections."[162] And in Iowa's 2010 retention vote for three supreme court justices, more than 90% of the funding for the "Vote No" campaign came from out-of-state groups.[163] As Iowa Chief Justice Mark Cady told Iowa legislators in 2011, "This branch of government is under attack."[164]

The data from Justice at Stake's recent report identified another significant and ominous trend, namely that in the 2009-2010 reporting period there was a "money explosion in retention elections."[165] In the entire previous decade, spending in retention elections had accounted for only 1%, but in the 2009-2010 period, spending in retention elections accounted for 12.7% of all election spending.[166] The Justice at Stake report concluded that, "In its full context, the most recent [2009-2010] election cycle poses some of the gravest threats yet to fair and impartial justice in America."[167] As Justice O'Connor has said, interest groups are pouring money into judicial elections in record amounts, and most of this money comes from special interest groups that believe their contributions can help elect judges who will be likely to rule in a manner favorable to their cause.[168] And as interest-group spending rises, public confidence in the judiciary declines.[169]

Under Canon 4, Rule 4.2 of the Indiana Code of Judicial Conduct, a candidate for retention to judicial office may engage in campaign activities only when his "candidacy has drawn active opposition."[170] Thus, the triggering event for a judicial retention campaign in Indiana is active opposition. But once this condition precedent has been satisfied, the door is opened to unlimited interest-group spending, and once "active opposition" appears, it may well be too late for an incumbent judge to organize an effective response.[171]

CONCLUSION

So how should we evaluate whether Indiana's forty years of experience with the merit selection and retention of appellate judges has been successful?

---

161. *Id.* at 3.

162. *Id.* at 4.

163. *Id.* at 8.

164. *Id.* at 27.

165. *Id.* at 7.

166. *Id.* at 2, 7.

167. *Id.* at 1.

168. O'Connor, *Justice for Sale*, *supra* note 125.

169. *Id.*

170. IND. CODE OF JUDICIAL CONDUCT R. 4.2(D) (2012).

171. *E.g.*, Mary A. Celeste, *The Debate Over the Selection and Retention of Judges: How Judges Can Ride the Wave*, 46 CT. REV. 82, 88 (2009-2010).

First, the Judicial Nominating Commission has served its purpose well and has performed as intended. Since January 1, 1972, when the revised Judicial Article took effect, some thirty different attorneys have been elected by the Bar and served on the Judicial Nominating Commission, including many leaders and distinguished members of the legal profession.[172] Of equal importance has been the participation and dedication of some thirty-three citizen members from each of the three geographic districts of the court of appeals who have leavened and broadened the Commission's deliberations with the perspectives of non-attorneys.[173]

There is no question that the Judicial Nominating Commission conducts a more thorough, systematic, objective, and reliable evaluation of judicial candidates than the political party conventions ever did. Indianapolis attorney John C. Trimble, who served as a member of the Commission from 2008 to 2010, described the process in 2010 as follows:

> The recent selection process . . . exceeded all prior precedent for direct public access and input. For the first time, candidate applications were posted online, which allowed the press and the public to review every detail of applicant information. In addition, the public had access to the candidates' writing samples, letters of recommendation and academic transcripts.
>
> Journalists from across the state attended the interviews. Photography was allowed, with some photos viewed as many as 700 times. Bloggers were permitted to observe and report on the questions posed by the commissioners and the answers of the candidates, and citizen observers were also present.
>
> As a commissioner, I can attest that our members received input on the candidates from legislators, other elected officials, appellate judges, trial judges, academia, business interests, citizens and friends and foes of the candidates.[174]

Since 1972, Governors Whitcomb, Bowen, Orr, Bayh, O'Bannon, Kernan, and Daniels have appointed eleven supreme court justices, twenty-nine court of appeals judges and two tax court judges through merit selection, including eleven women and four African-Americans.[175] Many other well-qualified individuals have applied and were either not nominated or were nominated and not selected, and it is not uncommon for an applicant to have applied for more than one

---

172. Adrienne Meiring, Counsel, Indiana Commission on Judicial Qualifications, Indiana Judicial Nominating Commission (Dec. 28, 2011) (unpublished) (on file with author).

173. *Id.*

174. John C. Trimble, *Method of Selecting Appellate Judges Serves Indiana Citizens Well*, INDIANAPOLIS STAR, Oct. 6, 2010, at A15.

175. Robert D. Rucker was appointed both to the Indiana Court of Appeals and to the Indiana Supreme Court. *See* Appendix.

vacancy. The composition of the applicant pool, timing and, indeed, a good bit of luck play a part in who is ultimately selected.

While political affiliation may well have influenced the appointment of these forty-two judges, merit selection has virtually eliminated the taint of party politics and the role of interest groups. Our appellate judges stand for retention on their own identity with no ties to political organizations. Between 1974 and 2012, sixty-two retention elections were held and, on average, 69% of the public voted to retain the justices and judges.[176]

In many states, unchecked special interest spending has hijacked judicial elections and placed the independence and integrity of the judiciary at risk. But that has not occurred in our state. As of this writing, there has been virtually no money spent on Indiana retention elections.

Still, we must forthrightly acknowledge that there has always been and will continue to be some politics in the selection of judges.[177] Thus, the test for the success of a merit selection system is not whether politics has been entirely eliminated but whether, and to what extent, merit selection has reduced and minimized the role of party politics and interest groups.[178] And the ultimate test is whether the plan has provided and sustained a qualified appellate judiciary in which the public can have confidence.

When announcing his retirement from the supreme court, Justice Frank Sullivan, Jr. said "that he [wa]s most proud that during his time on the bench not a single case was decided along party lines for political purposes."[179] Justice Sullivan summarized in just a few words how well merit selection has worked in Indiana:

> We have a judicial selection system in this state that minimizes the importance of partisanship. People are not thinking about partisanship when they cast their votes. . . . It's a remarkably, remarkably good system that we have here in Indiana. It lifts up raging moderates, such that each of us is free to find our own way to what we think is the right decision under the law and the facts in any particular case.[180]

Thus, the Indiana Constitution emphatically declares that Indiana's appellate judges are not partisan political officials, and our judges have behaved accordingly. Merit selection has enabled Indiana's appellate judges to maintain a demeanor that does not demean the office. For forty years, Indiana's appellate courts have remained above the fray, in a calm and civil place, removed from the sound and the fury of politics.

---

176. These statistics were compiled from information provided by the Indiana Secretary of State and are on file with the author. See the Appendix for a chronological listing of each justice and judge appointed pursuant to the revised article 7.

177. O'Connor, *The Essentials and Expendables of the Missouri Plan*, *supra* note 128, at 480.

178. *Id.*

179. Niki Kelly, *New Vacancy on Indiana's Highest Court*, J. GAZETTE (Apr. 3, 2012, 11:29 AM), http://www.journalgazette.net/article/20120403/NEWS07/304039978/1002/LOCAL.

180. *Id.*

When Governor Daniels introduced Mark S. Massa as his appointee to the Indiana Supreme Court, he stated that the selection process was "full of integrity."[181] Indiana's merit selection system has brought well-qualified attorneys to the appellate bench who have diligently and consistently produced well-reasoned opinions. A performance evaluation of incumbent judges is beyond the scope of these remarks, but without discounting any other judge, it is not inappropriate to ask who can seriously question the intellectual firepower, work ethic or integrity of our recently retired Justices, Shepard, Boehm and Sullivan?

The system has allowed our state's appellate judges to engage full time in the serious business of judging and to give careful consideration to every matter brought before them without distractions. Our judges issue written opinions that not only decide each case but articulate the law. And these opinions are an open book to be reviewed and critiqued by the public, the press and the profession. The strength of Indiana's appellate courts is derived from what George F. Will has called, "the public's respect for public reasoning."[182]

Today we stand on the shoulders of those Indiana leaders of a previous generation, in both public and private life, who firmly believed in an independent judiciary and who were relentless in their pursuit of that objective. They believed that judges should not be—and should not be seen—as politicians in robes. They believed that independent courts and a justice-for-hire system cannot be reconciled. They believed that partisan judicial elections fueled by special interest money substitute the rule of cash for the rule of law and cheapen the judiciary.

The judiciary is not merely a third political branch. As Oliver Wendell Holmes, Jr. so famously wrote, "The standards of the law are standards of general application."[183] And those standards are not grounded in politics, ideology, or the roar of the crowd. Thoughtful deliberation and well-reasoned judgment are the currency of the judiciary. And Indiana's system of merit selection and retention has provided an appellate judiciary characterized by just that—thoughtful deliberation and well-reasoned judgment.

Indiana has shown that when properly designed and administered, a system of merit selection can provide the foundation for an independent, well-qualified judiciary of men and women capable of giving fair and impartial consideration to every question presented. Forty years of experience with merit selection and

---

181. Governor Mitchell E. Daniels, Jr., Remarks at the Appointment of Mark S. Massa to the Indiana Supreme Court (Mar. 23, 2012).

182. George F. Will, Opinion, *Gingrich, the Anti-Conservative*, WASH. POST, Dec. 21, 2011, http://www.washingtonpost.com/opinions/gingrich-the-anti-conservative/2011/12/20/gIQALq8CAP_story.html. Will's observation is derived from Alexander Hamilton's famous statement in *Federalist 78* that the power of the judiciary is not derived from either "the sword or the purse . . . but merely judgment." THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *See* Randall T. Shepard, *On the Way to Something Better*, 55 RES GESTAE, Jan./Feb. 2012, at 9, 14.

183. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 108 (32d prtg. 1938) (1881).

retention in Indiana have provided appellate decisions rendered without fear or favor by judges who are not controlled by, or accountable to, any political party or interest group but accountable only to justice and the rule of law.

APPENDIX[184]
CHRONOLOGICAL LISTING OF THE JUSTICES OF THE INDIANA SUPREME COURT SINCE JANUARY 1, 1972

Alfred J. Pivarnik
5-13-1977 – 12-14-1990

Randall T. Shepard
9-6-1985 – 5-23-2012

Brent E. Dickson
1-6-1985 –

Jon D. Krahulik
12-14-1990 – 10-31-1993

Frank J. Sullivan, Jr.
11-1-1993 – 7-31-2012

Myra C. Selby
1-4-1995 – 10-7-1999

Theodore R. Boehm
8-8-1996 – 9-30-2010

Robert D. Rucker
11-19-1999 –

Steven H. David
10-18-2010 –

Mark S. Massa
4-2-2012 –

Loretta H. Rush
11-7-2012 –

---

184. This is a list of justices and judges appointed to the Indiana Supreme Court and the Indiana Court of Appeals pursuant to the revised Judicial Article. The list does not include justices and judges elected to either of Indiana's appellate courts before the amendment to article 7 took effect on January 1, 1972. It also does not include the two judges appointed to the Indiana Tax Court, Thomas G. Fisher, appointed by Governor Orr in 1986, and Martha Blood Wentworth, appointed by Governor Daniels in 2011, pursuant to statute. *See* IND. CODE ANN. §§ 33-26-2-4, 33-27-3-1 (West 2012). All information was compiled from the website for Indiana's judiciary, www.in.gov/judiciary. For a full list of the justices of the Indiana Supreme Court and the judges of the Indiana Court of Appeals before the amendment to Indiana's Judicial Article took effect, see https://mycourts.in.gov/JR/Default.aspx.

CHRONOLOGICAL LISTING OF THE JUDGES OF THE INDIANA COURT OF APPEALS SINCE JANUARY 1, 1972

Robert B. Lybrook
1-1-1972 – 9-30-1979

William I. Garrard
1-21-1974 – 1-24-2000

V. Sue Shields
7-1-1978 – 1-27-1994

Eugene N. Chipman
8-1-1978 – 10-26-1981

Stanley B. Miller
8-1-1978 – 6-20-1994

James B. Young
8-1-1978 – 8-31-1988

Robert W. Neal
10-1-1979 – 5-27-1989

Wesley W. Ratliff, Jr.
1-1-1980 – 11-3-1992

William G. Conover
10-26-1981 – 12-31-1993

Linda L. Chezem
11-21-1988 – 12-31-1997

John G. Baker
6-2-1989 –

Betty Barteau
1-1-1991 – 3-31-1998

Robert D. Rucker
1-1-1991 – 11-19-1999

John T. Sharpnack
1-1-1991 – 5-4-2008

Edward W. Najam, Jr.
12-30-1992 –

Ezra H. Friedlander
1-7-1993 –

Patricia A. Riley
1-1-1994 –

James S. Kirsch
3-4-1994 –

Carr L. Darden
11-28-1994 – 7-20-2012

L. Mark Bailey
1-30-1998 –

Melissa S. May
4-9-1998 –

Margret G. Robb
7-6-1998 –

Nancy H. Vaidik
2-7-2000 –

Paul D. Mathias
3-30-2000 –

Michael P. Barnes
5-22-2000 –

Terry A. Crone
3-8-2004 –

Cale J. Bradford
8-1-2007 –

Elaine B. Brown
5-5-2008 –

Rudolph R. Pyle III
8-27-2012 –

MERIT SELECTION AND DIVERSITY ON THE BENCH

K.O. MYERS*

I. MERIT SELECTION AND DIVERSITY DEFINED

Before we examine the relationship between merit selection and diversity on the bench, it will be useful to define those terms. When we say "merit selection," there is a basic working definition; when a vacancy occurs on the bench, a non-partisan nominating commission evaluates applicants for the position.[1] The commission recommends a list of nominees, and an "appointing authority (usually the governor)" appoints someone from the list to fill the seat.[2]

Beyond that basic template, nearly every state that uses merit selection has developed its own specific form of implementation. Judicial selection is one area in which the foundational idea of the states as laboratories of governance—trying out different approaches to policy and regulation—has really taken root. For example, nearly every state has its own particular way of selecting the people who serve on nominating commissions.[3] Some states require that the governor's appointees to the bench be confirmed by one (or both) chambers of the state legislature.[4] In some states, commission rules advise nominating commissioners to consider the diversity of the judiciary when selecting nominees. In other states, enabling legislation suggests (or requires) officials charged with appointing the nominating commissioners to consider the diversity of the commission itself when making their appointments commissioners.[5]

Indiana falls pretty squarely into this working definition for filling its

---

* K.O. Myers, J.D., is the Director of Research and Programs at the American Judicature Society (AJS)—an independent, non-partisan, membership organization, headquartered in Des Moines, Iowa. AJS was founded in 1913 and has been working nationally for nearly a century to protect the integrity of the American justice system. The Society's diverse and broadly based membership includes judges, lawyers, and members of the public. AJS promotes fair and impartial courts through research, publications, education, and advocacy for judicial reform. The work of AJS focuses primarily on judicial ethics, judicial selection, and access to justice, criminal justice reform, the jury system, and the responsible use of forensic science. AJS is the organization that first conceived of merit selection as a way of selecting qualified, impartial judges.

1. *FAQ—Frequently Asked Questions*, AM. JUDICATURE SOC'Y, http://www.ajs.org/selection/jnc/jnc_faq.asp (last visited Nov. 14, 2012) [hereinafter *FAQ*]; *see also Methods of Judicial Selection*, AM. JUDICATURE SOC'Y (2012), http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm.?state.

2. *FAQ*, *supra* note 1.

3. *Methods of Judicial Selection*, *supra* note 1.

4. *See* Rachel Paine Caufield, *Inside Merit Selection: A National Survey of Judicial Nominating Commissions*, AM. JUDICATURE SOC'Y 17 (2012), http://www.judicialselection.us/uploads/documents/Selection_Retention_Term_1160928503 16.pdf.

5. *See, e.g.*, R.I. GEN. LAWS § 8-16.1-2(a)(3) (1994); ALASKA JUD. COUNS., art. III, § 2 (2012).

appellate court and trial court vacancies in some counties.[6] The rest of Indiana's trial court judges are elected in partisan elections.[7] This kind of selection system, which uses merit selection for appellate courts and elections for trial courts, is fairly common among what are regularly thought of as "merit selection states."[8] The variety of judicial selection methods, both across and within states,[9] makes studying the relationship between merit selection and diversity on the bench a real challenge.

The word "diversity" has a fairly common working definition as well. A "diverse" judiciary reflects the demographic characteristics of the population it serves, in terms of gender, race and ethnicity, religious faith and non-faith, sexual orientation, etc.[10] However, diversity also means something a bit different depending on the state. Again, only some states have rules that encourage diversity in the selection of either nominating commissioners or judges.[11] The characteristics emphasized in these rules most often include gender and race or ethnicity, but there is often consideration given to other factors, like geographic and political diversity.[12]

Some states, such as Indiana, put restrictions on how many commissioners can be members of any one political party.[13] In Iowa, state law specifically mandates that "[n]o more than a simple majority of the members appointed [by the Governor] shall be of the same gender."[14] Commissioners chosen by the bar "alternate between women and men elected members."[15] In Indiana, geographic diversity is ensured among commissioners on the Commission on Judicial Qualifications, which functions as the Judicial Nominating Commission for the Indiana Supreme Court, the Court of Appeals, and the Tax Court.[16]

---

6. *See* IND. CODE ANN. § 33-27-3 (West 2012).

7. *Judicial Selection in the States: Indiana*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/index.cfm?state=IN (last visited Nov. 14, 2012).

8. *Progression of Judicial Merit Selection in the United States*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/uploads/documents/Merit_Selection_Progression_PDF_1F7A8597AE14E.pdf (last visited Nov. 15, 2012).

9. *See Judicial Selection in the States: Appellate and General Jurisdiction Courts Initial Selection, Retention, and Term Length*, AM. JUDICATURE SOC'Y (2012), http://www.judicialselection.us/uploads/documents/ Selection_Retention_Term_1196092850316.pdf.

10. *See* FRANCIS E. ROURKE, BUREAUCRATIC POWER IN NATIONAL POLITICS 396 (3d ed. 1978).

11. *See, e.g.*, R.I. GEN. LAWS ANN. § 8-16-1-2(a)(3) (West 2012) (encouraging "racial, ethnic, and gender diversity within the commission").

12. *Methods of Judicial Selection*, *supra* note 1 (listing Florida, Iowa, Rhode Island, and Tennessee as examples of states that have rules requiring diversity considerations in commission appointments).

13. *See, e.g.*, IND. CODE ANN. § 33-33-45-28(c)(6) (West 2012) (discussing the selection of commission members in Lake County, Indiana).

14. IOWA CODE ANN. § 46.1 (West 2012).

15. *Id.* § 46.2.

16. *See* IND. CODE ANN. § 33-27-2-2(a) (West 2012).

Commissioners are appointed from districts that correspond with the judicial districts of the courts of appeal.[17] The governor appoints one non-attorney citizen of Indiana as a commissioner from each district,[18] and the attorneys who reside in each district elect a commissioner.[19]

The American Judicature Society ("AJS") publishes *Model Judicial Selection Provisions*, which offers a best practices guide of the methods that work best for creating and implementing a judicial merit selection system.[20] The most recent edition of the *Provisions*, revised in 2008, contains the following recommended language for creating and staffing a demographically representative nominating commission:

> Appointments and elections to the commission[s] shall be made with due consideration to geographic representation and to ensure that no more than a simple majority of commissioners are of the same political party. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the diversity of the jurisdiction (e.g., racial, ethnic, gender, and other diversity).[21]

II. THE BENEFITS OF A DIVERSE JUDICIARY

Why diversity is something we should aspire to attain is a question not always considered closely enough. For those of us who are inclined to agree that it is beneficial, a diverse judiciary, which reflects the experiences of the people it serves, seems like an obvious and unquestionable good. Fortunately, there is a growing body of research looking at the benefits of a diverse judiciary.[22] Various studies and surveys suggest the following:

- "[A] judiciary that is representative of the population's diversity increases public confidence in the courts."[23]
- "[A] diverse bench provides decision-making power to formerly disenfranchised populations."[24]
- Nontraditional judges tend to include "'traditionally excluded perspectives'"

---

17. *Id.*

18. *Id.* § 33-27-2-1(a).

19. *Id.* §§ 33-27-2-2(a)-(c).

20. AM. JUDICATURE SOC'Y, MODEL JUDICIAL SELECTION PROVISIONS (rev. 2008), *available at* http://www.ajs.org/selection/docs/MJSP_web.pdf.

21. *Id.* at 2 (alteration in original) (quoting § _.02, Judicial Nominating Commission).

22. *See infra* notes 23-26 and accompanying text.

23. Malia Reddick et al., *Examining Diversity on State Courts: How Does the Judicial Selection Environment Advance—and Inhibit—Judicial Diversity?*, AM. JUDICATURE SOC'Y 1 (2008) (citing GARY S. BROWN, CHARACTERISTICS OF ELECTED VERSUS MERIT-SELECTED NEW YORK CITY JUDGES 1992-1997 (1998)), *available at* http://www.judicialselection.us/uploads/documents/Examining_Diversity_on_State_Courts_2CA4D9DF458DD.pdf.

24. *Id.* (citing Nicholas O. Alozie, *Black Representation on State Judiciaries*, 4 SOC. SCI. Q. 69, 979-986 (1988) [hereinafter Alozie, *Black Representation*]).

in their decision-making, "and their presence enhances the appearance of impartiality for [both] litigants . . . and for the public at large."[25]

- Finally, a 2008 study published by the Brennan Center for Justice "assert[s] that diversity on the bench is vital for the judiciary to provide equal justice for all."[26]

Public confidence, impartiality (both in appearance and practice), inclusivity, and equality are all qualities that any responsible judiciary should strive for, and the value of diversity as an enhancement of those qualities makes it a goal worthy of aspiration.

III. DIVERSITY IN STATE COURTS

Overall, state court judges are still overwhelmingly white and male. Table 1 compares the percentage of women and minorities in the national population with the percentage of state judges in those demographic categories. In 2010, data collected in the American Bench Gender Ratio Summary showed that there were 17,108 judges serving on the state courts.[27] Of that total, 4521, or 26.4%, were women.[28] U.S. Census data for that same year showed that 50.8% of the national population was female.[29] Also in 2010, the American Bar Association updated its data on minority judges, reporting that 54% of the "judges of color currently serving on state courts" are African American, followed by Hispanic Americans who comprise 25% of this group.[30] Of the 17,108 judges reported by the American Bench[31] judges serving in state courts, 1436, or 8.4%, were people

---

25. *Id.* (quoting Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47, 49 (2008) [hereinafter Hurwitz & Lanier, *Diversity in State and Federal Appellate Courts*]).

26. *Id.* (citing CIARA TORRES-SPELLISCY ET AL., BRENNAN CTR. FOR JUSTICE, IMPROVING JUDICIAL DIVERSITY 4 (2d ed. 2010)), *available at* http://brennan.3cdn.net/31e6c0fa3c2e920910_ppm6ibehe.pdf.

27. THE AMERICAN BENCH: JUDGES OF THE NATION GENDER RATIO SUMMARY: TOTALS BY COURT LEVEL JURISDICTION (20th ed. 2009) [hereinafter THE AMERICAN BENCH].

28. The American Bench reported the total number of judges, and the number of female judges, serving on the following courts: state-level final appellate jurisdiction courts, state-level intermediate appellate jurisdiction courts, state-level general jurisdiction courts, and state-level limited and special jurisdiction courts. Totals for all state courts, and percentage of female judges serving, were obtained by adding the category totals together and dividing the total number of female judges by the total number of all judges. *See id.*

29. U.S. CENSUS BUREAU, *Profile of General Population and Housing Characteristics: 2010*, AM. FACTFINDER 2 (May 24, 2011), http://www.stats.indiana.edu/c2010/dp1/FactfinderINandUS.pdf [hereinafter U.S. CENSUS BUREAU].

30. *See National Database on Judicial Diversity in State Courts*, A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, http://apps.americanbar.org/abanet/jd/display/national.cfm#1 (last visited Nov. 16, 2012) [hereinafter A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE].

31. THE AMERICAN BENCH, *supra* note 27.

of color.[32] By contrast, the U.S. Census Bureau reported that approximately 27.6% of the national population was non-white.[33] Clearly, there is some progress to be made if we want to create a judiciary that reflects the population it serves.[34]

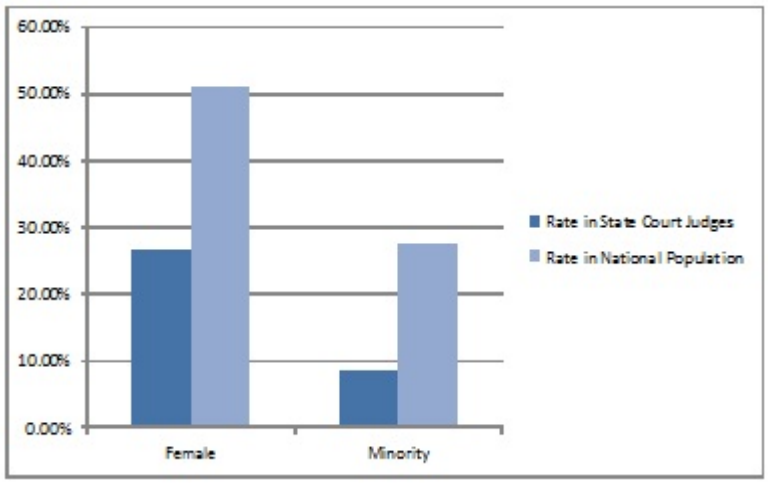

Table 1

IV. JUDICIAL SELECTION AND DIVERSITY

The relationship between methods of judicial selection and diversity in the judiciary is incredibly complex, and there are a number of variables that make it very difficult to identify a clear relationship between the two. It is also an incredibly challenging question to study. The judicial selection system is, for all intents and purposes, unique in each state.[35] Both across and within states, different methods are used to select (1) appellate judges and trial judges; (2) statewide and local judges; (3) candidates who are eligible for initial terms; (4) judges who are eligible for retention; (5) judges to fill seats at the end of a

32. The Standing Committee on Judicial Independence, National Database on Judicial Diversity in State Courts reports the total number of judges in five racial/ethnic categories serving on state courts nationally. The percentage was calculated by dividing this number by the total number of serving states judges reported by The American Bench. *See* THE AMERICAN BENCH, *supra* note 27.

33. U.S. CENSUS BUREAU, *supra* note 29, at 2 (GEO: United States) (reporting that 72.4% of the national population is white).

34. Racial demographic data is challenging to analyze and report, in part because individuals can self-identify in multiple categories. For the sake of simplicity, the racial data used herein is taken from 2010 U.S. Census information concerning individuals who identified in a single racial category.

35. *Methods of Judicial Selection*, *supra* note 1.

regular term; and (6) judges to fill interim vacancies on the bench.[36] In some states, like in Indiana, the selection method differs by county.[37]

Even when comparing states that use the same method to select judges for a particular type of court, there are other variables to consider. Among states that use merit selection to fill seats on their courts of last resort, some states require legislative confirmation of a final nominee, but many do not.[38] A minority of states have written rules emphasizing diversity as an important consideration.[39] The priorities of the nominating commissioners, and ultimately of the appointing authority (which is usually the governor) also play a role.[40] Finally, the demographic characteristics of the state in question, and of that state's bar and existing judiciary, appear to have some influence on the diversity of nominees selected by nominating commissions.[41]

Trying to sort out all those different variables is difficult, to say the least. As a result, the scholarship on judicial selection has had a difficult time coming to any kind of consensus as to the influence of merit selection on the diversity of the bench.[42]

V. MERIT SELECTION AND DIVERSITY

We know that merit selection is at least as good as judicial elections at promoting diversity on the bench. There seems to be some indication that minority judges are selected slightly more often under merit selection systems. By contrast, states that elect judges tend to select a slightly higher percentage of women.[43] Neither system is clearly superior to the other.

Existing studies have produced vastly different results about the effects of judicial selection systems regarding gender and racial diversity in state courts.

---

36. *Id.*

37. *See Methods of Judicial Selection: Indiana*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state=IN (last visited Nov. 17, 2012) (discussing the role of *local* judicial nominating commissions in the selection of county court judges).

38. *Methods of Judicial Selection*, *supra* note 1 (listing, among other states, Delaware, Iowa, New York, and Utah as states requiring legislative approval of the appointment).

39. *See id.*

40. *See FAQ*, *supra* note 1 (stating that common commissioner priorities include "the fundamental goal of ensuring that applicants are assessed on their knowledge of the law, their experience, their demeanor, and their ability to be fair and impartial judges").

41. *See generally* Lynette Labinger, *A Response from the Field: One Practitioner's View*, 15 ROGER WILLIAMS U. L. REV. 755 (2010) (discussing the need for changes in state statutes in order to increase the applicant pool of judicial candidates).

42. *See* Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 73 (2007).

43. *See* Malia Reddick et al., AM. JUDICATURE SOC'Y, *Racial and Gender Diversity on State Courts*, 48 JUDGES J. 28, 28 (2009).

Some have found that appointive systems advance judicial diversity.[44] For example, a 1985 study of women and minorities on courts in all fifty states concluded that "[t]he success of women and minorities in achieving judicial office depends in large measure upon the method of selection," and found appointive systems more effective than elective systems at creating a diverse bench.[45] A 2002 study found that appointment processes tended to favor African-American candidates of both genders.[46] Another report the same year showed that appointive systems provided greater gender diversity to formerly all-male courts, but the report noted that the effect does not seem to hold when the court being studied is already diversified.[47] A 2006 study tracked with that conclusion, showing that interim appointments frequently function to diversify all-white or all-male benches.[48]

Other studies have produced the opposite result. A study of New York City judges from 1992 to 1997 found that the city's "elective systems produced more minority and women jurists than appointive systems."[49]

Still, other studies have found no link between selection systems and diversity. A series of three studies, published between 1988 and 1996, concluded that judicial selection systems, by themselves, could not account for ethnic or racial diversity on the state bench.[50] Another series of three studies in 2001, 2003, and 2008 also concluded that the method of selection does not have a substantial effect on judicial diversity.[51]

AJS has contributed to recent research in this field with two significant projects. In 1999, AJS gathered demographic data from ten states that use nominating commissions in their judicial selection process.[52] The study looked

---

44. *See generally* M.L. HENRY, THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS (1985).

45. *Id.* at 65.

46. Elaine Martin & Barry Pyle, *Gender and the Racial Diversification of State Supreme Courts*, 24 WOMEN & POL. 35, 35-52 (2002).

47. Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504, 514 (2002).

48. Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort Through Interim Appointments*, 27 JUST. SYS. J. 1, 10-11 (2006).

49. Reddick et al., *supra* note 23, at 1 (citing BROWN, *supra* note 23).

50. *See* Nicholas O. Alozie, *Selection Methods and the Recruitment of Women to State Courts of Last Resort*, 77 SOC. SCI. Q. 110, 122-24 (1996); *see also* Alozie, *Black Representation*, *supra* note 24, at 984-85; Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selections Methods*, 71 SOC. SCI. Q. 315, 321 (1990).

51. Hurwitz & Lanier, *Diversity in State and Federal Appellate Courts*, *supra* note 25, at 67; Mark S. Hurwitz & Drew Noble Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, ST. POL. & POL'Y Q. 329, 345-46 (2003); Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84, 92 (2001).

52. Kevin M. Esterling & Seth S. Andersen, DIVERSITY AND THE MERIT SELECTION PROCESS:

at the demographic composition of the possible pool of applicants, lists of nominees recommended for appointment, and eventual appointees, as well as the demographic composition of the state bars and the nominating commissions themselves.[53]

Based on this data, the AJS study was able to draw several conclusions. "[M]erit selection commissions [generally] tend to *affirmatively select minority applicants as nominees for judicial vacancies*."[54] Specific governors, however, vary quite a bit in their inclination to choose minority applicants for appointment.[55] Nominating commissioners and appointing authorities tend to select female candidates in proportion to the percentage of women in the applicant pool.[56] There also seemed to be evidence that, when nominating commissions themselves are more representative, they attract more diverse applicant pools and produce more diverse lists of nominees.[57]

AJS revisited the topic again in 2008 with a study that did three important things, which, to that point, had not really been done. First, rather than looking at a few jurisdictions, or focusing on a particular level of the judiciary, this study examined "courts of last resort, intermediate appellate courts," and general jurisdiction trial courts in all fifty states.[58]

Second, studies up to that point made generalizations about the selection method in each state.[59] Previous studies tended to assume that judges in a particular state, or in a particular court, were selected using the most frequent method.[60] The 2008 study was the first to look at "the actual method of selection for each judge in [the] dataset."[61]

Finally, this study was the first to look at each judge on an individual level, to try to measure the influence of institutional, political, and contextual characteristics of the states in which they served, the courts on which they sat, the ideology of the actors involved in their selection, and the environment in which they were selected.[62] The study examined each state's factors in each state, including the geographic basis of selection, minimum qualification requirements, the political environment, and the demographics of the pool of attorneys eligible to apply to see how those factors might influence diversity in ways that went beyond simply the method of selection.[63]

A STATISTICAL REPORT, AM. JUDICATURE SOC'Y 6 (1999), *available at* http://www.judicialselection.us/uploads/documents/diversity_and_the_judicial_merit_se_9C4863118945B.pdf.

53. *Id.* at 7.
54. *Id.* at 6.
55. *Id.* at 7.
56. *Id.*
57. *See id.* at 11.
58. Reddick et al., *supra* note 23, at 2.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 2-5.

The results are complex, but the takeaway message is that minority and female judges are no more or less likely to reach the bench through merit selection or judicial elections.[64] For minority judges, the most important factors seemed to be the percentage of minorities in the pool of eligible nominees and, to some extent, the political environment of the state.[65] For women judges, the important factors varied quite a bit depending on the level of court in question.[66]

So again, the picture is complicated. There seems to be some indication that minority judges are selected slightly more often under merit selection systems, and women are selected slightly more in states that elect judges, but neither system is clearly better than the other.

VI. JUDICIAL NOMINATING COMMISSIONS AND DIVERSITY

From the perspective of those who believe in the value of a diverse and representative judiciary, merit selection offers one significant advantage over judicial elections: merit selection provides the opportunity to identify diversity as an institutional priority.[67] States can include the consideration of judicial diversity in statutes that govern commission appointments and the selection of nominees to the bench.[68] Commissions themselves often have significant discretion to create or modify their own rules.[69] In the absence of statutory guidance, many commissions could choose to make diversity a priority in the procedures they create and apply.[70]

AJS recently published a report called *Inside Merit Selection: A National Survey of Judicial Nominating Commissioners*.[71] With 487 respondents from thirty states and the District of Columbia, it is the largest survey of nominating commissioners ever conducted.[72] AJS surveyed the commissioners anonymously, and they shared very candid answers about the ways their commissions function, their opinions about the processes involved, the relationships between lawyer, non-lawyer and judge members, and their priorities when it comes to selecting the judges that they nominate for the bench.[73]

Many of the results were extremely encouraging. They seem to suggest that, by and large, nominating commissions are functional, responsible, and professional.[74] They are becoming more systematic; commissions are more likely

---

64. *Id.* at 7.
65. *Id.* at 6.
66. *Id.*
67. *See* Caufield, *supra* note 4, at 19.
68. *Id.* at 18.
69. *Id.* at 19.
70. *See id.* at 19-20.
71. *Id.* at 3.
72. *Id.* at 9.
73. *Id.* at 9-10.
74. *Id.* at 54-55.

than they were in the past to have written rules and formal procedures.[75] Almost across the board, respondents reported that they work together well, with no significant friction between lawyer and non-lawyer members.[76] Commissioners report that lawyer and lay members respect each other, and neither group holds an inappropriate sway over the process or the final selection of nominees.[77] The commissioners also report that, as a whole, they see themselves as an appropriate check on the appointive power of their governors and that they choose nominees without the intention of either helping or hurting their governors' political priorities.[78] Crucially, these answers did not vary significantly among lawyer and non-lawyer members.

As noted earlier, there is some evidence that diverse nominating commissions produce more diverse lists of nominees for judicial vacancies.[79] On that score, the results of *Inside Merit Selection* suggest that things might be improving.[80]

> Over time, more women have been appointed as Commissioners: 32% of all respondents were women, up from 10% in 1973 and 25% in 1989. The numbers of African American and Hispanic Commissioners are also growing, though the change appears to be happening very slowly. The percentage of White commissioners has gradually declined, from 98% in 1973 to 93% in 1989 to 88.9% in 2011, as the percent of Commissioners who identify as African American (4.2%), Asian or Pacific Islander (1.6%) and American Indian (.5%) seem to be inching upward. The percentage of Commissioners who identify as being of Hispanic, Latino, or Spanish origin appears to have leveled off at their 1989 levels.[81]

There seems to be significant room for improvement in the priorities of the commissioners who serve on the nominating commissions. One set of questions on the survey focused on what qualities the commissioners prioritize when considering nominees.[82] Commissioners consistently ranked professional qualification and mental fitness of an applicant as the qualities they thought were most crucial for a nominee.[83] Also consistently, they ranked political affiliation and party membership among the least important qualities.[84]

The results show, however, perhaps surprisingly, that commissioners do not consider diversity on the bench as a priority when choosing nominees.[85] They

---

75. *Id.* at 20.
76. *Id.* at 50.
77. *Id.* at 50-51.
78. *Id.* at 39-40.
79. *See* Esterling & Andersen, *supra* note 52, at 11.
80. Caufield, *supra* note 4, at 8, 18.
81. *Id.* at 18.
82. *Id.* at 28-29.
83. *Id.*
84. *Id.*
85. *Id.* at 29-30.

consistently ranked it among the lowest of their priorities when deciding who to nominate.[86] This suggests that the effect of more diverse commissions on the diversity of the bench is largely the result of individual decisions by commissioners who are simply more open to the qualifications of diverse candidates rather than the result of an affirmative commitment to diversity. Including diversity considerations in the formal process for selecting commissioners and judges might encourage those tendencies. In a follow up study on diversity in merit selection states, AJS hopes to compare states that have diversity guidelines with those that do not, to see if they actually have an effect on the diversity of the bench.

VII. DIVERSITY ON THE BENCH IN INDIANA

The diversity of the bench in Indiana also shows significant room for improvement. At the state level, staffing the nominating commissions from the three appeals court districts ensures a geographic distribution of commission members and is Indiana's only formal requirement for diversity, for either commissioners or nominees to the bench.[87] Diversity by any other measure is left up to the discretion of the commissioners when they decide whom to nominate, and this diversity ultimately is left up to the governor when he or she makes an appointment.[88]

Formal rules do not require the state or county commissions to consider the diversity of the judiciary when choosing the nominees they send to the governor for appointment.[89] There may be informal conventions, but again, the results from *Inside Merit Selection* suggest that, in the absence of a formal requirement, the commissioners themselves are not likely making diversity a priority when choosing nominees.

Table 2 compares the percentage of women and minorities in Indiana's population with the percentage of Indiana judges in those demographic categories. In 2010, 20.7% of the judges on the bench in Indiana were women,[90] while the state's overall population was 50.8% female.[91] Seven percent of Indiana's judges were people of color,[92] while the non-white population of the state was 15.7%.[93]

---

86. *Id.*

87. IND. CODE ANN. § 33-27-2-1 (West 2012).

88. *But see id.* §§ 33-33-45-28(b)(1)-(3), (c)(3)-(5) (requiring the makeup of two of the four attorney and two of the four non-attorney members of the Lake County Nomination Commission to be female and that one of each of the four be a minority). "'Minority' means an individual identified as black or Hispanic." *Id.* § 21-13-1-6.

89. *See* IND. CODE ANN. § 33-27-3-2 (West 2012).

90. THE AMERICAN BENCH, *supra* note 27.

91. U.S. CENSUS BUREAU, *supra* note 29.

92. A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, *supra* note 30.

93. U.S. CENSUS BUREAU, *supra* note 29.

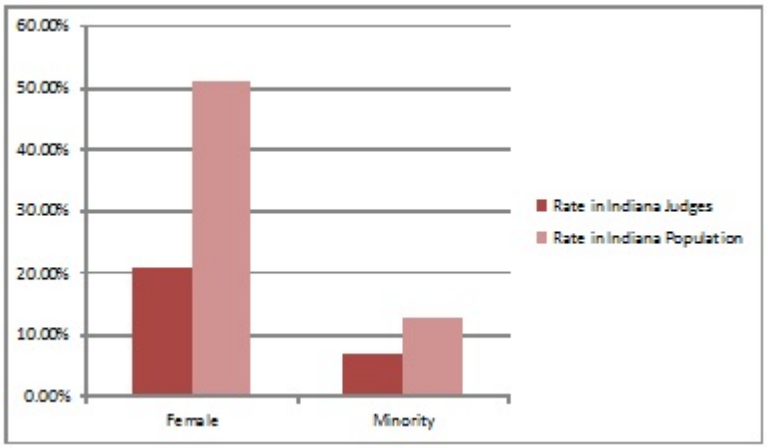

Table 2

Table 3 contrasts the rate of female and minority judges, both nationally and in Indiana, with the rates in the overall population from which those judges are drawn.[94] Nationally, the rate of female judges was 52% of their percentage in the population;[95] it was closer to 41% in Indiana.[96] Nationally, the rate of minority judges was 30% of their percentage in the general population.[97] In Indiana it was close to 44%.[98] Thus, compared to the national average, women are well-represented in Indiana's courts, but minority judges are better represented.

---

94. These figures were calculated by taking the percentages of women and minorities in the population of state judges (both nationally and in Indiana), calculated for Tables 1 and 2, and dividing those rates by the percentages of women and minorities in the corresponding populations (nationally and Indiana). They are intended to provide a means for a rough comparison between the representation of women and minorities on the bench nationally, and in Indiana specifically.

95. *See* THE AMERICAN BENCH, *supra* note 27; *see also* U.S. CENSUS BUREAU, *supra* note 29.

96. *See* THE AMERICAN BENCH, *supra* note 27; *see also* U.S. CENSUS BUREAU, *supra* note 29.

97. *See* A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, *supra* note 30; *see also* U.S. CENSUS BUREAU, *supra* note 29.

98. *See* A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, *supra* note 30; *see also* U.S. CENSUS BUREAU, *supra* note 29.

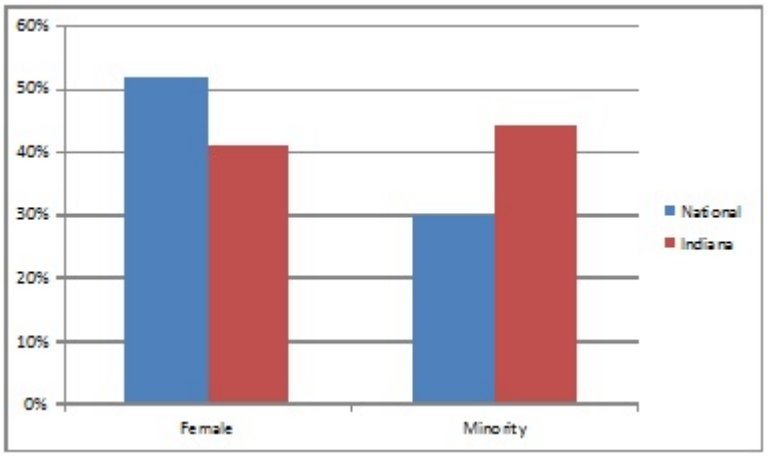

Table 3

As previously noted, Indiana's Commission on Judicial Qualifications/Judicial Nominating Commission has no statutory guidelines for including diversity as a consideration when choosing candidates to nominate to the bench.[99] In fact, the statewide commission's application form uses for judicial vacancies does not ask any demographic questions, so it is exceedingly difficult to take any measure of the racial and ethnic diversity of either applicants or nominees.[100]

More information about gender is available.[101] Since 1985, there have been eight vacancies on the Indiana Supreme Court.[102] The Commission on Judicial Qualifications/Judicial Nominating Commission sends a list of three nominees to the governor for each vacancy.[103] The commission has nominated fifteen men and eight women, including one, Judge Betty Barteau, who was nominated twice.[104] Of those eight women, only one, Justice Myra Selby, was appointed to

---

99. *See* IND. CODE ANN. § 33-27-3-2 (West 2012).

100. *See Application for the Indiana Supreme Court*, IND. JUDICIAL NOMINATING COMM'N, *available at* http://www.in.gov/judiciary/jud-qual/files/jud-qual-sc-108-application.doc (last visited Nov. 15, 2012).

101. Sincere thanks to Adrienne L. Meiring, Counsel to the Division of State Court Administration, for providing data on the members of the Commission on Judicial Qualifications/Judicial Nominating Commission and nominees to the Indiana Supreme Court.

102. *See* JUSTICES OF THE INDIANA SUPREME COURT 395-430 (Linda C. Gugin & James E. St. Clair eds., 2010).

103. IND. CODE ANN. § 33-27-3-1(c) (West 2012).

104. E-mail from Adrienne L. Meiring, Counsel, Ind. Comm'n on Judicial Qualifications/Ind. Judicial Nominating Commission, to author (Mar. 19, 2012, 2:56 PM) (on file with author).

the court.[105] When Justice Selby took the bench in 1994, she was the 103rd justice to serve on the court, and both the first woman and the first African-American to sit there.[106] She was also appointed from the only completely female slate of nominees ever submitted by the commission.[107] Since she retired from the court in 1999, no female justices have served on the court.[108] Currently, Indiana, Iowa, and Idaho[109] are the only states with no women as members of their courts of last resort.[110]

VIII. DIVERSITY OF NOMINATING COMMISSIONERS

Given the evidence suggesting that diversity among nominating commissioners has a positive influence on diversity of the judiciary, we should consider the diversity of the Commission on Judicial Qualifications/Judicial Nomination Commissions. Again, the use of districts to select commissioners ensures geographic diversity, but no other factors are formally considered in terms of ensuring diversity among the commissioners.[111] The Commission was created by an amendment to the Indiana Constitution in 1970 and began operation in 1972.[112] The first woman was appointed to the Commission in 1985.[113]

A total of sixty-six people have served on the Commission, in slates of seven. There are three attorney commissioners, three citizen commissioners, and the Commission is chaired by the current Chief Justice of the Indiana Supreme Court. Of the sixty-six commissioners who have served, thirteen, or 19.7%, have been women. More than two female commissioners have never served at a time. Records of the race or ethnicity of commissioners are not kept.[114]

CONCLUSION

While the relationship between judicial selection and diversity on the bench

---

105. JUSTICES OF THE INDIANA SUPREME COURT, *supra* note 102, at 413.

106. *Id.*

107. *See* E-mail, *supra* note 104.

108. *See* JUSTICES OF THE INDIANA SUPREME COURT, *supra* note 102, at 417-30.

109. *See Diversity of the Bench*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm (last visited Nov. 15, 2012).

110. This Article is based on a presentation that was given on April 5, 2012. On September 14, 2012, Governor Mitch Daniels appointed Tippecanoe County Judge Loretta Rush to fill the seat vacated by the retirement of Justice Frank Sullivan. Upon her swearing in, Rush will become the second woman to serve on the Indiana Supreme Court.

111. *See* IND. CONST. art. 7, §§ 9-10 (amended 1970); IND. CODE ANN. 33-27-3-2 (West 2012); *see also About the Commissions*, COURTS.IN.GOV, http://www.in.gov/judiciary/jud-qual/2380.htm (last visited Nov. 17, 2012).

112. *See* E-mail, *supra* note 104.

113. The first woman was nominated for a vacancy on the Indiana Supreme Court in 1986. *See id.*

114. *See id.*

is complicated, there exists an opportunity to improve merit selection systems to encourage judicial diversity. Affirmatively striving to diversify nominating commissions seems likely to assist in the creation of a more diverse and representative bench. Placing an institutional value on creating a judiciary that reflects the people it serves will hopefully encourage those commissioners to consider the value of diversity more explicitly when selecting nominees. Given the substantial institutional benefits that research suggests are conferred by diversity in the judiciary, attempting to improve merit selection systems in these ways seems both reasonable and useful.

JUDICIAL RETENTION ELECTIONS AFTER 2010

MELISSA S. MAY*

In November 2010, three justices of the Iowa Supreme Court, Chief Justice Marsha K. Ternus, Justice Michael J. Streit, and Justice David L. Baker, lost their seats after receiving less than 50% of the vote in their retention elections.[1] Their removal from the bench, which was based on a single decision by their court in 2009, sent shock waves through state court systems all over our country. As part of our attempt to make sense of this historical anomaly, this Article will address the following topics: first, judicial retention elections prior to 2010; second, retention challenges in the 2010 election cycle; and third, actions that have been taken by judges, bar associations, and ordinary citizens in response to these challenges, which are likely to continue to occur.

I. HISTORY OF JUDICIAL RETENTION ELECTIONS

The dramatic removal of Chief Justice Ternus and Justices Streit and Baker made headlines all over the nation,[2] but it was not the first time voters ousted an appointed judicial officer as a result of negative campaigning based on an isolated issue.

In 1986, Californians voted out of office three state supreme court justices, most notably Chief Justice Rose Bird.[3] Her defeat seemed to be based on the fact that she had never, in the sixty-one capital cases that had appeared before her, "voted to uphold a death sentence."[4] This loss in a retention election represented the first time an electorate voted any justice of a state's high court out of office.[5] Her opposition was funded primarily by big business,[6] and the morning after the election, the *Los Angeles Times* reported, "After nine years in the job, Bird fell victim to a multimillion-dollar campaign . . . ."[7] Television advertising played a crucial role in her defeat. For example, Chief Justice Bird's campaign "did not

---

* Judge, Indiana Court of Appeals, Fourth District, 1998-Present.

1. Annette J. Scieszinski & Neal Ellis, *The Gamble of Judging: The 2010 Iowa Supreme Court Retention Election*, 50 NO. 4 JUDGES' J. 8, 9 (2011).

2. *See* Mallory Simon, *Iowa Voters Oust Justices Who Made Same-Sex Marriage Legal*, CNN (Nov. 3, 2010, 1:13 PM), http://www.cnn.com/2010/POLITICS/11/03/iowa.judges/index.html; A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1, *available at* http://www.nytimes.com/2010/11/04/us/politics/04judges.html.

3. Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, http://articles.latimes.com/1986-11-05/news/mn-15232_1_court-justices. Justices Cruz Reynoso and Joseph Grodin lost their positions on the California Supreme Court at the same time as Justice Bird based on the perception that they were soft on crime. *Id.*

4. Patrick K. Brown, *The Rise and Fall of Rose Bird: A Career Killed by the Death Penalty* 1 (Cal. Sup. Ct. Hist. Soc'y, 2007 Student Writing Competition), *available at* http://cschs.org/02_history/images/CSCHS_2007-Brown.pdf.

5. Clifford, *supra* note 3.

6. James J. Sample, *Retention Elections 2.010*, 46 U.S.F. L. REV. 383, 404 (2011).

7. Clifford, *supra* note 3.

raise half the amount of money collected by her opponents,"[8] and "her low-key commercials, stressing the need for a judiciary that can make unpopular decisions in the face of intense political pressure . . . was no match for the emotional appeals of her opponents."[9]

Ten years later, Justice Penny White lost her retention election in Tennessee.[10] Unlike the three California justices, whose opposition had been vocal early in the campaign,[11] the opposition against Justice White was described as "a wildfire campaign that used a handful of her rulings to cast her as an enemy of the death penalty and a coddler of criminals."[12] That campaign strategy was illustrated in a letter from John Davies, who was the president of the Tennessee Conservative Union, which stated: "'Now Justice White is asking for your vote . . . . She wants you to vote 'Yes' for her in August. 'Yes' so she can free more and more criminals and laugh at their victims!'"[13] Justice White responded to these attacks, but her response was unsuccessful. She pointed out to the media that her record included "'127-year sentences affirmed and double-life sentences affirmed.'"[14] She was defeated in the election by a 55%-45% margin on a yes/no vote.[15]

Thus, prior to 2010, it seems only four justices had ever been removed from the bench as a result of a retention election, and only on a few other occasions had there been any serious attempt to oust a sitting judge.[16] Additionally, research suggests special interest group attacks on appointed judicial officers were extremely rare until recently.

II. THE DRAMA OF 2010

To get a brief idea of the drama that unfolded in 2010, one can examine the costs associated with judicial retention elections. "From 2000-2009 . . . barely one percent of campaign spending" went toward retention elections of state high courts.[17] However, in 2010, "high-court retention elections in Illinois, Iowa, Colorado and Alaska resulted in about $4.6 million in total costs—more than

---

8. *Id*.

9. *Id.*

10. Sample, *supra* note 6, at 405 (citing Paula Wade, *White First Casualty of Yes-No Option on Judges Soft-on-Crime Charge Costs Seat*, MEMPHIS COM. APPEAL, Aug. 2, 1996, at A1).

11. Clifford, *supra* note 3.

12. Sample, *supra* note 6, at 405 (quoting Wade, *supra* note 10).

13. *Id.* at 406 (quoting Richard Locker, *Conservatives Again Target Justice White*, MEMPHIS COM. APPEAL, July 17, 1996, at B1).

14. *Id.*

15. Jesse Fox Mayshark, *As Tennesseans Clamor for the Death Penalty, Judges Are Caught in a Political Crossfire that Threatens to Upend the Scales of Justice*, METRO PULSE (Oct. 6, 1997), http://weeklywire.com/ww/10-06-97/knox_feat.html.

16. *See* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS 11 (Matthew J. Streb ed., 2007).

17. Sample, *supra* note 6, at 408.

twice the $2.2 million raised for all retention elections nationally in 2000-2009."[18] On October 29, 2010, Justice at Stake and the Brennan Center for Justice announced that advertising concerning state supreme courts had exploded nationally—$3.3 million was spent in the week between October 21 and October 27, 2010.[19] A review of some political and legislative developments in states in which there were retention election contests in 2010 help to provide a better understanding of the reason behind the recent explosion in judicial retention election expenditures.

A. Iowa

In 1998, Iowa legislators passed an act commonly referred to as the Defense of Marriage Act,[20] which prohibited gay and lesbian couples from lawfully entering into a civil marriage.[21] In 2005, a lawsuit was filed in Polk County, Iowa on behalf of six couples that were denied marriage licenses.[22] Polk County District Judge Robert Hanson ruled in favor of the couples in 2007, and state officials immediately appealed.[23] The issue presented to the Iowa Supreme Court was whether "[Iowa's] state statute limiting civil marriage to a union between a man and a woman violates the Iowa Constitution."[24] On April 3, 2009, the Iowa Supreme Court handed down a unanimous decision:

> In the final analysis, we give respect to the views of all Iowans on the issue of same-sex marriage—religious or otherwise—by giving respect to our constitutional principles. These principles require that the state recognize both opposite-sex and same-sex civil marriage. Religious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union

---

18. Press Release, Justice at Stake Campaign, 2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say (Nov. 3, 2010), http://www.justiceatstake.org/newsroom/press_releases.cfm/2010_judicial_elections_increase_pressure_on_courts_refore_groups_say?show=news&newsID=9129.

19. *TV Spending Surges in State Supreme Court Races*, BRENNAN CTR. FOR JUST. (Oct. 29, 2010), http://www.brennancenter.org/content/resource/tv_spending_surges_in_state_supreme_court_races/.

20. Associated Press, *Iowa Judge Stays Ruling That OK'd Gay Marriage*, LIFE ON NBCNEWS.COM (Aug. 31, 2007), http://www.msnbc.msn.com/id/20531786/ns/us_news-life/t/iowa-judge-stays-ruling-okd-gay-marriage/.

21. IOWA CODE ANN. § 595.2 (West 2012), *held unconstitutional by* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). The Defense of Marriage Act amended a prior statute to read, "A marriage between a male and female each eighteen years of age or older is valid." MARRIAGES—FOREIGN MARRIAGES—RESTRICTIONS, 1998 Iowa Legis. Serv. Ch. 1099 (West).

22. Petition for Declaratory Judgment and Supplemental Injunctive and Mandamus Relief, Varnum v. Brien, No. CV5965, 2005 WL 5715627 (Iowa Dist. Ct. Dec. 13, 2005).

23. Varnum v. Brien, 763 N.W.2d 862, 871, 874 (Iowa 2009).

24. *Id.* at 872.

> between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person's religious faith does not lose its meaning as a sacrament or other religious institution. The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated in the past. The only difference is *civil* marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law. This result is what our constitution requires.
>
> . . . We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective. The legislature has excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification. There is no material fact, genuinely in dispute, that can affect this determination.
>
> We have a constitutional duty to ensure equal protection of the law. Faithfulness to that duty requires us to hold Iowa's marriage statute, Iowa Code section 595.2, violates the Iowa Constitution. To decide otherwise would be an abdication of our constitutional duty. If gay and lesbian people must submit to different treatment without an exceedingly persuasive justification, they are deprived of the benefits of the principle of equal protection upon which the rule of law is founded. Iowa Code section 595.2 denies gay and lesbian people the equal protection of the law promised by the Iowa Constitution.[25]

Immediately, there was backlash. U.S. Representative Steve King, who helped write the 1998 Defense of Marriage Act when he was a member of the Iowa Legislature, stated, "Our worst fears have been realized . . . . It turns immediately Iowa into the Mecca for same-sex marriages—a destination state . . . . There will be weekend packages that are being planned right now. It will be the Las Vegas of same-sex marriage for America if the Legislature doesn't act now."[26]

Bob Vander Plaats, who lost his 2010 Republican primary bid for governor, became a leader in the attack on the justices.[27] He formed "an anti-retention effort called Iowa for Freedom," which "was heavily financed by the Tupelo, Miss[issippi]-based American Family Association and other interest groups."[28] Drawing on his existing political support, he consistently told voters to "vote

---

25. *Id.* at 905-06.

26. Rod Boshart, *Iowa Supreme Court Legalizes Gay Marriage in Iowa*, GAZETTE (Apr. 3, 2009, 7:44 AM), http://thegazette.com/2009/04/03/iowa-supreme-court-legalizes-gay-marriage-in-iowa/.

27. Scieszinski & Ellis, *supra* note 1, at 9.

28. Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send Tremor Through the Judicial Retention System*, A.B.A. J. (Jan. 1, 2011, 1:59 AM), http://www.abajournal.com/magazine/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system/.

'No.'"[29] Vander Plaats had been clear that he supported traditional marriage and saw the three justices as part of the problem in Iowa.[30] He stated, "This election, in my opinion, to remove these judges is one of, if not the most[,] important election[s] in our country."[31] Vander Plaats conceded that the federal court ruling in California, which struck down Proposition 8,[32] encouraged "him to move against the justices in Iowa."[33] According to Vander-Plaats, "If the judges can do this to marriage, every one of your freedoms is up for grabs."[34] He also questioned "whether the decision by the [Iowa] Supreme Court . . . was not a conspiracy in order to 'protect their seats on the court.'"[35]

The Citizens United Political Action Committee focused its crusade toward "250,000 potential Iowa voters through robo-calls," urging them to vote against retention.[36] The Committee utilized Fox News host and former Arkansas Governor Mike Huckabee to make these robo-calls. Citizens United teamed with other conservative organizations, such as "the American Family Association, the National Organization for Marriage, the Family Research Council, and Concerned Women of America," which by October 31, 2010, had already spent in excess of $711,000 in their campaign against retention of the justices.[37] Between the day *Varnum* was handed down and election day, special interest campaigns poured almost one million dollars into Iowa to unseat the three justices up for retention.[38]

In contrast, the justices declined to campaign[39] and chose not to engage in fundraising because they did "not want to contribute to the politicization of the judiciary."[40] Chief Justice Marsha Ternus, in public comments at Iowa State University just three weeks before the election, stated that

---

29. Brian Tashman, *Iowa for Freedom*, RIGHT WING WATCH (Apr. 22, 2011, 10:13 AM), http://www.rightwingwatch.org/cpmtemtopwa-gap-tries-impeach-state-supreme-court-over-marriage-equality.

30. Christina Rivers, *Vander Plaats Announces He Is Ready to Launch a Battle Against Iowa Supreme Court Judges*, EXAMINER.COM (Aug. 6, 2010, 11:30 AM), http://www.examiner.com/article/vander-plaats-announces-he-is-ready-to-launch-a-battle-against-iowa-supreme-court-judges.

31. *Id.*

32. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052, 1096 (9th Cir. 2012).

33. Rivers, *supra* note 30.

34. *Id.*

35. *Id.*

36. Tyler Kingkade, *Citizens United, Huckabee Target Iowans over Judicial Retention Vote*, IOWA STATE DAILY.COM (Oct. 31, 2010, 4:22 PM), http://www.iowastatedaily.com/news/article_27bfe720-e536-11df-9c40-001cc4c03286.html.

37. *Id.*

38. ADAM SKAGGS ET AL., BRENNAN CTR. FOR JUSTICE, JUSTICE AT STAKE CAMPAIGN & NAT'L INS. ON MONEY IN STATE POL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10, at INTRO. (2011), *available at* http://brennan.3cdn.net/ 23b60118bc49d599bd_35m6yyon3.pdf.

39. Curriden, *supra* note 28.

40. Sample, *supra* note 6, at 383 (internal quotation marks omitted).

> [t]he American Family Association wants our judges to be servants of this group's ideology, rather than servants of the law . . . . These critics are blinded by their own ideology. They simply refuse to accept that an impartial, legally sound and fair reading of the law can lead to an unpopular decision.[41]

Iowa voters disagreed with Chief Justice Ternus. Turnout was unusually high for the November 2010 election,[42] with 52.98% of Iowan voters casting a ballot;[43] of those voters, 88% participated in the retention election.[44] Chief Justice Ternus and Justices Baker and Streit each received only 46% of votes supporting their retention,[45] which was five percentage points short of the number necessary to be retained.[46]

Interestingly, all of the other judges running for retention in the same Iowa election were retained.[47] Judge Robert Hanson, a district judge in Polk County, received 66% of the vote in support of his retention, despite the fact that he had made the initial ruling to permit same-sex marriage.[48] In addition, five of the judges on the Iowa Court of Appeals were retained with more than 60% support.[49]

B. Other States in 2010

There were "other hotly contested judicial retention votes in Alaska, Colorado, Florida, Illinois, [Kansas,] and Michigan" where more money was raised than in Iowa.[50] Nevertheless, in each of those states the sitting supreme court justices campaigned and won retention.[51]

1. Alaska.—Prior to the election, the Alaska Judicial Council unanimously recommended that Justice Dana Fabe be retained, citing an overall attorney-rated

---

41. Curriden, *supra* note 28.

42. Jason Clayworth, *Nov. 2 Was the Highest Total Midterm Election Turnout in Iowa History*, DES MOINES REGISTER (Nov. 29, 2010, 12:10 PM), http://blogs.desmoinesregister.com/dmr/index.php/2010/11/29/nov-2nd-was-the-highest-midterm-election-turnout-in-iowa-history/.

43. IOWA SECRETARY OF STATE, REPORT NO. E-030, VOTERS REGISTERED AND VOTING: 2010 GENERAL ELECTION STATEWIDE VOTERS, *available at* http://sos.iowa.gov/elections/pdf/2010/genstatestats.pdf.

44. Curriden, *supra* note 28.

45. *Id.*

46. *See* IOWA CODE ANN. § 46.24 (West 2012) ("A judge of the supreme court, court of appeals, or district court including a district associate judge, full-time associate juvenile judge, or full-time associate probate judge, or a clerk of the district court must receive more affirmative than negative votes to be retained in office.").

47. Curriden, *supra* note 28.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

performance of a 4.3 out of 5 and a court employee overall performance rating of 4.6 out of 5.[52] Alaska's ethical rules prohibit judges from campaigning for retention absent "active opposition,"[53] and the opposition to Justice Fabe's retention began very late in the campaign season.[54] Her opposition included CitizenLink, headed by Tom Minnery, the public policy arm of the national Christian group Focus on the Family.[55] As leader of a conservative group known as Alaska Family Action, Jim Minnery, Tom Minnery's cousin, opposed Justice Fabe's retention.[56] Another group, Alaskans for Judicial Reform, targeted Justice Fabe by airing a television ad depicting "a black-robed figure feeding papers, including an apparent ballot, into a paper shredder."[57] At the center of the debate was the Alaska Supreme Court's 2007 rejection of a state law that required girls seeking an abortion to get a parent's consent.[58] Alaska Family Action stated that Justice Fabe "Torpedoed Parental Rights."[59] In addition, Justice Fabe's opposition stated she was generally too liberal and was an "activist judge," as reflected by her "rulings on abortion, gay marriage, benefits for same-sex partners of state workers, and prisoner rights."[60]

Justice Fabe was unable to form a campaign committee, so she spent her own money on advertisements.[61] A group of her supporters, mostly friends and former law clerks, formed Alaskans for Justice Dana Fabe[62] and created a website containing endorsements from prominent organizations and people including, among others, former Governor Bill Sheffield, U.S. Senator Mark Begich, and the Alaska Federation of Natives.[63] She was retained with 53.33% of the vote.[64]

2. Colorado.—In 2010, three Colorado Supreme Court justices were up for

---

52. 2010 JUDICIAL RETENTION PERFORMANCE EVALUATION MATERIALS JUSTICE DANA A. FABE, SUPREME COURT JUSTICE, ALASKA JUDICIAL COUNCIL 2 (2010), *available at* http://www.ajc.state.ak.us/retention/retent2010/fabe10.pdf.

53. ALASKA CODE OF JUDICIAL CONDUCT Canon 5(c)(2) (2012).

54. Lisa Demer, *Allies Defend Fabe as Justice Fights Campaign to Oust Her*, ANCHORAGE DAILY NEWS (Oct. 29, 2010, 6:40 PM), http://www.adn.com/2010/10/28/1524477/allies-rally-around-fabe-as-justice.html.

55. *See* Mark Barna, *Citizen Link Sends Plea for $2.3 Million to Stay Afloat*, COLO. SPRINGS GAZETTE (Sept. 1, 2011, 10:09 PM), http://www.gazette.com/articles/link-124284-million-plea.html.

56. *Alaska Supreme Court Justice Faces Retention Vote*, JUNEAUEMPIRE.COM (Oct. 29, 2010), http://juneauempire.com/stories/102910/sta_727786461.shtml.

57. Peter Hardin, *Election 2010: Ugly Attack Ads at Finish Lines*, GAVEL GRAB (Nov. 1, 2010), http://www.gavelgrab.org/?p=15203.

58. State v. Planned Parenthood of Alaska, 171 P.3d 577 (Alaska 2007).

59. Demer, *supra* note 54.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id*.

64. *Voters Retain Fabe, Dismiss Postma*, KTUU.COM (Nov. 3, 2010, 12:34 AM), http://www.ktuu.com/news/ktuu-2010elect-judicial-retention-votes-110210,0,911916.story.

retention: Justices Michael Bender, Alex Martinez, and Nancy Rice. The Colorado Office of Judicial Performance Evaluation recommended that all three justices be retained.[65] However, they faced stiff opposition from Clear the Bench, a "grassroots" movement.[66] Matt Arnold, executive director of Clear the Bench, stated, "They have been serial violators of the Colorado Constitution and violated the rights of citizens and refused to follow the law and put their personal and political views above what the constitution says."[67] The Clear the Bench organization made the following claims:

> The current majority [Justices Bender, Martinez and Rice] were guilty of Aiding and Abetting:
>
> - Unconstitutional Property Tax Increases (Mill Levy Tax Freeze)
> - Unconstitutional elimination of Tax Credits & Exemptions (tobacco tax, "Dirty Dozen" taxes)
> - Unconstitutionally re-defining Taxes as Fees (Colorado Car Tax, Ritter Gun Tax)
> - Unconstitutional expansion of eminent domain property seizures (Telluride Land Grab)
> - Unconstitutional usurpation of legislative power (judicial redistricting, school funding).[68]

Clear the Bench also provides "Evaluations of Judicial Performance" to summarize the decisions made by the justices.[69]

Clear the Bench raised only about $45,000, which helped fund the website, buttons, yard signs, and bumper stickers.[70] Even with such limited funding, the three justices' margins of victory were smaller than usual. Approximately 59.3% of voters approved the retention of Justice Martinez; 60.2% of voters supported Justice Bender; and 61.7% voted for the retention of Justice Rice.[71] In the prior election, the two justices running for retention received 72.4% and 74.6% of the vote to support their retention.[72]

Although it does not appear the justices actively campaigned, several groups sponsored a public education campaign. These groups—including the Institute for the Advancement of the American Legal System, the League of Women

---

65. *2010 Judicial Performance Reviews*, COLO. OFF. OF JUD. PERFORMANCE EVALUATION (2010), http://www.coloradojudicialperformance.gov/review.cfm?year=2010.

66. CLEAR THE BENCH COLO., http://www.clearthebenchcolorado.org/ (last visited Nov. 3, 2012).

67. Felisa Cardona, *Three Colorado High Court Justices Face Stiff Retention Opposition*, DENVER POST (Oct. 3, 2010, 1:00 AM), http://www.denverpost.com/election2010/ci_16239280.

68. CLEAR THE BENCH COLO., *supra* note 66.

69. *Id.*

70. Matt Masich, *Colo. Supreme Court Justices Retained*, LAW WEEK COLO. (Nov. 3, 2010), http://www.lawweekonline.com/2010/11/colo-supreme-court-justices-retained/.

71. *Id.*

72. *Id.*

Voters of Colorado, the Colorado Judicial Institute, and the Colorado Bar Association—launched the website 'KnowYourJudge.com.'"[73] This website was designed "to provide voters with impartial, nonpartisan information about the judges appearing on Colorado's ballot."[74] Those organizations also produced television and radio public service announcements in order to provide voters with the resources to research their judges.[75]

3. Florida.—Opposition to two Florida Supreme Court Justices arose after the court removed three proposed constitutional amendments from the November 2010 ballot.[76] In response to that decision, a Tea Party-affiliated group began a campaign to oust two justices from the bench:

> Citizen2Citizen, partnering with the Central Florida Tea Party Council, is launching the "Restore Justice" campaign, advocating for a vote not to retain Florida Supreme Court Justices Jorge Labarga and James Perry this November, after placing politics above the law to deny Floridians of their constitutional right [to] vote on Health Care Freedom (Amendment 9). Labarga and Perry upheld a circuit court ruling by Judge James Shelfer to remove Amendment 9 from the November ballot. As such, these justices sided with the liberal political agenda of four Florida citizens having close ties to the Obama administration who filed suit in late June, alleging that three statements (comprising a mere twenty words) in the ballot summary were misleading, to thereby disenfranchise millions of Floridians desiring to exercise their constitutional right to vote on the legislature's proposed amendment.[77]

Citizen2Citizen was founded by Jesse Phillips, who stated the following:

> Such partisan politics . . . is unbecoming of any judge especially on the Supreme Court. Their role is to interpret the law and uphold our constitutional right to vote on legislatively proposed amendments, not to defend Obama's healthcare plan under the guise of "protecting" the voters. The fact of the matter is that this amendment was voted on by a supermajority of our elected representatives to constitutionally be placed on the ballot. And yet the court arbitrarily decided to ignore the constitution and intent of the legislature, by listening to only four of our

---

73. *Buying Time—2010: Colorado*, BRENNAN CTR. FOR JUST. (Sept. 19, 2010), http://www.brennancenter.org/content/resource/buying_time_--_2010_colorado [hereinafter *Buying Time—2010*].

74. *Id.*

75. *Id.*

76. Dara Kam, *Supreme Court Tosses Legislature's Amendments Off Ballot*, POST ON POL. (Aug. 31, 2010), http://www.postonpolitics.com/2010/08/supreme-court-tosses-legislatures-amendments-off-ballot/.

77. Ian Millhiser, *Tea Party Nullifiers Seek Revenge Against Florida Supreme Court Justices*, THINK PROGRESS (Sep. 27, 2010, 4:45 PM), http://thinkprogress.org/politics/2010/09/27/121134/florida-nullification/?mobile=nc.

> neighbors, deciding for and silencing millions of voters who suddenly can't weigh in.[78]

Jason Hoyt, the founding member of the Central Florida Tea Party Council, did weigh in, stating, "This is a tremendous injustice and power grab by the Court, which we have the opportunity to restore this November."[79]

Justices Labarga and Perry were retained by votes of 58.9% and 61.7%, respectively.[80] The two justices who ruled in favor of keeping Amendment 9 on the ballot were retained by votes of 67% and 66%, respectively.[81] Tom Tillison, an activist for the tea party from Orlando, said:

> This campaign was totally a grass-roots effort that was completely unfunded, yet it created an 8-10 point swing in the polls. In an election in which nearly 4.5 million people voted, that's fairly substantial . . . . The real success of this campaign is that it began just six weeks prior to the elections. Had we gotten an earlier start and had acquired any source of funding, I believe both judges would have failed to achieve retention. I think we've got their attention, regardless.[82]

4. Kansas.—Although four Kansas justices were up for retention in 2010, there was not as much furor there as in the previously mentioned judicial retention elections. Four justices were up for retention: Chief Justice Lawton Nuss and Justices Carol Beier, Dan Biles, and Marla Luckert.[83]

Kansans for Life ("KFL") targeted Justice Beier because she wrote opinions in 2006 and 2008, which heavily criticized the state's former attorney general, Phill Kline, for actions regarding the investigations of abortion clinics.[84] In a 2008 ruling, Justice Beier wrote that Kline "'exhibits little, if any, respect' for the court or the rule of law."[85] In her dissent, "[t]hen-Chief Justice Kay McFarland wrote that the comments [by Justice Beier] were designed to threaten and 'heap scorn' upon Kline and were inappropriate."[86]

On January 26, 2010, KFL issued a press release entitled "KFL's 'Fire Beier'

---

78. Jesse Phillips, *Restore Justice' Campaign Seeks Removal of Supreme Court Justices Labarga and Perry for Health Care Vote*, FLA. POL. PRESS (Sep. 21, 2010), www.florida fpoliticalpress.com/2010/09/21/restore-justice-campaign-seeks-removal-of-supreme-court-justices-labarga-and-perry-for-healthcare-vote/.

79. *Id*.

80. Kenric Ward, *How Justices Jorge Labarga, James Perry Survived Retention Fight*, SUNSHINE STATE NEWS (Nov. 9, 2010, 4:05 AM), http://www.sunshinestatenews.com/story/how-justices-jorge-labarga-james-perry-survived-retention-fight.

81. *Id.*

82. *Id.*

83. Fred Mann, *Justices on Ballot Draw Little Noise This Year*, WICHITA EAGLE (Oct. 18, 2010, 5:54 AM), http://www.kansas.com/2010/10/18/1546834/justices-on-ballot-draw-little.html.

84. *Id*.

85. *Id.*

86. *Id.*

Campaign Bolstered by Monday Revelation."[87] KFL's Director, Mary Kay Culp, stated:

> The "Fire Beier" initiative will reveal Kansas Supreme Court Justice Carol Beier's participation in a dishonorable disinformation campaign to obstruct justice, more reminiscent of an aggressive abortion industry defense attorney, than impartial judge. Her actions and interference have resulted in abortion prosecutions being unjustly stalled and compromised by a state Supreme Court that continues to:
> - [K]eep a judge gagged after he began testifying about Planned Parenthood document falsifications;
> - [D]elay a ruling that would release abortion forms from KDHE that at no time ever contained patient names;
> - [A]ctively inflame the public against abortion prosecutors, charging they violated ethical standards, while concealing that those charges are contradicted repeatedly by judges and the Supreme Court disciplinary administrator's own investigations.[88]

By October 18, 2010, however, KFL had done little to create opposition to Justice Beier's retention. Culp refused to discuss her group's plan, instead stating she wished to "[k]eep 'em guessing."[89] Culp did say the group would maintain its customary practice of "mailing postcards to voters with a sample ballot . . . indicating Kansans for Life's endorsements," including the judges up for retention.[90]

The Kansas Commission on Judicial Performance conducted a survey, in which all four justices scored well regarding performance of their judicial duties.[91] Justice "Beier received an overall average score of 3.55 on a scale of 4.0 from attorneys, and a 3.58" out of 4.0 from other judges.[92] Justice "Luckert received a 3.56 from attorneys and a 3.68 from judges."[93] Justice "Biles got a 3.46 from attorneys and a 3.61 from judges."[94] Justice "Nuss was given a 3.34 overall average by attorneys and a 3.52 by judges."[95]

Although the four justices were retained, ten out of 105 Kansas counties voted against the retention of at least one of the justices.[96] Five of those counties

---

87. Press Release, Kansans for Life, KFL's "Fire Beier" Campaign Bolstered by Monday Revelation: KFL Campaign to Expose Lies & Vendetta Against Abortion Prosecutors (Jan. 26, 2010), *available at* http://www.kfl.org/SiteResources/Data/Templates/templateb. asp?docid=1164 [hereinafter Kansans for Life].

88. *Id*.

89. Mann, *supra* note 83.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Earl Glynn, *10 Counties Voted Not to Retain Kansas Supreme Court Justices*, KAN.

"voted 'no' to all four judges."[97]

5. Illinois.—The prime target in Illinois was Chief Justice Thomas Kilbride. The Illinois Civil Justice League, operating as JUST PAC (a political action committee), was the main group opposing Chief Justice Kilbride's retention.[98] Ed Murmane, the leader of JUST PAC, made a speech in which he stated that Chief Justice "Kilbride not only had the worst record on civil issues, he also had a terrible record on criminal issues . . . ."[99] The Illinois Civil Justice League presented itself as a pro-business group and depicted Chief Justice Kilbride as unfriendly to business, especially after *LeBron v. Gottlieb Memorial Hospital*.[100] In *LeBron*, the Illinois Supreme Court overturned a medical malpractice law, which limited damages to $500,000 for pain and suffering and other non-economic damages in cases against doctors and $1 million for claims against hospitals.[101]

Groups opposed to Chief Justice Kilbride's retention raised over $688,000.[102] Other groups, including unions, trial lawyers and the Illinois Democratic Party, raised $2.8 million dollars to defend the Chief Justice.[103] In addition, Justice Kilbride openly campaigned with his own advertising and speeches.[104] The full price tag for this retention election was "$3.5 million, the most ever in a retention race in Illinois,"[105] and "the second most expensive judicial retention race in the country."[106]

Some of his opponents' ads were focused not on Justice Kilbride's perceived

---

WATCHDOG.ORG (Nov. 10, 2010), http://kansas.watchdog.org/5648/10-counties-voted-not-to-retain-kansas-supreme-court-justices/.

97. *Id.*

98. Carrie Johnson, *No Opponent, but Big Money in Illinois Justice's Race*, NPR (Oct. 26, 2010), http://www.npr.org/templates/story/story.php?storyId=130810189.

99. Judicial Campaign Ads, *Ed Murnane on Justice Kilbride's Atrocious Record on Crime*, YOUTUBE (Oct. 26, 2010), http://www.youtube.com/watch?v=QxGK6sIXX4M.

100. 930 N.E.2d 895 (Ill. 2010), *reh'g denied* (May 24, 2010). Justice Kilbride concurred in, but did not write, the *LeBron* decision. *Id.* at 917. The chief justice at the time, who wrote the decision, was Thomas Fitzgerald. *Id.* at 899. Justice Kilbride became chief a few months later. *See Thomas L. Kilbride, Supreme Court Chief Justice Third District*, ILL. COURTS, http://www.state.il.us/court/SupremeCourt/Justices/Bio_Kilbride.asp (last visited Nov. 3, 2012).

101. *LeBron*, 930 N.E.2d at 902, 911.

102. SKAGGS ET AL., *supra* note 38, at 8.

103. *Id.*

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

105. Jim Suhr, *Chief Justice Retention Election Is Nation's Costliest in 25 Years*, PJSTAR.COM (Oct. 27, 2011, 4:49 PM), http://www.pjstar.com/free/x671074930/Report-Illinois-Chief-Justice-Kilbrides-retention-election-costliest-in-25-years.

106. Ann Maher, *Justice Kilbride Prevails in Costly Ill. Retention Election*, LEGALNEWSLINE (Nov. 3, 2010, 1:12 AM), http://www.legalnewsline.com/news/229640-justice-kilbride-prevails-in-costly-ill.-retention-election.

anti-business stance, but rather on the belief he was weak on criminals.[107] In television ads, actors portrayed violent felons, "describ[ing] their atrocious crimes in detail," and stated that Chief Justice Kilbride sided with criminals over law enforcement or victims.[108] One ad stated, "Thomas Kilbride chose criminals' rights over and over again. Way more than any other justice."[109]

Chief Justice Kilbride fought back with his own ads, defending his record.[110] He was disgruntled, however, with "being forced to turn into a . . . politician, something he consider[ed] inappropriate for a judge."[111] He stated, "If we are going to allow the courts to be politicized to this degree, where there's more and more big-time money coming in, it's going to ruin the court system . . . . We might as well shut down the third branch."[112]

In Illinois, unlike most other retention election states, a justice needs to earn 60% of the vote in order to remain on the bench.[113] Chief Justice Kilbride received 65% of the vote after an aggressive campaign.[114]

III. REPERCUSSIONS OF 2010 RETENTION ELECTIONS

Will this trend continue? The answer is yes, for several reasons. First, judges and justices take an oath to uphold the U.S. Constitution, as well as their state constitutions, and to abide by that oath, they must remain true to the rule of law.[115] As a result, some of their opinions will not be popular with everyone. Second, judges and justices, primarily justices, have to rely on precedent and rule on difficult and controversial issues. These issues are the ones that anger the "losing" side the most. Third, as was quite evident in Iowa in 2010,[116] there are hot-button issues that interest many people. For Chief Justice Bird and Justice

---

107. *Judges and Money*, *supra* note 104.

108. *Id*.

109. Judicial Campaign Ads, *Vote No on Justice Kilbride*, YOUTUBE (Oct. 26, 2010), http://www.youtube.com/watch?v=aPmGtxw2en8.

110. Fair Courts Page, *Justice Thomas Kilbride Defends Himself from Attack Ads*, YOUTUBE (Oct. 21, 2010), http://www.youtube.com/watch?v=DonT0iTg4mE.

111. John Gramlich, *Judge Fights in Iowa, Illinois Signal New Era for Retention Elections*, WASH. POST (Dec. 4, 2010, 9:21 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403857.html.

112. *Id.*

113. ILL. CONST. art. VI, § 12(d) ("The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term . . . .").

114. Suhr, *supra* note 105.

115. A.B.A. DIV. FOR PUB. EDUC., DIALOGUE SER., DIALOGUE ON THE RULE OF LAW pt. 1, at 5 (2008), *available at* www.americanbar.org/content/dam/aba/migrated/publiced/features/FinalDialogueROLPDF.authcheckdam.pdf.

116. *See, e.g.*, Grant Schulte, *Iowa Ousts 3 Judges After Gay Marriage Ruling*, USA TODAY (Nov. 3, 2010, 10:17 AM), http://usatoday30.usatoday.com/news/politics/2010-11-03-gay-marriage-iowa-election_N.htm ("Here are three individuals who took a very controversial stand, because it's what they thought the law required . . . .").

Penny White, it was crime, death penalty sentences and a perception they were soft on crime.[117] In Iowa, it was gay marriage.[118] In Illinois, the "problem" was being soft on crime and anti-business.[119] In Alaska and Kansas, it was abortion.[120] All of these issues are controversial and likely to raise the blood pressure of people in groups most interested in those issues.

I find it merely coincidental that these high-profile, big-money races occurred in the first judicial election cycle following the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*.[121] That decision was not directed to state judicial elections; rather, it overturned limits on corporate and union general treasury funds aimed at influencing only federal elections.[122] Nevertheless, some commentators expected *Citizens United* to have an impact on judicial retention elections.[123] One such commentator is Jeffrey Toobin, a staff writer at the *New Yorker* and senior legal analyst for CNN, who stated,

> I think judicial elections are really the untold story of [*Citizens United*], the untold implication. Because when the decision happened, a lot of people said, "Okay. This means that Exxon will spend millions of dollars to defeat Barack Obama when he runs for re[-]election." I don't think there's any chance of that at all. That's too high profile. There's too much money available from other sources in a presidential race. But judicial elections are really a national scandal that few people really know about. Because corporations in particular, and labor unions to a lesser extent, have such tremendous interest in who's on state supreme courts and even lower state courts that that's where they're going to put their money and their energy because they'll get better bang for their buck there.[124]

I believe, given what occurred in the states discussed above, Mr. Toobin was correct.

---

117. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 313, 316 (1997).

118. Schulte, *supra* note 116.

119. Editorial, *supra* note 104.

120. Demer, *supra* note 54; Kansans for Life, *supra* note 87.

121. 130 S. Ct. 876 (2010).

122. *Id.* at 887, 917.

123. *See* CARMEN LO ET AL., SPENDING IN JUDICIAL ELECTIONS: STATE TRENDS IN THE WAKE OF *CITIZENS UNITED*, CAL. ASSEMBLY JUDICIARY COMM. 12, 17 (2011), *available at* http://www.uchastings.edu/public-law/docs/judicial-elections-report-and-appendices-corrected.pdf.

124. Interview by Bill Moyers with Jeffrey Toobin, Staff Writer, the *New Yorker*, and Legal Analyst, CNN (Feb. 19, 2010), *available at* http://www.pbs.org/moyers/journal/02192010/transcript2.html.

A. Challenges Continue in 2012

1. Florida.—Although the two Florida justices up for retention in 2010 won their elections,[125] the three justices up for retention in 2012 are now targets.[126] Jesse Phillips, the president of a non-profit group designed "to educate voters about the retention election," known as Restore Justice 2012,[127] stated, "We believe that judicial activism is a serious problem in Florida. Judges play politics and cater to special interests in ways that disrespect the Constitution and threaten our protection under the law . . . . Fortunately, our state provides a way to remove judges when necessary through the merit retention vote."[128]

Restore Justice 2012, a website Phillips created[129] to target Justices Fred Lewis, Barbara Pariente, and Peggy Quince, along with other members of the judiciary, is up and running.[130] Restore Justice released a voter guide to help its readers find information about each justice's record.[131] On October 1, 2012, Restore Justice 2012 announced it was releasing a new web advertisement against Justices Pariente, Quince and Lewis.[132] It highlights a 2003 murder case where Justices Quince and Pariente voted to order a new trial for Joe Elton Nixon, who had been sentenced to death for a 1984 murder because of unfair legal representation.[133] Nixon had been convicted of tying his victim to a tree with jumper cables and setting her on fire. He argued he did not have a fair trial because he never gave his attorney the authority to admit his guilt to the jury.[134]

---

125. Associated Press, *Supreme Court Justices All Retained*, FLA. TIMES-UNION (Nov. 2, 2010, 10:58 PM), http://jacksonville.com/news/florida/2010-11-02/story/supreme-court-justices-all-retained.

126. Yaël Ossowski, *FL: 'Activist Judges' Set to Face the Music in Merit Retention Fight*, FL WATCHDOG.ORG (Aug. 16, 2012), http://watchdog.org/50001/flactivist-judges-set-to-face-the-jusic-in-merit-retention-fight/.

127. *Id.*

128. Kenric Ward, *Conservative Groups Gunning for Florida Judges Who 'Play Politics' on Bench*, SUNSHINE STATE NEWS (June 12, 2011, 5:49 PM), http://www.sunshinestatenews.com/blog/conservative-groups-gunning-florida-judges-who-play-politics-bench.

129. Brady Dennis, *Super PACs, Donors Turn Sights on Judicial Branch*, WASH. POST (Mar. 9, 2012), http://www.washingtonpost.com/business/economy/super-pacs-donors-turn-sights-on-judicial-branch/2012/03/29/gIQAaIsnjS_story.html.

130. RESTORE JUSTICE 2012, http://www.restorejustice2012.com/ (last visited Nov. 3, 2012).

131. Press Release, Fla. Political Press, Restore Justice Releases Supreme Court Report Card to Grassroots Supporters Statewide (Sept. 4, 2012), http://www.floridapoliticalpress.com/2012/09/04/restore-justice-releases-supreme-court-report-card-to-grassroots-supporters-statewide/.

132. Mary Ellen Klas, *Restore Justice 2012 Says It's Launching TV Ad Aimed at Opposing Justices*, TAMPA BAY TIMES, Oct. 1 2012, http://www.tampabay.com/blogs/the-buzz-florida-politics/content/restore-justice-2012-says-its-launching-tv-ad-aimed-opposing-justices.

133. Mary Ellen Klas, *RPOF Wades into Hornets Nest to Oppose Retention of Three Justices*, MIAMI HERALD (Sept. 21, 2012, 4:22 PM), http://miamiherald.typepad.com/nakedpolitics/2012/09/rpof-wades-into-hornets-nest-to-oppose-retention-of-three-justices-.html [hereinafter *RPOF*].

134. *Id.*

The Florida Supreme Court agreed with him. But in 2004 the United States Supreme Court voted unanimously to overturn that decision, noting Nixon had several opportunities to object to his lawyer's strategy, but never did.[135]

The Republican Party of Florida released a statement that its executive board voted unanimously to oppose the three justices in their retention election:[136]

> While the collective evidence of judicial activism amassed by these three individuals is extensive, there is one egregious example that all Florida voters should bear in mind when they go to the polls on election day. These three justices voted to set aside the death penalty for a man convicted of tying a woman to a tree with jumper cables and setting her on fire. The fact that the United States Supreme Court voted, unanimously, to throw out their legal opinion, raises serious questions as to their competence to understand the law and serve on the bench, and demonstrates that all three justices are too extreme not just for Florida, but for America, too.[137]

This move by the Republican Party of Florida did not go unanswered. Dick Batchelor, a former Democratic lawmaker now working with Defend Justice from Politics, an advocacy group, stated,

> The Republican Party has demonstrated with this decision that there are special interests in this state that not only want to control all three branches of government, they want to own all three branches of government. . . . The question for the public now is, do we want an independent judiciary or do we want to surrender the sovereignty of the court to a political Legislature?[138]

This is not the only ruling by the court that has drawn an attack. Americans for Prosperity, a conservative group financed by billionaires Charles and David Koch, released an ad criticizing the entire Florida Supreme Court just days after the Republican Party of Florida announced its campaign.[139] This ad addresses an opinion in 2010 where Justices Pariente, Quince and Lewis joined the majority in a 5-2 decision to reject a state effort to invalidate President Barack Obama's healthcare law.[140]

In addition, the Southeastern Legal Foundation is raising questions whether

---

135. *Id.*

136. Mary Ellen Klas, *In Surprise Move, Florida GOP Opposes Supreme Court Justices' Retention in November*, MIAMI HERALD, Sept. 21, 2012, http://www.miamiherald.com/2012/09/21/3014793/in-surprise-move-florida-gop-opposes.html.

137. *RPOF*, *supra* note 133.

138. *Id.*

139. Michael Peltier, *Americans For Prosperity Launches Ad Attacking Florida Supreme Court (Video)*, HUFFPOST MIAMI (Sept. 25, 2012, 8:45 PM), http://www.huffingtonpost.com/2012/09/25/attack-ad-florida-supreme-court_n_1914741.html.

140. *Id.*

the justices may be violating ethics rules.[141] The rules they center on involve raising money and urging voters to keep them on the bench.[142] "'No man is above the law, particularly those charged with enforcing the law,'" said Shannon Gosseling, executive director of the Southeastern Legal Foundation."[143]

Florida Governor Rick Scott asked the Florida Department of Law Enforcement (FDLE) to independently decide if an investigation was warranted into the three justices' actions when they filed to run on the ballot in April of 2012.[144] Apparently the Florida Supreme Court put a hearing on hold for more than an hour to allow the three justices to complete their paperwork and file it.[145] The justices used court employees to notarize the paperwork, despite a state law that prohibits candidates for office from using state employees during working hours.[146] Although the FDLE found no wrongdoing, the Southeastern Legal Foundation has filed a lawsuit on behalf of two state residents, arguing that the three justices would not have made the ballot without the use of state employees. The lawsuit asks for their removal from the ballot.[147]

Aubrey Jewett, a political scientist at the University of Central Florida stated, "The three justices have raised a great deal of money to run ads to defend themselves and have spoken publicly and to the press that they think the impartiality of the court is under partisan and ideological attack."[148] For the first time ever, a tax-exempt political organization known as a 527 group has been formed to run television ads in the justices' defense.[149] The Fraternal Order of Police and the Florida Professional Fire Fighters have said they too would provide support for the justices' retention bids.[150] Approximately $1 million dollars has been raised for the justices' retention bids.[151]

2. Iowa.—After the 2010 election, the Southern Poverty Law Center of Montgomery, Alabama named the National Organization for Marriage (NOM) and the American Family Association (AFA) as groups it was investigating

---

141. *See* Gary Fineout, *Gov. Scott Requests Review of 3 Justices' Actions*, ORLANDO SENTINEL (June 5, 2012, 10:21 PM) http://articles.orlandosentinel.com/2012-06-05/news/os-supreme-court-justices-rick-scott-20120605_1_justices-fred-lewis-florida-supreme-court-justices-rick-scott.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *See* Brandon Larrabee, *FDLE Investigation Into Justices Over*, *Fight Not,* WCTV.TV (July 6, 2012, 11:04 PM), http://www.wctv.tv/home/headlines/FDLE_Investigation_Into_Justices_Over_Fight_Not_ 161565115.html.

148. Louis Jacobson, *Judicial Races in 4 States Draw Big Money, Partisanship*, GOVERNING THE STATES AND LOCALITIES (Oct. 16, 2012), http://www.governing.com/blogs/politics/Four-Judicial-Races-Draw-Big-Money-Partisanship.html.

149. *Id.*

150. *Id.*

151. Op-Ed., *Impartial Justice at Risk*, N.Y. TIMES (Oct. 6, 2012), http://www.nytimes.com/2012/10/07/opinion/sunday/impartial-justice-at-risk. html?_r=0.

regarding their "anti-gay rhetoric."[152] The Center said those groups not only opposed same-sex marriage but also called for the criminalization of homosexuality and spread "falsehoods about homosexuals being pedophiles and gay men having extremely short lifespans."[153] In fact, those statements were made by a bus driver named Louis Marinelli who claimed to be affiliated with the NOM.[154] The NOM later denied being associated with Marinelli.[155]

Bob Vander Plaats reported the "Iowans for Freedom" movement had the goal of sending messages to judges it believed acted beyond the scope of their powers.[156] Vander Plaats started a new group, the Family Leader, to pressure "the four remaining [Iowa Supreme Court] justices to resign."[157]

Only one justice on the Iowa Supreme Court, Justice David Wiggins, is up for retention in 2012. Vander Plaats stated Iowans should focus on the economy and the budget in the upcoming election.[158] When asked about Justice Wiggins around February of 2012, Vander Plaats stated, "He should be held to the same account his peers were in 2010, but we haven't made a decision yet in regards to that."[159] However, on August 11, 2012, Vander Plaats unveiled Iowans for Freedom's campaign to oust Justice Wiggins.[160] Vander Plaats stated, "This is about Freedom, not just about marriage . . . . We see this as a freedom and constitutional issue important to all Iowans. If courts are allowed to redefine the institution of marriage, every one of the liberties we hold dear is in jeopardy."[161]

The 2012 campaign only targets Justice Wiggins and not the three justices

---

152. Richard Cohen, *SPLC's Anti-Gay Hate List Compiled with Diligence and Clear Standards*, S. POVERTY LAW CTR. (Dec. 23, 2010), http://www.splcenter.org/get-informed/news/splc-s-anti-gay-hate-list-compiled-with-diligence-and-clear-standards. The SPLC claims it did not list the NOMAFA as a "hate group" but merely noted it was investigating NOM and AFA's anti-gay rhetoric. Josh Nelson, *Judge-Ouster Supporters Blast 'Hate' Label*, WCFCOURIER.COM (Nov. 29, 2010, 3:00 PM), http://wcfcourier.com/news/local/article_0d224deb-9ca4-5f17-9ae0-cdd5c98e47f5.html.

153. Evelyn Schlatter, *18 Anti-Gay Groups and Their Propaganda*, S. POVERTY LAW CTR., (2010), http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2010/winter/the-hard-liners.

154. *Id.*

155. *Id.*

156. Josh Nelson, *Chief Justice: Budget Cuts, Politicization Threaten Iowa Court System*, WCFCOURIER.COM (Feb. 11, 2011, 12:30 PM), http://wcfcourier.com/news/local/article_2d60b2ad-1c6f-5ad1-ba87-a859718362f9.html.

157. *Id.*

158. Steve Gravelle, *Same-Sex Iowa Couple Still Faces Hurdles*, GAZETTE (Feb. 5, 2012, 9:10 AM), http://thegazette.com/2012/02/05/same-sex-iowa-couple-still-faces-hurdles/.

159. *Id.*

160. Rod Boshart, *Vander Plaats Launches Effort to Oust Another Supreme Court Justice*, WCF COURIER.COM (Aug. 12, 2012, 7:15 AM), http://wcfcourier.com/news/local/govt-and-politics/vander-plaats-launches-effort-to-oust-another-supreme-court-justice/article_9fdc516e-e46a-11e1-a9de-0019bb2963f4.html.

161. *Id.*

appointed after the 2010 elections.[162] Vander Plaats again called for the four justices still on the bench, but not on the ballot, to resign, but stated he doubted that would happen because they still exhibited "a thread of judicial arrogance."[163]

Iowans for Freedom instituted a statewide "NO Wiggins" bus tour.[164] Former Pennsylvania Senator Rick Santorum and Louisiana Governor Bobby Jindal joined the bus tour.[165] Senator Santorum said:

> The judiciary's usurpation of authority in recent years is completely unacceptable. It is obviously clear the people's Constitution gives the judicial branch the least power, and yet these appointed judges continuously legislate from the bench whether it is gay marriage in Iowa, collective bargaining in Wisconsin, or resulting in the death of millions of lives caused by the opinion of Roe v. Wade.[166]

The bus tour was scheduled for 17 stops.[167]

The bus tour launched on September 24, 2012, with a rally in Des Moines.[168] Senator Santorum stated:

> You have an opportunity here in Iowa to continue what you did two years ago, and you struck a blow . . . . But now you have an opportunity to maybe even tip the balance with a fourth justice. So you have four new judges on the court and an opportunity maybe even to reverse this horrific decision.[169]

He went on to state:

> People of faith and no faith, even if you don't agree with my position on the issue of marriage, understand the danger that allowing judges to determine what the law of the land is . . . . Running roughshod over the constitution, the laws of the state, is as danger to people on both sides of the aisle. There is as much a chance of conservative judicial activism as there is for liberal judicial activism.[170]
>
> During that rally, the focus was not so much on same-sex marriage as it was

---

162. *Id.*

163. *Id.*

164. *Santorum, Jindal Join Iowans for Freedom on Statewide "NO Wiggins" Bus Tour*, IOWA REPUBLICAN (Sept. 18, 2012), http://theiowarepublican.com/2012/santorum-jindal-join-iowans-for-freedom-on-statewide-no-wiggins-bus-tour/.

165. *Id.*

166. *Id.*

167. Kevin Hall, *Vander Plaats, Santorum Launch "No Wiggins" Bus Tour*, IOWA REPUBLICAN (Sept. 25, 2012), http://theiowarepublican.com/2012/vander-plaats-santorum-launch-no-wiggins-bus-tour/.

168. *Id.*

169. *Id.*

170. *Id.*

on judges making law, instead of interpreting the law.[171] Tama Scott, co-chair for Iowans for Freedom, stated:

> This is not just about marriage. It's not just about morality. This is about the constitutional process that our Founding Fathers set in place so long ago and the Iowa Bar Association worked to put in place this retention vote. . . . And yet, when the people decide to use it, they're criticized as politicizing it.[172]

The Iowa State Bar Association conducted a survey of state bar association members, which showed that an average of 90% of the members approved most Iowa judges.[173] However, Justice Wiggins received a 63% rating, the second-lowest approval rating.[174] Vander Plaats called it "unconscionable" to retain a judge who, essentially, got a D- grade.[175] Vander Plaats went on to state:

> What they said in that scoring instrument is Judge Wiggins is arrogant. He's confrontational. He's not all that bright and above all, he's lazy . . . . Now, ladies and gentlemen, take that *Varnum* decision out of there. He does not deserve to be on the bench and we need to vote Wiggins out on November 6.[176]

However, even though Iowans for Freedom and their supporters are vehemently opposed to Justice Wiggins, there is another side to this matter. On September 21, 2012, the "Iowa State Bar Association announced a 'multipronged effort to support Iowa's judicial merit selection system' that involve[d], among other things, [a] bus tour."[177] The "Yes Iowa Justice Tour" schedule mimicked the "No Wiggins" bus tour and added visits to two-liberal-trending college towns.[178] The bar association planned "to promote the retention of all judges and justices standing for retention this year . . . . [T]he plan calls for the association to respond to, and correct, misinformation about Iowa's judicial system."[179]

As Iowa approaches election day, a new TIR/Voter/Consumer Research Poll showed 49% of Iowans now favor gay marriage, while 42% oppose allowing gays and lesbians to marry legally in Iowa.[180] The poll found 40% of Iowans

---

171. *Id.*

172. *Id.*

173. *Iowa Judges Get "Thumbs Up" From Lawyers*," 6 NEWS (Aug. 9, 2012), http://www.wowt.com/home/headlines/Iowa-Judges-Get-Thumbs-Up-From-Lawyers-165671156.html.

174. *Id.*

175. Hall, *supra* note 167.

176. *Id.* (emphasis added).

177. Jeff Eckhoff, *Group to Shadow 'No Wiggins' Tour*, DES MOINES REGISTER (Sept. 22, 2012, 12:08 AM), http://www.desmoinesregister.com/article/20120922/NEWS09/309220042/Group-shadow-No-Wiggins-tour.

178. *Id.*

179. *Id.*

180. Craig Robinson, *TIR Poll: Iowans Favor Gay Marriage—Retention Election Remains Complicated*, IOWA REPUBLICAN (Oct. 1, 2012), http://theiowarepublican.com/2012/tir-poll-

planned on voting to retain Justice Wiggins, while 32% planned on voting no.[181] This shift in opinion may be due in part to more than 4,500 same sex marriages in Iowa since 2009.[182] A Des Moines Register poll in February of 2012 found that voters overwhelmingly opposed amending the constitution to ban gay marriage.[183] Those surveyed are split on whether they agreed with the 2009 *Varnum* ruling, and one-third said they "don't care much" about the issue.[184] Bob Vander Plaats conceded that "[i]t makes it more difficult" to oust Justice Wiggins, and"'with limited resources,' it would be harder to get an anti-Wiggins message out as" the election nears and more and more presidential and congressional ads air.[185]

3. North Carolina.—States where members of the judiciary actively campaign in partisan elections are not immune from the effects of outside interest groups. For example, in North Carolina, the North Carolina Judicial Coalition, referred to "as a super PAC," pledged its support for Justice Paul Newby, a conservative, "who has opposed adoptions by same-sex couples and disallowed a lawsuit challenging alleged predatory lending."[186] Limitations on independent fundraising by candidates give special interest groups almost complete control over the information disseminated to voters because of the unlimited spending permitted by *Citizens United*.[187]

4. Indiana.—On May 12, 2011, Justice Steven David authored *Barnes v. State*.[188] In that case, Justice David wrote the majority opinion: "We hold that there is no right to reasonably resist unlawful entry by police officers."[189] It also stated that "In sum, we hold that [in] Indiana the right to reasonably resist an unlawful police entry into a home is no longer recognized under Indiana law."[190] This ruling arose out of a Vanderburgh County case in which a man yelled at police and blocked them from entering his apartment to investigate a domestic disturbance.[191] Barnes shoved a police officer who entered anyway.[192] Barnes

---

iowans-favor-gay-marriage-retention-election-remains-complicated/.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. Ryan J. Foley, *Vote on Iowa Justice Seen as Test for Gay Marriage*, YAHOO! NEWS (Oct. 8, 2012), http://news.yahoo.com/vote-iowa-justice-seen-test-gay-marriage-182452900--politics.html.

186. Op-Ed., *North Carolina, Meet Citizens United*, N.Y. TIMES, June 6, 2012, at A26, *available at* http://www.nytimes.com/2012/06/06/opinion/north-carolina-meet-citizens-united.html.

187. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 908 (2010).

188. 946 N.E.2d 572 (Ind. 2011).

189. *Id.* at 574.

190. *Id.* at 577.

191. *Id.* at 574.

192. *Id.*

was shocked with a stun gun and arrested.[193]

Bloggers immediately started discussing the Court's ruling. "[T]his holding went far beyond [the facts of the case] to intrude, absurdly, into Fourth Amendment jurisprudence."[194] This blogger went on to state,

> Appellate courts generally limit their legal analyses to the facts of the case before them, for good reason. Failure to do so not only results in otherwise unnecessary future litigation, it also changes the law for no valid reason. The creation of new law is the proper function of legislatures, not courts. Here, however, what the court did went well beyond what even the Indiana Legislature could properly have done.[195]

The mainstream media also responded: "Overturning a common law dating back to the English Magna Carta of 1215, the Indiana Supreme Court ruled Thursday that Hoosiers have no right to resist unlawful police entry into their homes."[196] The Indiana Supreme Court began receiving harassing phone calls and email messages regarding the *Barnes* decision.[197] A rally took place at the Indiana Statehouse on May 25, 2011, with some 300 people expressing opposition to the *Barnes* decision.[198] During the ninety-minute rally, several speakers urged voters to oust Justice David in the November 2012 elections.[199]

At least two Facebook pages have been started in response to the *Barnes* decision—"Over Turn [sic] Indiana Supreme Court's Ruling Against the 4th Amendment"[200] and "Remove Justice Steven H. David in 2012."[201] On October 16, 2012, the following post was made to the latter Facebook page: "Ok folks, people are starting to vote early, and we NEED the word to get out about our

---

193. *Id.*

194. Dan Miller, *Indiana Supreme Court Issues Death Warrant for Fourth Amendment*, PJ MEDIA (May 13, 2011, 9:38 AM), http://pjmedia.com/tatler/2011/05/13/indiana-Supreme-court-issues-death-warrant-for-fourth-amendment/.

195. *Id.*

196. Dan Carden, *Court: No Right to Resist Illegal Cop Entry into Home*, NWI TIMES (May 13, 2011, 3:56 PM), http://www.nwitimes.com/news/local/govt-and-politics/article_ec169697-a19e-525f-a532-81b3df229697.html.

197. Dan Carden, *Indiana Supreme Court Threatened Following Controversial Ruling*, NWI TIMES (May 16, 2011, 5:30 PM), http://www.nwitimes.com/news/local/govt-and-politics/article_8d416141-5026-51b7-898e-6cd827d878ee.html.

198. Dan Carden, *Hundreds Rally at Statehouse in Opposition to Recent Ind. Supreme Court Ruling*, MUNSTER COMMUNITY.COM (May 25, 2011, 6:30 PM), http://www.nwitimes.com/news/local/lake/munster/article_55d77b9a-8f0f-5112-ae74-657702f3b7a2.html.

199. *Id.*

200. *Over Turn Indiana Supreme Court's Ruling Against the 4th Amendment*, FACEBOOK, http://www.facebook.com/pages/Over-Turn-Indiana-Supreme-Courts-Ruling-Against-the-4th-Amendment/210974625592425 (last visited Nov. 2, 2012) .

201. *Remove Justice Steven H. David in 2012*, FACEBOOK, http://www.facebook.com/NOin NOVEMBER (last visited Nov. 2, 2012) (obtaining 687 likes as of November 2, 2012).

choice! Remind everyone to vote NO for supreme [c]ourt retention!"[202]

Andy Downs, with the Mike Downs Center for Indiana Politics, said:

> Immediately people start[ed] saying this violates the U.S. Constitution, and it violates the Indiana Constitution, and that got a lot of people riled up . . . . We'll have an opportunity after the election, if we see a huge difference in the result, one of the factors we can point to probably is this decision, as something that played into it.[203]

Rick Barr, who serves on the steering committees for the Indianapolis Tea Party and another conservative group, said the movement to oust Justice David is larger than the tea party;[204] "[i]t's a broad-based movement all over the state with a variety of folks involved . . . ."[205]

B. Responses from Judges and Legal Systems

The legal community is not without a plan to counter the attacks of special interest groups that are determined to unseat members of the judiciary based on perceived biases. Voters all over the country can expect to be better informed about the judiciary; specific judges and justices up for retention or running for office; large scale education initiatives; judicial performance evaluations, and bar association participation in response to issues set forth in negative ads.[206]

1. Campaigning.—In an article after the 2010 election, the *Des Moines Register* reported Iowa Supreme Court Justice Wiggins declared that he would not "stand quietly" if a campaign is launched to remove him from the bench.[207] "If someone wants to attack me, I'm not going to let them bully me . . . . If asked to, I'll speak up for myself. The others didn't do that last time. I will."[208]

---

202. *Id.*

203. Jeff Neumeyer, *Justice Faces Challenge to Position on State's High Court*, INCNOW (Oct. 3, 2012, 5:52 PM), http://www.indianasnewscenter.com/news/local/Justice-Faces-Challenge-To-Position-On-States-High-Court-172550481.html.

204. Charles Wilson, *Indiana Justice Could Lose Seat over '11 Ruling*, COURIER-JOURNAL.COM (Oct. 13, 2012), http://www.courier-journal.com/viewart/20121012/NEWS02/310110145/Indiana-justice-could-lose-seat-over-11-ruling?odyssey=nav|head.

205. *Id.*

206. *See* Fred N. Six, Op-Ed., *Where to Find Information About the Judges and Justice Who Are Standing for Retention on the November 2012 Ballot*, KAN. COMM'N ON JUDICIAL PERFORMANCE, http://www.kansasjudicialperformance.org/index.cfm?Page=TheKansasJudicialReport (last visited Oct. 2, 2012, 12:38 AM); Albert J. Klumpp, *Arizona Judicial Retention: Three Decades of Elections and Candidates*, ARIZ. ATTORNEY 16-18 (2008), *available at* http://www.myazbar.org/AZAttorney/PDF_Articles/1108election.pdf; Scott G. Hawkins, *Perspective on Judicial Merit Retention in Florida*, 64 FLA. L. REV. 1421, 1431-32 (2012); *ISBA Action Plan Designed to Provide Truth About Judicial Retention*, STATE BAR ASS'N, http://iowabar.org/displaycommon.cfm?ari=1& subarticlenbr=761.

207. Eckhoff, *supra* note 177.

208. Ian Millhiser, *GOP Iowa Governor: Anti-Gay Groups Likely to Try to Oust Another Iowa*

However, less than a month before the election, the Iowa Bar Association and its supporters are actively campaigning for Justice Wiggins, while he apparently is honoring the tradition that Iowa judges do not campaign.[209] He did write recently in the *Des Moines Register*, "I do not want Iowa [t]o end up like states with highly partisan courts. Iowa is better than that."[210]

In the meantime, the three Florida justices are starting to campaign.[211] Aware that opposition already was mounting against their retention, the three justices decided to campaign early and hard.[212] In March 2012, the justices held a fundraiser; the invitation to which "asked for a 'suggested contribution' of $500 to each of" the three justices.[213] They were not happy, however, to be asking for money. Justice Fred Lewis stated, "It is almost embarrassing to be doing it," and Justice Barbara Pariente agreed that "[i]t's an awkward thing."[214] Justice Peggy Quince also added, "We should not have to go around and have our friends and committees collecting money . . . . We don't want to get caught up in those kinds of things."[215]

In Indiana, Justice David responded to opposition by establishing his own website about a month before the retention vote. The official Indiana Courts website includes informational pages designed to provide voters with information about all Supreme Court justices and appellate court judges, including Justice David, who are facing retention votes.[216] But having been singled out for criticism because of his *Barnes* decision, Justice David posted his own separate website,[217] with both informational and campaign-oriented content.[218] In it, the

---

Marriage Equality Justice, THINKPROGRESS JUST. (May 15, 2012, 2:50 PM), http://thinkprogress.org/justice/2012/05/15/484552/gop-iowa-governor-anti-gay-groups-likely-to-try-to-oust-another-iowa-marriage-equality-justice/?mobile=nc.

209. Ryan J. Foley*, Vote on Iowa Justice Who Joined Gay Marriage Ruling Seen as Barometer as Views Change*, NEWSER (Oct. 8, 2012), http://www.newser.com/article/da1pjkt01/vote-on-iowa-justice-who-joined-gay-marriage-ruling-seen-as-barometer-as-views-change.html.

210. *Id.*

211. *Florida Retention: Targeted Justices Are No 'Sitting Ducks,'* GAVEL GRAB (Sept. 18, 2012), http://www.gavelgrab.org/index.php?s=florida+retention+election&sbutt=GO.

212. *GOP Opposing 3 Florida Justices' Retention Bids*, GAINESVILLE SUN (Sept. 21, 2012, 4:20 PM), http://gainesville.com/article/20120921/WIRE/120929896?p=2&tc=pg.

213. Dennis, *supra* note 129.

214. *Id.*

215. *Id.*

216. *Judicial Retention 2012*, COURTS.IN.GOV, http://www.in.gov/judiciary/admin/2924.htm (last visited Nov. 3, 2012).

217. JUSTICE STEVEN DAVID, http://justicestevendavid.com/ (last visited Dec. 27, 2012). It does not appear any of the other judges facing retention have done so.

218. The Indiana Code of Judicial Conduct provides, "A Judge or Candidate for Judicial Office Shall Not Engage in Political or Campaign Activity That is Inconsistent with the Independence, Integrity, or Impartiality of the Judiciary." IND. CODE OF JUD. CONDUCT CANON 4 (2012). However, Rule 4.4 of the Canon permits "a candidate for retention who has met active opposition, [to] establish a campaign committee to manage and conduct a campaign for the

Justice posts "I ask for your support on Election Day by voting YES to retain me, and by voting YES to retain all of the Judges and Justices seeking retention."[219] Under the subtitle "Punishing judge over 1 decision lowers judicial process," he provides a link to a newspaper editorial expressing concern over the opposition to his retention.[220]

Judges subject to retention are not alone in their frustration with the politicization of the judiciary.[221] An Ohio Supreme Court Justice, Paul E. Pfeifer, while campaigning in a recent election, stated, "I never felt so much like a hooker down by the bus station in any race I've been in as I did in a judicial race."[222]

In Florida and other states where justices feel compelled to run active retention campaigns, the justices will have to forego, at least in part, their regular workload and actively campaign to keep their seats.

One recent judicial decision that illustrates the possible effect that politicization may have on the judiciary is *Caperton v. A.T. Massey Coal Co*.[223] In *Caperton*, the Supreme Court held that a justice's failure to recuse himself when a campaign contributor appeared in his court violated the Due Process Clause of the Fourteenth Amendment.[224] *Caperton* has implications for perceptions of "judicial favoritism."[225] In response to *Caperton*, "Michigan's Supreme Court issued new rules making it harder for justices to hear cases involving major campaign supporters."[226]

2. Educate Voters.—"A $300,000 campaign is underway to educate Florida voters" about merit selection.[227] The Florida Bar launched this campaign, and the American Bar Association and the League of Women Voters have become

---

candidate." *Id.* at 4.4.

219. Seven David, *I Would Appreciate Your Vote*, JUSTICE STEVEN DAVID, http://justicestevendavid.com/i-would-appreciate-your-vote-nov-6/ (last visited Nov. 3, 2012).

220. *Id. See* Steven David, *All Six Judges Have Earned "Yes" Votes for Retention*, JUSTICE STEVEN DAVID (Oct. 15, 2012), http://justicestevendavid.com/all-six-judges-have-earned-yes-votes-for-retention/.

221. Brendan H. Chandonnet, *The Increasing Politicization of the American Judiciary: Republican Party of Minnesota v. White and Its Effects on Future Judicial Selection in State Courts*, 12 WM. & MARY BILL RTS. J. 577, 581-83 (2004).

222. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1, *available at* http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all.

223. 556 U.S. 868 (2009).

224. *Id.* at 872.

225. Mary A. Celeste, AM. JUDGES ASS'N, *The Debate over the Selection and Retention of Judges: How Judges Can Ride the Wave*, 46 CT. REV. 82, 88 (2009-2010), *available at* http://aja.ncsc.dni.us/publications/courtrv/cr46-3/CR%2046-3%20Celeste.pdf.

226. Press Release, Citizens United Called Grave Threat for America's Courts, JUST. AT STAKE CAMPAIGN (Jan. 22, 2010), http://www.justiceatstake.org/newsroom/press-releases-16824/?show=news&newsID=6669.

227. Sascha Cordner, *Florida Supremes Facing Retention Votes in 2012*, WFSU (May 11, 2012, 6:05 PM), http://news.wfsu.org/post/florida-supremes-facing-retention-votes-2012.

involved to ensure voters receive "fair and balanced information."[228]

In 2010, several groups in Colorado, including the Institute for the Advancement of the American Legal System, the League of Women Voters of Colorado, the Colorado Judicial Institute, and the Colorado Bar Association, sponsored a public education campaign.[229] In support thereof, the group launched the website "KnowYourJudge.com."[230] This website was designed "to provide voters with impartial, nonpartisan information about the judges appearing on Colorado's ballot."[231] Those organizations also created a television and radio public service announcement to help equip voters with the resources to research their judges.[232]

3. Judicial Performance Evaluations.—At a recent symposium sponsored by the Indiana University McKinney School of Law entitled, "Reflecting on Forty Years of Merit Selection," former Justice of the Tennessee Supreme Court and distinguished professor Penny White recommended Judicial Performance Evaluations as a way to respond to negative campaigning by special interest groups against judges facing retention.[233] White reasoned that Judicial Performance Evaluations are effective because they are a

> means of evaluating judicial performance based upon objective, relevant criteria that are essential to good judging. And that gives the electorate a more meaningful reason to vote for or against a judge than does some "fear" ad, taking one case that the judge has decided that may or may not be consistent with popular opinion.[234]

Prior to the Iowa 2010 retention elections, Alaska, Arizona, Colorado, Kansas, Missouri, New Mexico, Tennessee, and Utah conducted Judicial Performance Evaluations for those judges that were subject to retention.[235] Since then, Justice White indicated, "several other states are looking to use them."[236]

These Judicial Performance Evaluations are not simply polls taken by state bar associations like the Indiana Bar Association poll, where bar members vote "yes" or "no" to retain judges.[237] Instead, they include "observations, interviews,

---

228. *Id.*

229. *Buying Time—2010*, *supra* note 73.

230. *Id.*

231. *Id.*

232. *Id.*

233. *See, e.g.*, Penny J. White, *"The Appeal" to the Masses*, 86 DENV. U.L. REV. 253, 258-59, 264 (2008) (discussing the politicization of state judges and defending their roles from well-funded special interest groups).

234. Audio recording: Symposium on Reflecting on Forty Years of Merit Selection, held by the Indiana Law Review at the Robert H. McKinney School of Law (Apr. 5, 2012), at 32:45 – 33:13 (on file with Robert H. McKinney School of Law).

235. Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635, 654 n.110 (2009).

236. Audio recording, *supra* note 234, at 32:43.

237. Dan Carden, *State Bar Association Urges Hoosiers Vote 'Yes' to Retain Justices, Judges*,

public hearings, and responses to standardized, scaled surveys, provided by relevant individuals who have direct information based on interaction or observation within the evaluation period."[238] This combination of individual opinions with the knowledge of each particular judge is essential in assuring the evaluation is thorough. "Lawyers provide knowledge about the role of the judge and the judicial process, while lay members add a needed safeguard against an incestuous process," Justice White said.[239]

In addition to having a diverse sample of the population, Justice White believes it is important for the performance evaluation questions to examine the numerous aspects of the judge's role.[240] The American Bar Association has established five sections, or "guidelines," by which judicial performance may be measured: (1) "legal ability" in the form of "reasoning ability" and legal knowledge of precedent and procedure; (2) "integrity and impartiality," including not only adherence to "judicial ethics," but also the ability to make "difficult and unpopular decisions;" (3) "written and oral communication skills;" (4) the "judges demeanor," focusing on "professionalism and temperament" and promotion of "public understanding of and confidence in the courts;" and (5) the judge's administrative capabilities, measuring "punctuality and preparedness," as well as "the judge's ability to foster a productive work environment" in a diverse workplace.[241] Justice White agreed that these guidelines "mirror the qualities that have long been regarded as essential to good judging and are appropriate measures of judicial performance."[242]

According to Justice White, the use and proper dissemination of Judicial Performance Evaluations helps the general public, most of who are unfamiliar with, and often uninformed about, the role of the judiciary and the judicial process. These evaluations provide a way to become informed about the judge's tenure as a whole instead of relying on negative attack ads that focus on a specific case or issue of concern to a particular special interest group. This tool not only informs voters but also de-politicizes the judiciary and "promot[es] trust and confidence in the judicial branch."[243]

4. "Rapid Response Team."[244]—During the same panel discussion at the Robert H. McKinney School of Law in April 2012, a former justice of the Indiana Supreme Court, Theodore Boehm, noted that when he was up for retention in the 2008 election, he had given some thought to how a judge could best deal with a last minute challenge. Justice Boehm suggested that "the bar itself should give

---

NWI POLITICS (Oct. 15, 2012, 7:00 PM), http://www.nwitimes.com/news/local/govt-and-politics/elections/ state-bar-association-urges-hoosiers-vote-yes-to-retain-justices/article_970cca3d-c741-55aa-b9df-55dba2073131.html.

238. White, *supra* note 235, at 652.

239. *Id.* at 654.

240. *Id.* at 655.

241. *Id.* at 656.

242. *Id*. at 657.

243. *Id*. at 636.

244. Audio recording, *supra* note 234, at 1:02:44.

serious thought to how to organize a rapid response team that would be positioned to have thought out how best to reach voters, with what message, in the event of an attack on a judge."[245] He suggested the response could occur in both the news and social media and should occur within twenty-four hours of the first assault on the judge so that the response was not "three weeks behind the public dialogue curve."[246] Justice Boehm noted the message should have less to do with any particular judge and more to do with the purpose of judicial retention elections and the benefits of an independent judiciary. Justice Boehm and Justice White agreed that such a response team should include both members of the bar and lay persons from all walks of life, all who support the notion of an independent judiciary.[247]

No strategy will fit every situation. However, as a judicial and legal community, we all need to be aware of such threats and be prepared to respond. Indiana's supreme court justices, appellate court judges, and members of the bar should never forget the effects retention elections had on the judiciary in Iowa and should diligently prepare a plan in anticipation of a similar organized challenge to members of Indiana's judiciary.

245. *Id.* at 1:02:39.
246. *Id.* at 1:04:26.
247. *Id.* at 1:08:21.

THE PERILS OF MERIT SELECTION*

JAMES BOPP, JR.**

INTRODUCTION

My interest in the judicial selection debate stems from my successful representation of the Republican Party of Minnesota in *Republican Party of Minnesota v. White* before the United States Supreme Court.[1] It became apparent to me after *White* that judicial selection in this country had strayed from constitutional and republican principles and needed to be reexamined. I was particularly troubled by the trend towards merit selection and away from popular elections, and, since *White*, I have taken up three legal challenges to the use of merit selection in the states.[2]

Merit selection is inherently perilous to a well-functioning democracy and is fundamentally illegitimate because it permits groups of selected elites, not the People, to choose our policy makers, i.e., judges. Merit selection is founded on the erroneous belief that expertise is the only quality necessary for a person to be a good judge because it claims to ignore an even more important qualification: judicial philosophy. The art of judging is not merely the product of skill and experience; judging depends heavily on the perspective, values, and judicial philosophy of the judge.[3] Law-making is at the heart of common-law judge's function. Through this role, the judge assumes responsibilities, like those assigned to the legislature—to craft law and public policy on behalf of the People.[4]

---

* This Article is adapted from a speech given by the author at the Indiana Law Review's Symposium, "Reflecting on Forty Years of Merit Selection," at the Indiana University Robert H. McKinney School of Law in Indianapolis on April 5, 2012. The author expresses his appreciation to Justin McAdam of The Bopp Law Firm for his research and writing assistance.

** James Bopp, Jr. is an attorney with The Bopp Law Firm in Terre Haute, Indiana, whose practice emphasizes biomedical issues of abortion, foregoing and withdrawing life-sustaining medical treatment and assisted suicide, not-for-profit corporate and tax law, campaign finance and election law, and U.S. Supreme Court practice.

1. 536 U.S. 765 (2002). *White* involved a challenge to one of Minnesota's canons of judicial conduct prohibiting candidates for judicial office from stating their "views on disputed legal or political issues." *Id.* at 768. The Court held that the canon was an unconstitutional infringement on a judicial candidate's First Amendment rights. *Id.* at 788.

2. *See* Dool v. Burke, No. 10-3320, slip op. (10th Cir. Sept. 13, 2012) (challenging Kansas's merit selection system); Carlson v. Wiggins, 675 F.3d 1134 (8th Cir. 2012) (challenging Iowa's merit selection system), *cert. denied*, No. 12-51, 2012 WL 2906861 (U.S. Oct. 1, 2012); Kirk v. Carpeneti, 623 F.3d 889 (9th Cir. 2010) (challenging Alaska's merit selection system).

3. *See* Anca Cornis-Pop, Republican Party of Minnesota v. White *and the Announce Clause in Light of Theories of Judge and Voter Decisionmaking: With Strategic Judges and Rational Voters, the Supreme Court Was Right to Strike Down the Clause*, 40 WILLIAMETTE L. REV. 123, 166 (2004).

4. John V. Orth, *The Role of the Judiciary in Making Public Policy*, 4 N.C. INSIGHT 12, 14-

Merit selection purports to remove considerations of politics and ideology from the selection process on the pretense that such considerations are not relevant to the judge's role.[5] This assumes that the law can be found; it can be discerned merely through the application of legal skill and expertise in all cases. But common law judges frequently make the law based on the judge's public policy preferences.[6] And as any lay person would attest, when judges exercise their discretion, the judge's personal policy preferences influence his or her judicial decision-making.[7] Often, the law as written does not address the particular facts of the case, and so it is up to the judge to determine how the legislature intended to resolve the case, if at all.[8] In other instances, the judge is asked to develop the common-law and apply it to the facts of a novel case.[9] Here, the judge's law-making discretion is at its pinnacle. There is no right answer, no written laws to guide the judge's decision. Instead, there is only a choice about which policy is the best policy to create the type of society in which we want to live. The judge's unique experiences, judgment, values, and judicial philosophy inevitably will guide the judge in answering these questions.[10]

Furthermore, politics is woven into the very fabric of our society and permeate every aspect of our lives. Politics, and political ideology in particular, define the type of society we live in, the powers of our government, the rights and liberties of each of us, and thus the very structure of our society. Such ideas are not abstract concepts that we choose to invoke when convenient; they are personal and inextricably woven into our actions. It is unrealistic to expect that people can set aside such fundamental parts of their identity. Lawyers and judges are no exception.

Merit selection is also fraught with many perils that contradict the fundamental principles of representative government. It eliminates the People from any direct role in the initial selection process and afterward offers only a weak accountability mechanism in periodic retention elections.[11] This is a poor substitute for the consent of the governed. Moreover, by giving lawyers a privileged role in the selection process, the system invites the selection of judges whose values and world-views differ widely from the People, resulting in a more liberal and more judicially active bench.

---

15 (1981).

5. Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 13-15 (1995).

6. Brian Z. Tamanaha, *The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influences" Is Not "Partisanship,"* 61 EMORY L.J. 759, 761-62, 770-71 (2012).

7. *Id.* at 765.

8. *See* Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 280-87 (1997).

9. *See* Andrew Beckerman-Rodau, *A Jurisprudential Approach to Common Law Legal Analysis*, 52 RUTGERS L. REV. 269, 293-94 (1999).

10. *See* Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 4-5 (2007).

11. *See* David Barron, *Judges: Should They Be Elected or Appointed?*, WALL BUILDERS (Jan. 2001), http://www.wallbuilders.com/libissuesarticles.asp?id=107.

While Indiana has avoided many of the perils associated with merit selection over the past three decades, it is the exception, not the rule. We have avoided these perils simply by happenstance and luck, due in large part to the efforts and political acumen of former Chief Justice Randall Shepard, who guided the merit selection system in Indiana for the last twenty-five years.

I. ROLE OF THE JUDGE

A judge's fundamental role is to resolve the disputes of the parties before him or her according to the law.[12] In fulfilling this role, the judge must strive to provide equal justice under the law. This means that the judge should ensure that the law is applied consistently to all parties. In so doing, the judge must ensure that the law not only applies consistently to those parties coming before him or her but also that the law is applied in the same manner as it would be applied in other courts.[13] There are three elements necessary to ensure equal justice under the law: independence, impartiality, and respect for the constitutionally established boundaries of judicial authority.[14]

Independence refers to both institutional and personal independence. Institutional independence requires the judiciary to be separated from the legislative and executive branches and its decision-making insulated from outside influences.[15] Such independence is inherent in our American system of democratic government because the Constitution establishes the judiciary as a separate branch of government with its own separate set of powers.[16] It is also ensured in the United States by providing the judiciary with separate budget, facilities, and personnel over which the judiciary has exclusive control.[17] Personal independence demands that a judge's decision-making power should be free from control by other judicial officers, executive and legislative officials, and from any other person or institution. Yet, by independence, I do not mean that the judge should not be beholden to the People. In a representative democracy such as ours, independence and accountability to the People can never be inconsistent. The consent of the governed is the principle mechanism the People have for holding their government in check and is therefore always a legitimate source of influence.

Impartiality requires the judge to set aside his or her idiosyncratic biases and

---

12. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 19 (2002).

13. *See* Stephen J. Markman, *An Interpretivist Judge and the Media*, 32 HARV. J.L. & PUB. POL'Y 149, 154 (2009).

14. *See History of the Federal Judiciary*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/talking_ji_tp.html (last visited Nov. 30, 2012).

15. *See* Renée M. Landers, *An Independent and Accountable Judiciary*, 48 BOS. B.J. 2, 2 (2004).

16. U.S. CONST. art. III, § 1.

17. *See* Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 220-21, 226-27 (1993).

personal predilections towards the parties or the parties' circumstances and ensure that each party enjoys the equal protection of the law.[18] In *White*, the Supreme Court defined impartiality as

> lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party.[19]

Of course, bias is part of human nature, and true impartiality is impossible. Nevertheless, it is a goal to which all judges should aspire and one which our court system seeks to foster through the incorporation of several countermeasures, such as the opportunity for appeal to multi-judge panels, the requirement of written decisions and orders, and the limitations on ex-parte communications.[20]

Third, a judge must strive to stay within the bounds of judicial power. Once a judge steps outside of the legitimate exercise of the judicial power, the judge necessarily invades the power of another branch of government or the freedoms reserved to the People. Any exercise of power outside of the judicial power is illegitimate because the power is disconnected from the consent of the governed.[21] Such illegitimate usurpation of power is a grave offense against the rule of law and democratic self-government.

Staying within the legitimate bounds of judicial authority requires the judge to recognize the dual functions played by a judge. On the one hand, judges must decide cases based on the particular facts of each case applied to the applicable law.[22] On the other hand, judges often must determine what the "law" is because in many instances the law is vague or does not speak precisely to the facts before the court.[23] As such, judges are tasked with the job of making the law in certain instances. All judges, both state and federal, also exercise discretion in defining and applying broad and general written laws to specific facts and circumstances while adhering to the scope of the law set forth by the legislative branch. Further, state judges are inherently vested with the power to develop the scope and

---

18. Barak, *supra* note 12, at 55-57.

19. Republican Party of Minn. v. White, 536 U.S. 765, 775-76 (2002).

20. Cornis-Pop, *supra* note 3, at 127 ("Securing an impartial judiciary has been a concern in the United States since colonial times.").

21. Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365, 371, 374-77, 381 (2000).

22. *See, e.g.*, Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 35 (2009) ("Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make rules, they apply them. The role of the umpire and a judge is critical. They make sure everyone plays by the rules but it is a limited role.") (quoting Chief Justice Roberts during his confirmation hearings).

23. *See* Lee J. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, 3 U. ST. THOMAS L.J. 48, 58-60, 62, 73-74 (2005).

substance of the common law.[24] Because the boundaries of these law-making functions are rarely clear, the judge must always be vigilant not to usurp the power of the legislative and executive powers.

The structure of the judicial selection system can help ensure that a judge stays within the legitimate bounds of his or her authority by incorporating meaningful accountability measures. The more direct the accountability mechanism, the more cautious and restrained the judge will be in treading at the edges of judicial authority. In a democratic republic like ours, the only legitimate source of accountability is the People, so the best judicial selection systems provide for the People to have a voice in the selection of judges.[25] Of course, there are other forces to help ensure accountability: appellate judges, commentators, future judges, and history, but none of these forces is a legitimate substitute for the consent of the governed.

II. HISTORY OF JUDICIAL SELECTION

The public's perception of the appropriate balance of these four factors has changed over time, resulting in a shifting landscape of judicial selection. In Colonial times, judges served "at the pleasure of the Crown" and served only so long as it pleased the King.[26] During the Early Period, the states shifted to a system of gubernatorial appointment with legislative approval, and judges were usually appointed with life-tenure.[27] Then, with the rise of Jacksonian Democracy and the fervor for popular sovereignty, many states adopted a system of popularly electing judges.[28] Finally, in the Progressive Era, when reform was the watch-word of the day, merit selection began to grow in popularity out of the idea that so called "experts" were better suited to make policy choices than ordinary people.[29] Merit selection was a natural extension of the growing faith in expertise, the application of scientific principles to public policy, and the loss of faith in the ability of ordinary people to make reasonable choices for themselves.[30]

---

24. *See* Bernard W. Bell, *The Model APA and the Scope of Judicial Review: Importing Chevron into State Administrative Law*, 20 WIDENER L.J. 801, 832-33 (2011) ("[S]tate judges possess common law authority that confers upon them law-generating functions that federal courts lack in areas of common law.").

25. *See* Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States*, 75 MICH. B.J. 904, 908 (1996).

26. Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1107, 1117 (1976).

27. Matthew Schneider, *Why Merit Selection of State Court Judges Lacks Merit*, 56 WAYNE L. REV. 609, 611 (2010).

28. *Id.* at 611-12, 621-22.

29. *Id.* at 624 n.62; Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 677-78 (2009).

30. *See* Daniel W. Shuman, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 PSYCHOL. PUB. POL'Y & L. 242, 244-46 (1997).

Indiana's history has largely followed the national trajectory. Upon becoming a state in 1816, Indiana's constitution provided for appointment of justices of the supreme court by the governor with the advice and consent of the senate and the popular election of trial court judges.[31] The 1851 constitution rejected appointment in favor of the popular election of all appellate and trial court judges.[32] Then, in 1970, Indiana amended its Constitution, adopting merit selection for appellate judges, which has since served as our system of judicial selection.[33]

III. MERIT SELECTION UNDER THE MISSOURI PLAN

Merit selection is often referred to as The Missouri Plan because Missouri was the first state to adopt a system of merit selection for its judges in 1940.[34] While there are many variations of the Missouri model by other states, the general model has two primary features.[35] First, the initial selection of the judge is made by the governor from a list of names assembled by a judicial nominating commission.[36] This commission is usually comprised of some combination of lay persons and attorneys chosen by the state bar.[37] The second predominant feature is the requirement that the judge be subject to a retention referendum (i.e., a retention election) one or more times after appointment, at which point the electorate can remove the judge if he or she fails to receive a sufficient number of votes in favor of retention.[38]

Indiana's system for selecting appellate judges is largely similar. The judicial nominating commission reviews applications, interviews candidates, and selects three candidates for recommendation to the governor.[39] The governor then must choose one of the candidates from the list of three candidates provided by the judicial nominating commission.[40] If the governor fails to make an appointment within sixty days of receiving the list of candidates, the appointment is made by the chief justice of the supreme court.[41] The newly appointed justice or judge must then stand for retention at the first general election occurring after the judge has served two years of the appointment.[42] The justice or judge can retain the

---

31. IND. CONST. of 1816, art. V, § 7.
32. IND. CONST. of 1851, art. VII, § 3 (amended 1970).
33. IND. CONST. art. VII, § 10.
34. Fitzpatrick, *supra* note 29, at 675 n.31, 678.
35. *Id.*
36. *Id.*
37. *Id.* at 680.
38. *Id.* at 678-79.
39. Adrienne Meiring, *The Role of the Judicial Nominating Commission in Judicial Selection*, IND. CT. TIMES (Sept. 3, 2010), http://indianacourts.us/times/2010/09/the-role-of-the-judicial-nominating-commission-in-judicial-selection/.
40. IND. CONST. art. VII, § 10.
41. *Id.*
42. IND. CONST. art. VII, § 11.

office only if they receive a majority of favorable votes. Afterward, the justice or judge must stand for a retention election every ten years while remaining on the bench.[43] The judicial nominating commission is comprised of seven members.[44] Three of the members must be citizens "not admitted to the practice of law" and are appointed by the governor.[45] Another three members must be "admitted to the practice of law" and are elected by those so admitted to the bar.[46] The seventh member is the chief justice of the supreme court.[47] None of the commission members can hold office in any political party or organization.[48]

IV. JUSTIFICATIONS FOR MERIT SELECTION

Proponents of merit selection generally advance four main arguments in support of the system: (1) merit selection takes politics out of the selection process;[49] (2) merit selection eliminates the influence of campaign contributions;[50] (3) merit selection "produces better quality judges";[51] and (4) merit selection increases "public confidence in the judiciary."[52] None of these justifications are persuasive. Two of these justifications are premised on faulty reasoning, and two are not supported by the experiential evidence.

First, supporters argue that merit selection "removes the 'politics' from the" judicial selection process.[53] I say "politics" because the concept is a fuzzy one and not well-defined by proponents of the system.[54] Some scholars have taken the claim to mean that merit selection commissions are "less inclined to examine the personal ideological preferences of judicial candidates than are voters or elected officials" such as "whether a candidate is a Republican or a Democrat, a conservative or a liberal."[55] However, by "politics," proponents could also be referring more broadly to"how" the political process is involved in campaigning for office (i.e., politicking).[56] Ultimately, I suspect that proponents of merit selection consider both kinds of "politics" to be an undesirable component of judicial selection to some extent.[57]

---

43. *Id*.
44. IND. CONST. art. VII, § 9.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. Fitzpatrick, *supra* note 29, at 685.
50. Schneider, *supra* note 27, at 626.
51. *Id.* at 627.
52. *Id.* at 627-28.
53. *Id.* at 625.
54. Fitzpatrick, *supra* note 29, at 676.
55. *Id.*
56. *Id.* at 685 n.32.
57. Additionally, to the extent politicking is perceived as harmful to the legitimacy of the judiciary, at least one study found that exposure to negative advertising in judicial elections in

However, neither conception of politics is a persuasive reason to adopt a merit selection system. With respect to political ideology, merit selection does not eliminate politics from judicial selection but, instead, simply moves the focus for political considerations from the public arena to the closed door meetings of the nominating commission. As explained in the introduction, it is unrealistic to expect people to set aside considerations of political ideology because political ideology is part of a person's identity.[58] Conversely, if politicking is the concern, it is not clear why merit selection should be preferred over gubernatorial or legislative appointment as either would accomplish the same objective with more opportunities for the People to have input.

Proponents of merit selection also argue that the system "reduces the influence of money" in the judiciary and increases the independence of judges from campaign contributors.[59] The problem with this justification is that it presumes elected judges are somehow more corruptible than other elected officials. Yet, our whole system proceeds on the notion that judges strive to be impartial.[60]

Moreover, there is plenty of concern over the influence of campaign

---

Kentucky had either no effect on or actually increased support for the justices on the Kentucky Supreme Court. JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 122-23 (University of Chicago Press 2012) (ser. Chicago Studies in American Politics, Benjamin I. Page et al., eds.).

58. Fitzpatrick is of the same view:

> Even if bar associations are better able to identify more intelligent or more qualified judges than are voters or public officials, it does not follow that they are less inclined to consider the political beliefs of judicial candidates. In my view, state bar associations are just as likely to be concerned—if not more concerned—with the decisional propensities of judicial candidates as are voters and elected officials. Moreover, insofar as a judge's personal ideological preferences are correlated with his or her decisions, and insofar as those preferences are often more easily observed than his or her decisional propensities, it is hard for me to believe that state bar associations accord those preferences any less weight than voters or elected officials when they select judges. In short, I am skeptical that merit selection *removes* politics from judicial selection. Rather, merit selection may simply *move* the politics of judicial selection into closer alignment with the ideological preferences of the bar.

Fitzpatrick, *supra* note 29, at 676 (emphasis added).

59. Schneider, *supra* note 27, at 625-26.

60. "There is a presumption of impartiality on the part of judges," *Wilson v. Neal*, 166 S.W.3d 228, 231 (Ark. 2000), that they "are honest, upright individuals . . . [who] rise above biasing influences," *Franklin v. McCaughtry*, 398 F.3d 955, 959 (7th Cir. 2005), and that, because a "judge [is] sworn to administer impartial justice, [the judge] is qualified and unbiased," *Dillard's v. Scott*, 908 So. 2d 93, 99 (Miss. 2005)." Justice Anthony Kennedy put it thusly, "[T]he conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect." Liteky v. United States, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) (quoting *In re* J.P. Linahan, Inc., 138 F.2d 650, 652 (2d Cir. 1943)) (internal quotation marks omitted). We should remain faithful to our belief in judicial impartiality.

contributions on elected officials in the executive and legislative branches,[61] yet there are no widespread calls for merit selection of governors, state legislators, or other elected officials on grounds that they are corrupted by the campaign process. This is because, as a nation, we are committed to the idea that legitimacy is conferred only by the consent of the governed. Instead, in addressing these problems of influence peddling, we have adopted a more direct solution to remedy the perceived corrupting influence of money in elections by imposing contribution limitations on the amounts individuals and organizations can give to judicial candidates to dilute the influence of any one contributor and spread the electoral fortune of candidates across a plethora of interested parties.[62] There is no reason to suspect that such prophylactic measures would be any less effective for judicial candidates.

The third reason advanced in support of merit selection is that the "system produces better-quality judges."[63] Because the nominating commission is supposedly detached from political considerations, as the argument goes, merit selection focuses on "the professional qualifications"—i.e., "judicial temperament, experience, education, and collegiality"—of candidates rather than ideological concerns or other factors, such as likability, name recognition, and advertising.[64] The justification is grounded directly in the belief that "experts" (i.e., nominating commissions) are better at choosing judges than ordinary voters.[65]

This justification, however, evinces a complete lack of respect for and faith in the wisdom and judgment of the People and is deeply flawed for two reasons. First, the evidence does not support it. Research examining the differences between merit selected and elected judges has found little or no discernible difference between the quality of judges selected by either system.[66] Second, and on a more fundamental level, the notion that quality should be measured only in terms of education, experience, collegiality, and temperament is misleading. It ignores the inherent dual role of the common law judge as both umpire and law-

---

61. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 423 (2000) ("'Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.'") (quoting Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985) (emphasis in original)).

62. As the Supreme Court said in *Buckley v. Valeo*, "The overall effect of . . . contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons." 424 U.S. 1, 21-22 (1976).

63. Schneider, *supra* note 27, at 627.

64. *Id.*

65. *Id.*

66. Michael DeBow et. al., *The Case for Partisan Judicial Elections*, THE FEDERALIST SOC'Y FOR LAW & PUB. POL'Y STUDIES (Jan. 1, 2003), http://www.fed-soc.org/publications/detail/the-case-for-partisan-judicial-elections (surveying research on the differences in quality between elected and merit selected judges).

maker.[67] The exercise of law-making power is heavily influenced by a person's political beliefs and value preferences. It is not an endeavor susceptible to scientific or mathematical deduction. Policy choices are directly linked to a person's values, experience, political philosophy, and personality among other things.[68] There is no reason to suspect that policy-making in the judicial branch is an exception.[69]

Finally, proponents of merit selection contend that the system generates more public confidence in judges and the judiciary than popular elections.[70] Yet a 2002 study commissioned by the ABA directly contradicts this contention.[71] The study found that 75% of "Americans believe that judges who are elected are more fair and impartial than those who are appointed" and also found that 61% of "Americans believe that someone who voices political opinions can later be a fair and impartial jurist."[72] Together, these findings suggest that judicial elections do not undermine, but rather bolsters, the public's confidence in the judiciary. Thus, evidence actually suggests that elections confer legitimacy.

---

67. Eva S. Nilsen, *Introduction*, Symposium, *The Role of the Judge in the Twenty-first Century*, 86 B.U. L. REV. 1037, 1038-39 (2006).

68. *See* Fitzpatrick, *supra* note 29, at 687-89 ("[W]e have known for quite some time now that the decisions judges make are correlated with their personal ideological preferences. This correlation has been demonstrated over many years by both political scientists and legal scholars. It has been demonstrated for United States Supreme Court Justices, federal courts of appeals judges, federal district court judges, and state supreme court justices. It has been demonstrated across a broad range of litigation areas, including administrative law, sovereign immunity, labor law, employment law, campaign finance, piercing the corporate veil, civil rights, criminal law, religion, and free speech. It should be noted that this correlation exists not because judges are inappropriately smuggling their personal preferences into the law; it exists because, as the Legal Realists taught us nearly 100 years ago, language is often ambiguous. The Legal Realists famously demonstrated this in the early twentieth century by showing that precedents, statutes, and constitutional provisions can often be read in more than one way. Consequently, judges often cannot render decisions based solely on legal texts; they must incorporate—whether consciously or subconsciously—other considerations in order to resolve ambiguities. This is especially true of state court judges. Not only do state court judges have the power to shape the vague commands of statutes and constitutions, but, much more so than their federal counterparts, they also have the power to make common law.") (footnotes omitted).

69. *See* Debow et. al., *supra* note 66 ("Modern legal scholars and social scientists no longer deny that judges make policy.").

70. Schneider, *supra* note 27, at 627-28

71. HARRIS INTERACTIVE, *A Study About Judicial Impartiality*, A.B.A., 4-5 (Aug. 2002), *available at* http://www.abavideonews.org/ABA245C/Shell.ppt; *see* Press Release, Harris Interactive, Most Americans Want State Judges to Be Elected (Oct. 20, 2008), http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Electing-judges-2008-10.pdf (reporting that survey results indicated that 55% of people in America want judges to be elected, while only 19% of people favor the appointment of judges).

72. HARRIS INTERACTIVE, *supra* note 71, at 4-5.

V. PITFALLS OF MERIT SELECTION

Aside from the lack of a convincing justification, merit selection systems contain several structural and practical pitfalls that further undermine the propriety of utilizing such a system in a republican democracy.

The primary pitfall is that merit selection lacks any strong accountability mechanism since retention elections are a weak substitute for popular elections.[73] As a structural matter, retention elections remove many of the elements of elections that generate public interest and attention.[74] Retention elections

> minimize the incentives for opposing forces to wage antiretention campaigns by preventing any individual from opposing the incumbent directly; they eliminate indications of partisanship that allow voters to translate their policy preferences cost-effectively into votes; and they increase voter fears of uncertainty by forcing a choice of retaining or rejecting the incumbent before the voter knows the names of potential replacements.[75]

The actual results of retention elections support this assessment: judges in retention elections have been retained 98.9% of the time (99.5% of the time if Illinois is excluded, where over half of the defeats have occurred and which requires a judge to obtain 60% of the vote to be retained).[76] Such success rates are astonishing and make clear that retention elections are little more than formalities in most instances.

The structural posture of the retention election also places the judge seeking retention at a significant disadvantage if a serious challenge to oust the judge is mounted. The principle reason is that judicial canons impose severe limits on campaigning by judicial candidates, while leaving others without significant limitations. In Indiana, for example, judicial canons bar judges up for retention election from publicly identifying themselves as members or candidates of any political organization, accepting endorsements from any political organization, personally soliciting or accepting campaign contributions, soliciting funds for or making a contribution to any political organization, and attending dinners or other events sponsored by political organizations.[77] Even more damaging to the

---

73. *See, e.g.*, Debow et al., *supra* note 66 ("The retention elections conducted in Missouri Plan states compare poorly with partisan election contests as a means of ensuring judicial accountability to the public.").

74. Stephen J. Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 KAN. J.L. & PUB. POL'Y 392, 422 (2009) (explaining that judicial retention elections create merely an illusion of public involvement).

75. Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803, 807-08 (2004).

76. Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473, 495 (2008) (reporting the data compiled from ten states over a thirty-year period).

77. IND. CODE OF JUDICIAL CONDUCT R. 4.1(A) (2011).

challenged retention candidate, Indiana's judicial canons only allow a candidate for retention to form a campaign committee, "accept campaign contributions," "speak on behalf of his or her candidacy," or seek or accept endorsements from non-political organizations *after* the candidate has been attacked.[78] Obviously then, judicial canons incentivize groups seeking to unseat an incumbent to launch surprise attacks in the waning days before an election and take advantage of a candidate's lack of an organized campaign apparatus. This only increases the power of interest groups and their ability to affect the outcome of judicial elections. The 1986 ouster of California Supreme Court Chief Justice Rose Bird and two other justices is a prime example of how the lack of prior organization places the judge at a serious disadvantage. They were outspent by their opponents two to one, unable to assemble an organized campaign to mount a defense, and unable to formulate an effective counter-strategy to respond.[79]

Moreover, in a contested election, the opposing candidate who attacks the incumbent is held accountable by the adversarial process for any accusations because the challenger will likely be scrutinized according to any attacks he levies at the incumbent. In a retention election, however, there is no challenging candidate, only interest groups seeking to turn the incumbent out of office for one reason or another.[80] The absence of a need to remain electable means that such anti-retention groups can level attacks against the incumbent with impunity.[81] This stands in stark contrast to the contested election wherein an opposing candidate must always balance the benefits of making an attack with the risk that such an attack will harm the opposing candidate's own campaign.

A second major pitfall of merit selection is that the process for selecting the attorney members of the nominating commission is likely to result in a commission that is dominated by liberal trial lawyers.[82] In most states that employ merit selection, a substantial portion of the members of the nominating commission must be attorneys, with more than half of such states requiring more than 50% of the commission members be attorneys.[83] More than half of these states also delegate the responsibility for choosing at least 50% of the attorney

---

78. *Id.* R. 4.2(D).

79. James Sample, *Retention Elections 2.010*, 46 U.S.F. L. REV. 383, 402-05 (2012).

80. Dimino, *supra* note 75, at 808-09.

81. *Id.* at 808.

82. *See, e.g.*, L. STEVEN GRASZ, JUDICIAL SELECTION IN NEBRASKA, FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES (May 8, 2012), *available at* http://www.fed-soc.org/publications/detail/judicial-selection-in-nebraska (discussing the Nebraska State Bar Association's Executive Council, "which has the most direct influence on judicial nominating committee membership, does not necessarily reflect the Nebraska electorate either geographically or politically[, and] there is no requirement for political balance on the executive council" and how "[t]he influence of the trial bar on the selection of candidates for judicial nominating commissions is perceived, by at least some judicial candidates, to be pervasive and longstanding").

83. Fitzpatrick, *supra* note 29, at 680-81. In Indiana, three of the seven commission members must be attorneys, and all three of those attorneys must be elected by the members of the state bar. IND. CONST. art. VII, § 9.

members to state bar associations.[84] This is important because it means that the lawyer class of a state has a significant role in shaping the ideological composition of the state's judiciary. A disconnect between the ideological preferences of the People and the commission is thus inevitable given that lawyers, as a group, are more liberal than the general public,[85] as well as the fact that lawyers, particularly trial lawyers, have a concrete stake in the choice of judge because the judge's decisions directly affect their livelihood.[86]

The combined effect of the first two pitfalls leads to the third: merit selection systems result in the selection of judges who are more liberal and more aligned with the preferences of the trial bar.[87] It is unrealistic to expect nominating commission members to set aside their personal ideological inclinations when selecting judges.[88] Even if members set out to choose candidates based only on "merit," such assessments are subjective because the law is not a fixed constant, but rather it is a tool for the implementation of policy preferences.[89] Further, a person's perception of whether a candidate is a good judge is likely to depend, at least in part, on whether that candidate shares the judicial philosophy and political ideology of the commissioner. Thus, to the extent that nominating commissions are dominated by persons with liberal ideological perspectives, and who share the interests of trial lawyers, the judges selected by that system are likely to reflect those characteristics, whether chosen that way intentionally or not.

Moreover, because judges who identify more closely with the liberal ideological perspective tend to reject originalism and textualism as a judicial philosophy, and are more inclined towards a judicial philosophy founded on purposivism and living constitutionalism, merit selection tends to result in more judicial activism.[90] This activism generally arises in the areas of elections, the expansion of common law tort liability, social issues, and criminal law. Prime illustrations of this pitfall include: the actions of the Florida Supreme Court in the

---

84. Fitzpatrick, *supra* note 29, at 680-81.

85. *Id.* at 690-91 ("[M]any people believe that lawyers are, on average, more liberal than are the members of the general public. Justice Scalia, for example, argued in his dissent in *Romer v. Evans* that the 'lawyer class' holds more liberal views on social issues than does the public. More broadly, a former head of the Federal Election Commission, pointing to larger campaign contributions to Democratic candidates than Republican candidates, opined that 'lawyers generally tend to lean left politically.' Surveys of lawyers confirm that lawyers associate themselves with the Democratic Party and the 'liberal' label more often than do members of the general public. . . . Although none of this evidence is conclusive, I tend to share the view of many people that, on average, lawyers are more liberal than the rest of the public.") (footnotes omitted).

86. *Id.* at 686.

87. *Id.* at 687.

88. *Id.*

89. Bradley P. Jacob, *Back to Basics: Constitutional Meaning and Tradition*, 39 TEX. TECH. L. REV. 261, 284-86 (2007).

90. *See* Brian T. Fitzpatrick, *On the Merits of Merit Selection*, 53 ADVOC. (TEX.) 67, 68-69 (2010).

2000 presidential election recount cases;[91] the legalization of same-sex marriage by the Iowa Supreme Court in 2009; and the subsequent removal of three justices,[92] as well as the removal of Chief Justice Rose Bird, who voted to vacate every death sentence ever reviewed by her, from the California Supreme Court in 1986.[93]

VI. INDIANA'S EXPERIENCE

To a large extent, Indiana has avoided the pitfalls of merit selection. But this good fortune is not the result of a superior merit selection system. It is merely due to the luck of having been blessed with good leaders. These leaders have understood the proper role of the judiciary in an American republic and have remained committed to protecting that balance.[94]

Indiana has not had any judges removed through retention campaigns.[95] This state's nominating commission has not been uniformly dominated by liberal trial lawyers, despite the fact that in recent years, Democrats and trial lawyers have comprised the majority of the members.[96] Even with this partisan balance, Indiana's merit selection commission has largely deferred to the party holding the governor's office and has tended to provide the governor with a pool of candidates identifying with the same political party as the governor. This has been true under both Democrat and Republican governors. Furthermore,

---

91. *See* James Bopp, Jr. & Richard E. Coleson, *Vote-Dilution Analysis in* Bush v. Gore, 23 ST. THOMAS L. REV. 461, 498 (2011) ("The Florida Supreme Court's failure to respect the deferentially expressed concerns in Bush I made it appear that the state court had little regard for constitutional concerns of its superior court. And it caused many to believe that it was acting in a partisan fashion for Gore, whether or not the four-member Harris II majority intended to create such an impression.").

92. A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1, *available at* http://www.nytimes.com/2010/11/04/us/politics/04judges.html?_r=0. At present, there is an ongoing campaign to remove a fourth justice of the Iowa Supreme Court during the 2012 General Election. Marcia Lense, *Competing Bus Tours Over Iowa Supreme Court Justice*, KWQC (Oct. 2, 2012, 3:41 PM), http://www.kwqc.com/story/19636614/competing-bus-tours-over-iowa-supreme-court-justice.

93. Sample, *supra* note 79, at 402-03.

94. *See, e.g.*, Chief Justice Brent E. Dickson, *A Tribute to Randall T. Shepard, Justice, Indiana Supreme Court 1985-2012, Chief Justice of Indiana, 1987-2012*, 45 IND. L. REV. 585, 589, 591 (2012) (discussing the leadership style of the former Chief Justice of the Indiana Supreme Court, including his respect for colleagues and citizens and his understanding of the role of the judiciary, and how the quality of the court gained national recognition under his guidance).

95. *See* Dave Stafford, *Signs of Dissent in Retention Vote*, IND. LAW. (Oct. 24, 2012), http://www.theindianalawyer.com/signs-of-dissent-in-retention-vote/PARAMS/article/29938?page=1 ("Since Indiana adopted a merit system for appellate judges in 1970, none has lost a retention question.").

96. Of the six most recent attorney members, five have been trial lawyers, four have been Democrats, and two have been Republicans.

Indiana's Supreme Court has not been characterized by judicial activism. It has upheld the results of popular elections in election disputes, ruling in favor of both Republican and Democratic candidates, and thereby avoided accusations of partisanship;[97] it has not significantly expanded common law tort liability;[98] it has deferred largely to legislative determinations on controversial social issues;[99] and it has been deferential to the legislature and to juries in the area of criminal law.[100]

Much of the credit for this success, in my opinion, should be credited to the leadership and integrity of former Chief Justice Randall T. Shepard, who, from 1987 until spring of 2012, chaired the Indiana Judicial Nominating Commission and oversaw the selection and appointment of three of the five current supreme court justices and all of the court of appeals judges.[101] While Indiana's system is in equally capable hands under the direction of newly appointed Chief Justice Brent E. Dickson, we should not hang the fortunes of our judiciary on the hope that humble leaders will continue to occupy positions of influence within our

---

97. *See, e.g.*, White v. Ind. Democratic Party, 963 N.E.2d 481, 482, 490 (Ind. 2012) (upholding Charlie White's election as Secretary of State, in part, because the allegations of ineligibility were known prior to the election, but White still received a majority of the votes for the office); Burke v. Bennett, 907 N.E.2d 529, 532-33 (Ind. 2009) (declining to interpret the federal Little Hatch Act to permit post-election disqualification of duly elected candidate); State Election Bd. v. Bayh, 521 N.E.2d 1313, 1314, 1318 (Ind. 1988) (upholding then-candidate Evan Bayh's qualification as a candidate for governor and finding that he met the constitutional residency requirement).

98. *See, e.g.*, Spangler v. Bechtel, 958 N.E.2d 458, 466 n.4, 471-72 (Ind. 2011) (reaffirming limitations on recovery of emotional distress damages and rejecting broader liability rule); Pfenning v. Lineman, 947 N.E.2d 392, 403-05, 407, 411 (Ind. 2011) (declining to extend scope of duty and breach in negligence actions involving sports participants); Ind. Patient's Comp. Fund v. Patrick, 929 N.E.2d 190, 192-94 (Ind. 2010) (declining to interpret the Indiana Medical Malpractice Act as creating new claims or causes of action); Ledbetter v. Hunter, 842 N.E.2d 810, 814-15 (Ind. 2006) (upholding constitutionality of Indiana Medical Malpractice Act's limitation period for claims by minors).

99. The Indiana Court of Appeals deferred to the General Assembly's determination regarding same-sex marriage and upheld Indiana's Defense of Marriage Act. Morrison v. Sadler, 821 N.E.2d 15, 19-20, 23-27, 30-31, 34-35 (Ind. Ct. App. 2005). The Indiana Supreme Court has never directly addressed the issue of the constitutionality of law limiting same-sex marriage. In the area of abortion, the Indiana Supreme Court largely upheld a state law regulating abortions. *See, e.g.*, Clinic for Women, Inc. v. Brizzi, 837 N.E.2d 973, 975, 982-86, 988 (Ind. 2005) (upholding Indiana law requiring informed consent prior to performing an abortion and requiring physicians to provide information about the abortion no less than eighteen hours before the abortion is performed); Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247, 257, 259-60 (Ind. 2003) (upholding constitutionality of state law restricting funding of abortion services for Medicaid recipients to certain cases of medical necessity).

100. *See, e.g.*, State v. Barker, 809 N.E.2d 312, 314-19 (Ind. 2004) (upholding constitutionality of Indiana death penalty statute).

101. *Judicial Nominating Commission Fact Sheet*, COURTS.IN.GOV, http://www.in.gov/judiciary/jud-qual/2920.htm (last visited Dec. 1, 2012).

court system. As the saying goes, past performance is no guarantee of future success. Indiana should not assume that future leaders and future commissions will possess the same commitment to the proper role of the judiciary and the foundational principles of republican democracy.

VII. CHARTING A NEW COURSE FOR THE FUTURE

A judicial selection system should embody the principles of republican government. It should be a system founded on the consent of the governed and should provide a direct link of accountability between the judge and the People. This means that only the people or their elected representatives should have a voice in the selection process. It means also that judges should not be appointed for life terms in order to preserve the People's ability to affirm their consent to be governed as values change and experience dictates. Lastly, it means that judges should, at least in a general sense, reflect the values and political ideology of those whom they govern. Three judicial selection systems meet these criteria: partisan elections, non-partisan elections, and gubernatorial or legislative appointments.

Of the three, the partisan election is the best system for choosing judges because it openly and honestly acknowledges the judicial law-making function and encourages candidates to be forthright about their own political ideologies. Partisan labels are a good, though admittedly imperfect, proxy for voters to identify candidates with whom they share similar political ideologies. Such information goes to the heart of the judge's role as policy-maker. Conversely, for this reason, the non-partisan election should be a less preferred option. Without information about a judge's political identity, the voter is largely left in the dark about the most critical aspect of a judge's qualifications. And, while the information might still be garnered from other sources, it places a significant and unrealistic burden on even the most savvy voter.

The least desirable alternative, though still preferable to merit selection, would be the gubernatorial or legislative appointment of judges. The system shares many of the characteristics of merit selection in that it delegates the selection of the judge to political elites, removes some of the considerations of political ideology from public view, and, to a lesser extent than merit selection, attenuates the connection between the People and the judge. Yet, unlike merit selection, these undesirable characteristics are not wholly unconnected from the People. The People elect the governor and the legislature, the People choose governors and legislators partly based on political ideology, and the People are able to hold governors and legislators accountable for the judges they choose through popular elections. Merit selection, on the other hand, removes the People from any effective participation in the process, resulting in the People being governed without their consent.

A NEW PERSPECTIVE ON JUDICIAL DISQUALIFICATION: AN ANTIDOTE TO THE EFFECTS OF THE DECISIONS IN *WHITE* AND *CITIZENS UNITED*

PENNY J. WHITE*

"*[W]hat you see and hear depends a great deal on where you are standing*."[1]

INTRODUCTION

For the first decade of my legal career, as a member of the bar, I held members of the judiciary in uniform high esteem. I viewed judges as prestigious, accomplished members of the bar who deserved the upmost respect and honor. Even when judges ruled against my clients, I assumed that their rulings were legally justified. Because they were judges, I imagined that they had developed keener insight and wisdom that, in time, I too would acquire. If I had lost a case, it must have been because I had missed something in my factual investigation or failed to uncover or interpret relevant legal precedent. Even in my losses, I generally came away impressed with the judgment of the judiciary, even though it was inconsistent with my own. I largely attributed our different viewpoints to my youth and inexperience, and I aspired to develop wisdom, insight, and judiciousness.

In the second decade of my law life, I served as a member of this institution that I so revered. I became a trial judge by running in a hotly contested, non-partisan-in-name-only election in a multi-county judicial district, spanning more than 1000 square miles of rural eastern Tennessee. I campaigned based on qualifications, which included my educational background and my trial and appellate experience as a small-town lawyer. I knocked on doors, rode on unexceptional floats in Fourth of July parades, and ate tons of pancakes, country ham, and spaghetti. Because that formula worked, giving me a landslide victory, I determined, by virtue of my newly-acquired judicial wisdom, that the popular election system for choosing judges worked well.

Within a few years, I was appointed by Tennessee's governor to the intermediate appellate bench following a commission-based nomination. My application was based on my record as a lawyer and trial judge. I did not need to tell the commission that I was a woman, nor did they need reminding that only one female had served as an appellate judge in the state's nearly 200-year history. When the state's Democratic governor selected my name from the commission's three nominees, he made history by appointing a thirty-four-year old woman. He

---

* Elvin E. Overton Distinguished Professor of Law and Director, Center for Advocacy and Dispute Resolution, University of Tennessee College of Law.

This essay is largely derived from a presentation given on April 5, 2012, at the Indiana University Robert H. McKinney School of Law at a Symposium entitled "Reflecting on Forty Years of Merit Selection." I am grateful to the *Indiana Law Review* for both inviting me to participate in the Symposium and for publishing these comments.

1. The entire quote from C.S. Lewis continues as follows: "It also depends on what sort of person you are." C.S. LEWIS, THE MAGICIAN'S NEPHEW 136 (1955).

also acquired the opportunity to fill the seat I vacated on the trial bench in a completely Republican judicial district, undoubtedly a factor for him but a factor about which I was blissfully oblivious.

The commission-based selection system in effect at the time was based ostensibly on merit—a consideration of whether the applicant's background and experiences prepared the applicant for the particular judicial position.[2] I perceived the system as quite appropriate, especially for an appellate judge whose duty it was to review the trial court's application of the law. My satisfaction with the merit-based system was magnified when I easily won a state-wide retention election two years after my initial appointment without organizing a campaign committee, raising any funds, or eating a single pancake.

With my new-found perspective as a (learned) appellate judge, I began to favor merit appointment systems and retention elections over popular or partisan elections for judges. I embraced this point of view and praised the advantages of a merit-based judicial selection system when I was again nominated by the commission and appointed by the governor, this time to serve on Tennessee's highest court. Again, the governor made history, appointing the second woman, and the youngest person, to serve on the Tennessee Supreme Court, and again he acquired the added benefit of creating a vacancy on the intermediate appellate court which he had the opportunity to fill.

The retention election two years later—which I lost, making me the first and only judge to lose a retention election in Tennessee—did not change my point of view on the preferable and appropriate method for selecting judges, but it did enable me to view the tasks of judging from a different perspective.[3] I was no longer a judge or lawyer. Nor did I remain a member of the inner circle or the legal elite. Since I had chosen not to return to the practice of law, I was, in effect, not even a member of the legal fraternity. As a result, I gained the advantage of an outsider and was able to view the system objectively, rather than from my particular, subjective point of view.

I have spent the last ten years standing at a distance, rather than shoulder to shoulder with members of the bar or in robed isolation with members of the bench. I still bear and relish the benefit of my prior experiences, but I now endeavor to view the justice system in general and the tasks of judging in particular from the unique perspective of those who the justice system exists to serve, the general public.

Some obvious truths bear repeating. The justice system does not exist and should not function for the benefit of lawyers; nor is its raison d'étre the career advancement, job satisfaction, or job security of judges. The justice system exists to provide a fair, orderly, and efficient method of resolving disputes in accord with the rule of law. As John Adams noted in Article 29 of the Massachusetts Declaration of Rights, "It is the right of every citizen to be tried by judges as free,

---

2. *See* TENN. CODE ANN. § 17-4-102, repealed by 2009 Tenn. Pub. Acts ch. 517, § 1 (current version at TENN. CODE ANN. § 17-4-102 (West 2012)).

3. *See* Christine Buttorff, *WPLN News Feature Transcripts: Judicial Retention*, NASHVILLE PUB. RADIO (Aug. 3, 2006), http://wpln.org/?p=8050.

impartial, and independent as the lot of humanity will admit."[4]

This essay undertakes to address, first, the effects that the United States Supreme Court's decisions in *Republican Party of Minnesota v. White*[5] and *Citizens United v. Federal Election Commission*[6] have had on state courts.[7] Second, the essay suggests that robust disqualification[8] provisions can serve as a powerful antidote to the harmful effects of those two decisions, particularly when judges view disqualification requests from the public's perspective.

I. THE DECISION IN *WHITE*, ITS AFTERMATH, AND EFFECTS

A 5-4 majority of the Supreme Court in *Republican Party of Minnesota v. White* invalidated a provision of the Minnesota Code of Judicial Conduct that prohibited a judge or judicial candidate from announcing personal "views on disputed legal or political issues."[9] The decision was narrow in its scope[10] and application[11] but had wide-reaching effects, both on individual judges and on state

---

4. MASS. CONST. of 1780, art. XXIX; *see* 4 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 229 (1851).

5. 536 U.S. 765 (2002).

6. 130 S. Ct. 875 (2010).

7. As was noted, this essay is drawn largely from a presentation given in conjunction with the *Indiana Law Review*'s Symposium on merit selection. Because those in attendance were largely familiar with *White* and *Citizens United*, I did not undertake to explain why, as I do briefly here, those two decisions have had a negative effect on state courts, in my opinion.

8. Some have observed that, historically, judicial recusal referred to a judge's *sua sponte* decision to withdraw from hearing a case, while judicial disqualification referred to the procedure by which a litigant requested the judge to decline to hear the case. Clearly, this historical distinction is no longer observed. *See* MODEL RULES OF PROF'L CONDUCT R. 2.11 (1972) (utilizing the term "disqualification" to refer to both *sua sponte* withdrawal and withdrawal based upon a party's motion or request).

9. 536 U.S. 765, 788 (2002).

10. The "announce" clause, Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct, in effect at the time of the *White* case was part of the 1972 Model Code of Judicial Conduct. *See White*, 536 U.S. at 768. It provided that a "candidate for a judicial office, including an incumbent judge, shall not announce his or her views on disputed legal or political issues." *Id.* (internal quotation marks omitted) (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

11. *Id.*; *see id.* at 773 n.5, 786-87 (noting the limited number of states with provisions similar to the "announce clause" in effect in Minnesota, and that the provision had been modified in the revised Model Code of Judicial Conduct). Not only did the Court limit its grant of certiorari to one of several issues raised, *see* Petition for a Writ of Certiorari, Republican Party of Minnesota v. Kelly, 534 U.S. 1054 (2001) (No. 01-521), the Court also described the issue narrowly in the opening sentence of the opinion ("whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues"), and specifically confined the holding to the Minnesota announce clause ("[T]he Minnesota Code contains a so-called 'pledges or promises' clause . . . that is not challenged here and on which we express no view."). *White*, 536 U.S. at 768-70 (internal

courts as an institution.

Before the decision in *White*, most state judicial elections were low-key, decorous events in which candidates talked about their educational backgrounds, their professional experiences, and their military and community service.[12] This was the norm in judicial elections, not only because judicial ethics rules restricted political activity, but also because many judges envisioned themselves as a unique class of elected officials insulated from rough-and-tumble politics and high-dollar campaigns incumbent upon ordinary politicians.

The dispute that brought the *White* case to the Supreme Court was emblematic of an emerging landscape in judicial elections. A candidate for the Minnesota Supreme Court wanted to run on a platform which would include criticism of some of the decisions of the Minnesota high court and statements of his own views on the issues raised in those decisions.[13] When the state ethics board refused to endorse this type of campaigning, the candidate sued, challenging the restrictions placed upon him and other candidates for judicial office by the Minnesota Code of Judicial Conduct.[14] The United States Supreme Court limited its inquiry to only one of the challenged provisions[15] and ultimately agreed that the provision restricting candidates for judicial office from announcing their views on contested legal and political issues violated the First Amendment.[16]

The success of those mounting the constitutional challenge in *White* emboldened special interest groups and First Amendment advocates, while simultaneously cowering lower federal courts, state supreme courts, and judicial ethics bodies.[17] Special interest groups were now empowered to dispute judicial candidates' claims that they were ethically prohibited from answering questions

---

citation omitted).

12. *See* James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 FIRST AMENDMENT L. REV. 180, 180-81 (2007).

13. Gregory Wersal, a Minnesota lawyer, sought election to the Minnesota Supreme Court on three occasions. *See White*, 536 U.S. at 768-69. He filed the first of three lawsuits seeking to enjoin enforcement of several provisions of the Minnesota Code of Judicial Conduct during his 1996 election bid. *See* Republican Party of Minn. v. Kelly, 996 F. Supp. 875, 875-76 (D. Minn. 1998). The original lawsuit in *White*, 536 U.S. 765 (2002), was filed in the United States District Court by Gregory Wersal, his wife, and the following additional plaintiffs: the Republican Party of Minnesota, the Indian Asian American Republicans of Minnesota, the Republican Seniors, the Young Republican League of Minnesota, the Minnesota College Republicans; the Campaign for Justice, the Minnesota African-American Republican Council, the Muslim Republicans, Mark E. Wersal, Corwin C. Hulbert, Michael Maxim, and Kevin J. Kolosky. *See* Brief for Petitioners Party of Minn. et al. at *ii, Republican Party of Minn. v. Kelly, 996 F. Supp. 875 (1998) (No. 05-521).

14. *White*, 536 U.S. at 769-70, 769 n.2.

15. *Id.* at 768-70.

16. *Id.* at 788.

17. *See* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 297-98 (2008) (noting the many post-*White* challenges to judicial ethics rules).

about their political and personal opinions.[18] The questionnaires became the new weapon in state judicial races.[19] When candidates responded with answers that mirrored the interest groups' views, the candidates received either direct contributions or inclusion in the interest groups' issue advertisements or voters' guides.[20] Thus, the decision in *White* helped interest groups to simplify the task of identifying which judicial candidates to support politically and financially.[21]

Though significant, it seemed that this ability to identify, publicize, and fund like-minded candidates for judicial office did not satisfy special interest groups' and first amendment advocates' appetite for involvement in state judicial elections. These groups seemed to crave even greater influence in matters related to judicial selection, as was evidenced by the uncompromising stance they took against some candidates who chose not to respond to questionnaires. When candidates refused to answer, the groups often juxtaposed their refusal to answer with the stated views of cooperating candidates.[22] Moreover, some groups painstakingly differentiated between "decline to respond" and "refuse to respond," designating "decline to respond" as indicating a candidate's unwillingness to respond based on the candidate's perceived belief that state ethics rules prohibited a response.[23] When a candidate indicated that he or she

---

18. The questionnaires distributed to candidates for judicial office often included a recitation of the *White* holding along with an assurance that the questionnaire sought only the candidate's views, and not his or her pledges, promises, or commitments. For example, a letter drafted by James Bopp, plaintiff's counsel in *White*, and sent to Alaska judicial candidates by the Alaska Right-to-Life Committee in 2002, contained this introduction:

> The Alaska Right to Life [C]ommittee certainly recognizes that judicial candidates should maintain actual and apparent impartiality [and] should not pledge or promise certain results in particular cases that may come before them . . . . This questionnaire is intended to elicit candidates' views on issues of vital interest to the constituents of the Alaska Right to Life Committee without subjecting candidates answering its questions to accusations of impartiality or requiring candidates to recuse themselves in future cases.

POUND CIVIL JUSTICE INST., THE LEAST DANGEROUS BUT MOST VULNERABLE BRANCH: JUDICIAL INDEPENDENCE AND THE RIGHTS OF CITIZENS 15 n.130 (2010), *available at* http://www.roscoepound.org/2007%20Pound%20Forum%20Report.pdf (second and third alteration in original).

19. *Id.* at 15.

20. *Id.*

21. *See* 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, 345, 358-60 (2008).

22. *See, e.g.*, Camille M. Tribble, *Awakening a Slumbering Giant: Georgia's Judicial Selection System After White and Weaver*, 56 MERCER L. REV. 1035, 1067-68 (2005) (noting how one judge's refusal to answer specific questions in the Christian Coalition of Georgia survey put the candidate at a disadvantage to his opponent, who chose to advertise his conservative credentials).

23. For example, a questionnaire sent to candidates for judicial office in Kansas included a

was not responding because of ethics rules, or based on specific advice from state judicial bodies, the state judicial bodies frequently were sued.[24]

Based either on a misreading of *White* or a desire to avoid protracted and expensive litigation with an uncertain result, some lower federal courts, state supreme courts, and judicial ethics bodies unnecessarily dismantled or discontinued enforcement of numerous other important restrictions on judges' political speech and conduct,[25] while other courts distinguished and upheld limitations on political conduct by candidates for judicial office.[26] The advocates in *White* continue to challenge other provisions of the Minnesota Code of Judicial Conduct following the remand from the United States Supreme Court.[27] The result of these efforts were mixed, with the United States Court of Appeals for the Eighth Circuit striking some additional restrictions on political conduct in the Minnesota Code of Judicial Conduct,[28] and upholding others,[29] but by and large

---

paragraph describing the "decline to response" answer as follows:

> This response indicates that I would answer this question, but believe that I am or may be prohibited from doing so by Kansas Canon of Judicial Conduct 5A(3)(i) and (ii), which forbids judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" or "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." This response also indicates that I would answer this question, but believe that, if I did so, then I will or may be required to recuse myself as a judge in any proceeding concerning this answer on account of Kansas Canon 3E(1),which requires a judge or judicial candidate to recuse him or herself when "the judge's impartiality might reasonably be questioned. . . ."

Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1218 (D. Kan. 2006), *vacated*, 562 F.3d 1240 (10th Cir. 2009).

24. *See, e.g.*, Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002); *Stout*, 440 F. Supp. 2d at 1218-19; Ind. Right to Life, Inc. v. Shepard, 463 F. Supp. 2d 879 (N.D. Ind. 2006), *rev'd in part*, 507 F.3d 545 (7th Cir. 2007); Family Trust Found. of Ky., Inc. v. Wolnitzek, 345 F. Supp. 2d 672 (E.D. Ky. 2004).

25. *See, e.g.*, *Weaver*, 309 F.3d 1312; *Stout*, 440 F. Supp. 2d 1209; Duwe v. Alexander, 490 F. Supp. 2d 968 (W.D. Wis. 2007); *Shepard*, 463 F. Supp. 2d 879; N. Dakota Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021 (D. N.D. 2005); *Wolnitzek*, 345 F. Supp. 2d 672.

26. *See, e.g.*, Wersal v. Sexton, 674 F.3d 1010 (8th Cir. 2012); Bauer v. Shepard, 620 F.3d 704 (7th Cir. 2010).

27. Republican Party of Minn. v. White, 361 F.3d 1035, 1041 (8th Cir. 2004) (upholding challenges to partisan-activities and solicitation restrictions in Minnesota Code of Judicial Conduct), *vacated*, 416 F.3d 738, 744 (8th Cir. 2005) (en banc) (affirming judgment for the plaintiffs and holding that "the partisan-activities and solicitation clauses" violated the First Amendment).

28. *Id.* at 1047-49.

29. *See* Wersal v. Sexton, 607 F. Supp. 2d 1012 (D. Minn. 2009), *rev'd*, 613 F.3d 821 (8th Cir. 2010) (holding the endorsement and solicitation clauses violated the First Amendment), *and rev'd*, 674 F.3d 1010, 1013 (8th Cir. 2012) (en banc) (upholding the constitutionality of the

these ambiguous events have not led jurisdictions to reinstate or revisit their eliminated restrictions.

Because ethical restrictions on judicial political speech and conduct have been greatly diminished, the historical distinctions between judicial elections and elections for executive and legislative offices have been significantly lessened. Some suggest that the result is not only a more politicized state judiciary, but a less respected one as well.[30]

II. THE DECISION IN *CITIZENS UNITED*, ITS AFTERMATH, AND EFFECTS

With a simplified means of identifying judicial candidates' views on legal and political issues, interest groups are better able to filter funds to support like-minded candidates of their choice.[31] Even before the stopgaps on campaign expenditures were lifted by the United States Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*,[32] the *White* decision and other factors had prompted a deluge of spending in state judicial elections.[33] For

---

endorsement, personal solicitation, and political organization solicitation clauses of the Minnesota Code of Judicial Conduct). Wersal's most recent suit challenged restrictions on political endorsements and solicitations. The district court ruled against him, but a panel of the Eight Circuit reversed. Ultimately, an en banc panel of the Eighth Circuit upheld the district court ruling.

30. As Justice O'Connor noted in her concurring opinion in *White*, "Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so." Republican Party of Minn. v. White, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring). Justice O'Connor cited a 2001 national opinion poll that found "that 76% percent of registered voters believe that campaign contributions" affect judicial decision-making and that two-thirds of voters believe that judges give favorable treatment to donors. *Id.* at 790 (citing GREENBERG QUINLAN ROSNER RESEARCH, INC., JUSTICE AT STAKE CAMPAIGN & AM. VIEWPOINT, JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 4-5 (2001), *available at* www.justiceatstake.org/files/JASNationalSurveyResults.pdf).

31. *See supra* text accompanying notes 17-24.

32. 558 U.S. 310 (2010).

33. *See* JAMES SAMPLE ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON MONEY IN STATE POLITICS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE 1-2 (2010), *available at* http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83e3.pdf [hereinafter SAMPLE ET AL., JUDICIAL ELECTIONS 2000-2009]; JAMES SAMPLE ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON MONEY IN STATE POLITICS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006: HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS—AND HOW AMERICANS ARE FIGHTING BACK 15 (2007), *available at* http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf; DEBORAH GOLDBERG ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON MONEY IN STATE POLITICS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A "TIPPING POINT"—AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL 13-14 (2005), *available at* http://www.justiceatstake.

example, from 1990-1999, the decade before the 2002 *White* decision, judges seeking seats on America's fifty state supreme courts spent a combined total of over $83 million dollars.[34] In the near-decade that followed, 2000-2009, that amount nearly tripled, to $206.9 million,[35] with the increase being virtually across the board.[36] This spending trend continued and expanded in 2010 and 2011, with many states experiencing their most expensive state supreme court races ever[37] and with enormous amounts of out-of-state money being invested in a retention race in Iowa.[38]

While the decision in *White* provided a means by which special interest groups could identify judicial candidates who shared the groups' political ideologies, the United States Supreme Court's decision in *Citizens United* enabled corporations and labor unions to invest their funds and vastly influence the election of state court judges as well.[39] In the *Citizens United* decision, the Court invalidated portions of the Bipartisan Campaign Reform Act of 2002, which restricted corporate and union campaign expenditures.[40] In so doing, the Court overruled two decisions[41] that had upheld modest restrictions on campaign expenditures.[42]

Although the dispute in *Citizens United* arose from expenditures in an

---

org/media/cms/NewPoliticsReport2004_83BBFBD7C43A3.pdf.

34. SAMPLE ET AL., JUDICIAL ELECTIONS 2000-2009, *supra* note 33, at 1-2.

35. *Id.*

36. Twenty of the twenty-two states that elect their supreme courts witnessed their costliest judicial race ever in the last decade. *Id.* at 8.

37. Illinois Supreme Court Justice Thomas Kilbride spent nearly $3 million to retain his seat on Illinois' high court in a down-state race in 2011. ADAM SKAGGS ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON MONEY IN STATE POLITICS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10: HOW SPECIAL INTEREST "SUPER SPENDERS" THREATENED IMPARTIAL JUSTICE AND EMBOLDENED UNPRECEDENTED LEGISLATIVE ATTACKS ON AMERICA'S COURTS 8 (2011), *available at* http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf. Candidates for the Michigan Supreme Court in 2010 spent just over $2 million, while special interest groups spent an additional $6.8 million to $8.8 million. *Id.* at 3-4. Candidates for the Wisconsin Supreme Court agreed to public financing, which limited the amounts their respective campaigns could spend, but special interest groups spent an additional $3.6 million in the race. *Id.* at 11.

38. *Id.* at 8. Chief Justice Marsha Ternus, Justice David Baker, and Justice Michael Streight of the Iowa Supreme Court were defeated in a retention election in November 2010.

39. *See* ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, BUYING JUSTICE: THE IMPACT OF *CITIZENS UNITED* ON JUDICIAL ELECTIONS 1-2 (2010), *available at* http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=1 [hereinafter SKAGGS, BUYING JUSTICE].

40. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 886-87 (2010).

41. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003) (per curiam), *overruled by Citizens United*, 130 S. Ct. at 876; Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. at 876.

42. *Citizens United*, 130 S. Ct. at 886.

executive branch campaign[43] and dealt explicitly with federal campaign finance laws,[44] the decision eliminated a distinction between individual and corporate expenditures, recognized the First Amendment rights of corporations and unions,[45] and rejected the notion that independent expenditures, including those made by corporations and unions, could give rise to corruption or the appearance of corruption.[46] Thus, the decision's ill effects will not be limited to federal elections.

Both the majority[47] and the dissent acknowledged the decision's broader implications for state judicial elections, but the dissent more aptly forecast the concern:

> [T]he consequences of today's holding will not be limited to the legislative or executive context. The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, the Court today unleashes the floodgates of corporate and union general treasury spending in these races.[48]

As was true in the aftermath of the decision in *Republican Party of Minnesota v. White*, courts have already begun expanding the reach of the *Citizens United* holding. In *SpeechNow.org v. Federal Election Commission*, for example, the United States Court of Appeals for the D.C. Circuit invalidated a cap on campaign contributions to independent political groups who spent money in direct support of candidates for federal office.[49] The *SpeechNow* case involved restrictions on campaign contributions, not campaign expenditures, as were at issue in *Citizens United*, but the D.C. Circuit applied the rationale of *Citizens United* to a different set of facts and invalidated restrictions, not on campaign expenditures, but on campaign contributions.[50]

Even before the full effects of the decision in *Citizens United* are felt, the public believes that the entanglement of money and special interest is having a

---

43. *Id.* (evaluating the legality of the airing of a movie regarding Secretary of State Hillary Clinton when she was a candidate for the Democratic Party's presidential nomination). *Id.* at 887.

44. *Id.* at 886-87 (raising challenges to the federal Bipartisan Campaign Reform Act of 2002).

45. Some commentators have referred to the decision as bestowing "personhood" on corporations and unions. *See, e.g.*, Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 720-21 (2011).

46. *Citizens United*, 130 S. Ct. at 908.

47. *Id.* at 910-11.

48. *Id.* at 968 (Stevens, J., concurring in part and dissenting in part) (internal citation omitted).

49. 599 F.3d 686, 696 (D.C. Cir. 2010).

50. *Id.* at 692-93, 695 ("Because of the Supreme Court's recent decision in *Citizens United v. FEC*, the analysis is straightforward. There, the Court held that the government has *no* anti-corruption interest in limiting independent expenditures. . . . Given this analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechNow.").

toxic effect on state courts.[51] Recent studies show that more than three-fourths of the public believes that campaign contributions influence judicial decision-making.[52] When asked to quantify the influence, 89% of those surveyed said that money buys influence in the courts, and 90% of the surveyed voters agreed that a judge should not preside over a case involving any of his or her campaign contributors.[53] Equally disconcerting is that 80% of the public expresses concern with the influence that special interest groups exert over state courts.[54] Accordingly, when public trust in the judicial process is undermined, the public will become disenfranchised, disengaged, and disinterested in the courts.[55]

---

51. Professor Zephyr Teachout, an expert on political corruption, provides a significant argument about the dangers corruption creates for the Constitution. *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009). Teachout argues that the *Citizens United* Court ignored the Framers' concerns with preventing corruption. She posits that the Framers of the American Constitution were acutely concerned about political corruption and that they largely viewed the Constitution as a safeguard against political corruption. *Id.* at 347. To curb the potential for political corruption, defined as the "self-serving use of public power for private ends," Teachout argues that the Framers regulated elections, imposed term limits, limited acceptance of foreign gifts, outlined impeachment provisions, and provided for the separation of powers. *Id.* at 373-74. With regard to the Judicial Article, Professor Teachout notes that "[m]any of the Article III discussions concerned ways to ensure the independence of the judiciary. The judiciary, it was argued, needed to be independent of both 'the gust of faction' and corruption. Thus, in determining the method of selection of judges, the Framers were concerned with dependency and corruption. . . . The determination that judges were to hold their office during good behavior meant the absence of corruption. Similarly, the jury protection came in part from the anti-corruption urge. . . . Likewise, inferior courts were established in part due to anti-corruption concerns." *Id.* at 368-69 (footnotes omitted).

52. *See* SAMPLE ET AL., JUDICIAL ELECTIONS 2000-2009, *supra* note 33, at 68 (figure 33). Additionally, in an October 2011 survey, only 3% of the public expressed a belief that campaign contributions have "no influence" over judges' decisions. *National Registered Voters Frequency Questionnaire*, 20/20 INSIGHT LLC, at Q6 (Oct. 10-11, 2011), *available at* http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf [hereinafter *20/20 Survey*].

53. SKAGGS, BUYING JUSTICE, *supra* note 39, at 4. *See 20/20 Survey*, *supra* note 52, at Q6 (96% of surveyed voters believe campaign contributions have either a "great deal," "some," or "just a little" influence on a judge's decisions involving those contributors); Memorandum from Stan Greenberg, Chairman & CEO of Greenberg Quinlan Rosner Research, Inc., & Linda A. DiVall, President of Am. Viewpoint, to Geri Palast, Exec. Dir. of Justice at Stake Campaign (Feb. 14, 2002), *available at* http://justiceatstake.org/media/cms/PollingsummaryFINAL_9EDA3EB3BEA78.pdf.

54. *See* SKAGGS, BUYING JUSTICE, *supra* note 39, at 4; Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 962 (2010) (Stevens, J., concurring in part and dissenting in part) (citing McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 623-24 (D.C. Cir. 2003) (per curiam)).

55. To illustrate, see Gregory C. Pingree, *Where Lies the Emperor's Robe? An Inquiry into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1098 (2007).

III. FINDING A SILVER LINING

Although the decisions in *White* and *Citizens United* lionized the First Amendment, not all of the justices who joined to form the majority opinions completely disregarded the adversaries' concerns about the effect that unfettered political speech and unlimited campaign expenditures would have on state courts. In both cases, Justice Kennedy, author of a concurring opinion in *White* and the majority opinion in *Citizens United*, addressed these concerns, but he cautioned that fear of the effects of political speech and campaign expenditures could not be allowed to suppress the exercise of important First Amendment freedoms.[56] Rather than restrict important speech rights, Justice Kennedy suggested that robust judicial disqualification rules could be used to ameliorate the feared effects.[57] In so doing, Justice Kennedy, in essence, embraced judicial disqualification as an antidote to the harms occasioned by an unyielding First Amendment.

While the First Amendment would not tolerate restrictions on political speech and campaign expenditures, states could articulate standards of judicial conduct that advanced the state's interest in assuring "citizen's respect for judgments [which] depends in turn upon the issuing court's absolute probity."[58] "Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office."[59] In his concurring opinion in *White*, Justice Kennedy counseled states to "adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."[60]

Justice Kennedy's support for robust recusal provisions in *White* acquired added significance in light of his majority opinion, as well as Chief Justice Robert's dissenting opinion, in *Caperton v. A.T. Massey Coal Co.*, a case in which judicial recusal was actually at issue.[61] In *Caperton*, the Court held that due process requires recusal when "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent"[62] such as existed in the case before the Court.[63] Although the dissenting justices were extremely critical of the *Caperton*

---

56. *Citizens United*, 130 S. Ct. at 910; Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

57. *Citizens United*, 130 S. Ct. at 910; *White*, 536 U.S. at 793-94 (Kennedy, J., concurring).

58. *White*, 536 U.S. at 793 (Kennedy, J., concurring).

59. *Id.* at 794.

60. *Id.*

61. 556 U.S. 868, 872 (2009).

62. *Id.* at 884.

63. A newly elected judge on West Virginia's highest court refused to recuse himself and ultimately voted to reverse a $50 million jury verdict against a company whose chair, president, and chief executive officer had donated more than two-thirds of the judge's campaign's total funds and

holding[64] and predicted that the probability of bias standard would in fact diminish public confidence in the system, even the dissenting opinions endorsed the freedom of states to adopt broad recusal rules.[65]

Perhaps based on this apparent consensus, the four dissenting justices in *Citizens United* suggested that the *Caperton* holding undermined *Citizen United*'s position.[66] Justice Kennedy curtly disposed of any implication of incompatibility between the litigant's due process rights recognized in *Caperton* and the First Amendment rights of individuals, corporations, and unions to expend funds in political campaigns.[67] Although Justice Kennedy matter-of-factly observed that the connection between a contributor and a candidate for judicial office could not be eliminated by banning or curbing political speech, he reiterated that states could require judicial disqualification.[68]

If a silver lining exists, it is in the recognition that states may mandate robust disqualification standards, informed by the states' interest in enhancing the public's confidence in the courts.[69] Strong disqualification provisions can counterbalance the unfortunate effects of the decisions in *Republican Party of Minnesota v. White*[70] and *Citizens United v. Federal Election Commission*.[71] Consistent application of those strong provisions will curtail the incentive of special interest groups to invest in judicial races. Even the potential that a judge may disqualify herself will likely cause groups to reevaluate their investments.

Shouldering Justice Kennedy's suggestions, the American Bar Association[72]

---

spent an additional half of a million dollars supporting the judge's candidacy. *Id.* at 872-73.

64. *See id.* at 902 (Roberts., C.J., dissenting) ("I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous 'probability of bias,' will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts."); *see also id.* at 902-03 (Scalia, J., dissenting) (lamenting that "the principal consequence of today's decision is to create vast uncertainty with respect to a point of law . . . . This course was urged upon us on grounds that it would preserve the public's confidence in the judicial system. . . . . The decision will have the opposite effect.").

65. *Id.* at 892-93 (Roberts, C.J., dissenting) (joined by Justices Scalia, Thomas, and Alito).

66. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 967-68 (2010) (Stevens, J., concurring in part and dissenting in part) (joined by Justices Ginsburg, Breyer, and Sotomayor).

67. *Id.* at 910 (majority opinion) (observing that "*Caperton* . . . is not to the contrary. . . . *Caperton's* holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.").

68. *Id.*

69. *See* Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (noting that "[j]udicial integrity is, in consequence, a state interest of the highest order.").

70. *Id.* at 768.

71. *Citizens United*, 130 S. Ct. at 886.

72. In August 2011, the American Bar Association House of Delegates passed Resolution 107, which "urge[d] states to establish clearly articulated procedures for: [j]udicial disqualification determinations; and [p]rompt review . . . of denials of requests to disqualify." A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, A.B.A., RESOLUTION 107 (revised July 22, 2011) (adopted by

and some states have undertaken to revise their judicial disqualification provisions.[73] The Tennessee Supreme Court, for example, recently adopted new judicial disqualification rules, with both substantive and procedural changes,[74] which have been widely applauded and positively received.[75] Other states have attempted recusal reform only to face internal dissension. In Wisconsin, for

---

the ABA House of Delegates on Aug. 8-9, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/report107_judicial_disqualification.authcheckdam.pdf. Resolution 107 also recommended that states provide for a prompt review of a denied disqualification motion, conducted by a different judge and that states in which judges are elected adopt provisions requiring disclosures of direct and indirect campaign support and guidelines regarding disqualification of judges presiding over cases involving litigants or lawyers who have contributed support. *Id.* Following the passage of Resolution 107, the ABA Standing Committees on Judicial Independence and Ethics and Professional Responsibility conducted public hearings on proposed amendments to the Model Code of Judicial Conduct. *See, e.g.*, A.B.A. STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY & A.B.A. STANDING COMM. ON PROF'L DISCIPLINE, *Proposed Amendments to the Model Code of Judicial Conduct Regarding Judicial Disqualifications*, A.B.A. (Feb. 3, 2012), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20111228_scepr_draft_proposed_amendments_and_hearing_notice_dec_2011.authcheckdam.pdf.

73. According to the American Judicature Society, nine state supreme courts have adopted judicial disqualification rules that address campaign contributions in light of and consistent with the decision in *Caperton v. A.T. Massey Coal Co*., 556 U.S. 868 (2009). Those states include: Georgia, Iowa, Michigan, Missouri, New Mexico, North Dakota, Oklahoma, Tennessee, Washington. *See Judicial Disqualification Based on Campaign Contributions*, AM. JUDICATURE SOC'Y 5-10 (last updated Mar. 8, 2012), http://www.ajs.org/ethics/pdfs/Disqualification contributions.pdf.

74. The revised Tennessee Rules of Judicial Conduct retain their previous standard, which requires disqualification of a judge whose "impartiality might reasonably be questioned," but expand the non-exclusive list of circumstances which may require disqualification. TENN. SUP. CT. R. 10, Rule 2.11(A). Specifically, disqualification is required when "[t]he judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has made contributions or given such support to the judge's campaign that the judge's impartiality might reasonably be questioned." *Id.* Rule 2.11(A)(4). Comment 7 clarifies that the fact of contribution "does not of itself disqualify the judge," but requires consideration of a number of detailed factors. *Id.* Rule 2.11 cmt. 7. Additionally, the rule requires disqualification when the judge "has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." *Id.* Rule 2.11(A)(5).

The procedural changes in the Tennessee rules effect both trial and appellate judges. The revised Tennessee rules require trial judges to rule "promptly by written order," which, in the event the motion is denied, includes the grounds for denial. TENN. SUP. CT. R. 10, Rule 2.11(D); TENN. SUP. CT. R. 10B § 1.03. Appellate review of denied disqualification motions is *de novo* and expedited. Tenn. Sup. Ct. R. 10B § 2.01.

75. *See, e.g.*, Editorial, *A Reform for Fair Courts*, N.Y. TIMES, Jan. 30, 2012, at A22, *available at* http://www.nytimes.com/2012/01/30/opinion/a-reform-for-fair-courts.html.

example, a majority of the Supreme Court declined to adopt rules requiring recusal in cases involving endorsements, lawful campaign contributions, independent expenditures, or "issue advocacy communications" made by individuals or entities regardless of the amount or content and notwithstanding the involvement of the individuals or entities in the proceedings before the court.[76] Similarly, in Nevada, justices rejected a proposal that would have made disqualification mandatory when a judge received contributions totaling $50,000 or more from a party or lawyer during the previous six-year period.[77]

Still other states have faced legal challenges based on proposed modifications to their judicial disqualification standards. First Amendment advocates maintain that disqualification rules

> have merely shifted unconstitutional regulations of speech from an ex ante prohibition of speech during judicial campaigns to an ex post

---

76. Petitions were filed requesting the Wisconsin Supreme Court to amend the judicial disqualification rules applicable to disqualification based on campaign contributions. A petition filed by the League of Women Voters of Wisconsin sought to require disqualification for contributions over $1000 within the preceding two years of the election. *See* Petition of the League of Women Voters of Wis. Education Fund to the Wis. Supreme Court, at 3, *In re* Creation of Rules for Recusal When a Party or Lawyer in a Case Made Contribution Effecting a Judicial Campaign (amended July 28) (No. 08-16), *available at* http://www.wicourts.gov/supreme/docs/0816petition.pdf. Petitions filed by the Wisconsin Realtors Association and the Wisconsin Manufacturers and Commerce took the position that disqualification should never be required based on a lawful campaign contribution. Petition for Supreme Court Rule of the Wisconsin Realtors Assoc. to the Justices of the Wis. Supreme Court at 1, *In re* Amending the Rules of Judicial Conduct (Sept. 30 2008) (No. 08-25), *available at* http://wicourts.gov/supreme/docs/0825petition.pdf; Petition for Supreme Court Rule of the Wisconsin Manufacturers & Commerce to the Justices of the Wis. Supreme Court at 1, *In re* Amending the Code of Judicial Conduct (Oct. 16, 2009) (No. 09-10), *available at* http://wicourts.gov/supreme/docs/0910petition.pdf. The court adopted two rules that provided that judges "shall not be required to recuse" based solely on endorsements, campaign contributions, independent expenditures, or "issue advocacy communication" including endorsements, contributions, expenditures, or issue advocacy communications from or by individuals or entities involved in the proceeding. WIS. SUP. CT. RULES 60.04(7); 60.04(8). For a full discussion of the petitions and the adoption of the rules, see *Legislative Report: Special Legislative Committee Studies Judicial Discipline and Recusal*, WIS. CIVIL JUST. COUNCIL, INC., http://www.wisciviljusticecouncil.org/policy-project/legislative-report-special-legislative-committee-studies-judicial-discipline-and-recusal/#_ftn3 (last visited Nov. 28, 2012).

77. Editorial, *Can Justice Be Bought?*, N.Y. TIMES, June 16, 2011, at A34, *available at* http://www.nytimes.com/2011/06/16/opinion/16thu1.html?_r=1. *Nevada Judicial Code Commission Issues Proposed Amendments*, ADMIN. OFFICE (Oct. 23, 2008), http://www.nevadajudiciary.us/index.php/njccnews/130-nevada-judicial-codecommission-issues-proposed-amendments; *2009 Nevada Code of Judicial Conduct*, WASHOE CNTY. BAR ASSOC. (Feb. 2010), http://www.wcbar.org/documents/JudicialCode.Feb2010.Handouts.pdf; Order, *In re* Amendment of the Nevada Code of Judicial Conduct, ADKT 427 (Nev. 2009), *available at* http://www.leg.state.nv.us/courtrules/SCR_CJC.html.

> formulation that requires judges to disqualify themselves for statements they have made, all the while continuing to reach the same speech protected in [*White*]: the right of judges and judicial candidates to announce their views.[78]

These advocates argue that forcing judges to disqualify themselves unconstitutionally chills protected political speech and conduct.[79]

The recent United States Supreme Court decision in *Nevada Commission on Ethics v. Carrigan* appears to undermine this argument.[80] At issue in *Carrigan* was a conflict-of-interest recusal provision of the Nevada Ethics in Government Law.[81] Carrigan, a public official, was censured for voting on a matter involving his close friend and campaign manager.[82] Carrigan challenged the constitutionality of the Nevada law, arguing that it violated the First Amendment.[83] The Nevada Supreme Court agreed with Carrigan's argument and held "that voting by an elected public officer on public issues is protected speech under the First Amendment."[84] Several states, as amici, urged a reversal of the Nevada Supreme Court's holding.[85] They argued that disqualification rules are "a measured response to the credibility gap between the public and its public officials."[86] To their delight, a unanimous Supreme Court agreed.[87]

Justice Scalia, writing for seven members of the Court, upheld the constitutionality of the Nevada ethics provision based on the history and tradition of recusal rules in the United States.[88] Because these rules have long been a part of the American tradition and history, their constitutionality is presumed.[89] And

---

78. James Bopp, Jr. & Anita Y. Woudenberg, *An Announce Clause by Any Other Name: The Unconstitutionality of Disciplining Judges Who Fail to Disqualify Themselves for Exercising Their Freedom to Speak*, 55 DRAKE L. REV. 723, 724 (2007) (internal footnotes omitted).

79. *Id.* at 739 (submitting that "[r]ecusal for announcing one's view is unprecedented").

80. Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011).

81. *Id.* at 2346. The specific provision prohibited a public officer from "vot[ing] upon or advocat[ing] the passage or failure of . . . a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by [his or her] commitment in a private capacity to the interests of others." *Id.* (quoting NEV. REV. STAT. ANN. § 281A.420(3) (West 2011)).

82. Carrigan v. Comm'n on Ethics, 236 P.3d 616, 618-19 (2010) (en banc), *rev'd*, *Nev. Comm'n on Ethics*, 131 S. Ct. at 2352.

83. *Nev. Comm'n on Ethics*, 131 S. Ct. at 2347.

84. *Carrigan*, 236 P.3d at 621.

85. *See* Brief of Florida et al., Amici Curiae in Support of the Petitioner at 2-3, Carrigan v. Comm'n on Ethics, 236 P.3d 616 (2010) (No. 10-568) (2011 WL 771327 at **2-3).

86. Brief of Florida et al. as Amici Curiae in Support of the Petition for a Writ of Certiorari at 6, Carrigan v. Comm'n on Ethics, 236 P.3d 616 (2010) (No. 10-568) (2010 WL 4852436 at *6).

87. Justices Kennedy and Alito filed concurring opinions. *Carrigan*, 131 S. Ct. at 2352 (Kennedy, J., concurring); *id.* at 2354 (Alito, J., concurring in part and concurring in judgment).

88. *Id.* at 2346-48 (majority opinion).

89. *Id.* at 2347-48 (noting that "[a] universal and long-established tradition of prohibiting

although the case before the Court concerned legislative recusal rules, the majority opinion explicitly referenced longstanding judicial disqualification statutes.[90] Most noteworthy were two observations, one by Justice Scalia and the other by Justice Kennedy. Justice Scalia gratuitously commented that "there do not appear to have been any serious challenges to judicial recusal statutes as having unconstitutionally restricted judges' First Amendment Rights"[91] and differentiated between rules that restrict exercising the functions of one's office (be that voting as a legislature or ruling as a judge) and rules that restrict speech.[92] Justice Kennedy meticulously distinguished between the role of legislators and the role of judges and the corresponding breadth of applicable disqualification rules:

> The differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the other, may call for a different understanding of the responsibilities attendant upon holders of those respective offices and of the legitimate restrictions that may be imposed upon them.[93]

IV. URGING A NEW PERSPECTIVE ON JUDICIAL DISQUALIFICATION

These aspects of the *Carrigan* rationale should provide an adequate defense to constitutional challenges against strong state judicial disqualification rules.[94] But even if the decision in *Carrigan* is ultimately confined to its facts, robust judicial disqualification rules can remain a strong antidote to the toxic effects of *White* and *Citizens United* if individual judges consider the broad view of the public when ruling on disqualification motions.

Perhaps human nature causes judges to view disqualification motions as a challenge to their personal integrity. Certainly, no judge, and arguably no person, enjoys being told that he or she is, or appears to be, unfair. It is understandable, therefore, that some (perhaps, many) judges take umbrage at the filing of disqualification motions. These motions may track the language of judicial ethics rules and allege that the judge's "impartiality might reasonably be questioned."[95] Judges may be offended by the allegations that they believe challenge their good

---

certain conduct creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness.") (quoting Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002) (internal quotation marks omitted)).

90. *Id.* at 2348-49.

91. *Id.* at 2349.

92. *Id.* at 2349 n.3.

93. *Id.* at 2353 (Kennedy, J., concurring) (internal citation omitted).

94. *See* Keith Swisher, *Recusal, Government Ethics, and Superannuated Constitutional Theory*, 72 MD. L. REV. (forthcoming Dec. 2012).

95. TENN. SUP. CT. R. 10, Rule 2.11(A).

name and reputation.[96] They may view the motion as suggesting that they lack the most essential characteristic of good judging—the ability to judge a case impartially.

But judges must battle these natural instincts to consider the motions as personal attacks[97] or criticisms and instead reflect on the underlying purpose for judicial disqualification motions—to preserve public trust and confidence in the judiciary.[98] Judges should strive to set aside personal reactions to disqualification motions and view the motions, instead, in light of their underlying purpose, against a backdrop of history,[99] and in the face of modern attempts to undermine the integrity of state courts.

When motions for disqualification are viewed as a vehicle for upholding the court's integrity, rather than as a personal attack or criticism of an individual judge, the importance of taking into account the broader perspective of the public becomes apparent. The view from outside the system, from the non-judge, focuses on preserving the integrity of the system. That preservation, rather than the individual judge's desire to remain free from challenge, is the overriding concern.

Viewing disqualification methods from the public's perspective is consistent with some of the longstanding per se disqualification rules. A good example is Rule 2.11, which prohibits a judge from sitting in cases in which a person "within the third degree of relationship to" the judge is a party or in cases in which the

---

96. Unfortunately, this was the attitude expressed by the Chief Justice in his dissenting opinion in *Caperton v. A.T. Massey Coal Co*., 556 U.S. 868, 898, 902 (2009) (Roberts, C.J., dissenting) (asking "Does the *judge* get to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case?" and predicting that an upsurge in recusal motions would tarnish judges' reputations and diminish respect for the judicial system).

97. I do not intend to suggest that all disqualification motions are meritorious. I know that many are not and that some lawyers attempt to "game" the system, but I adhere to views I have expressed previously—that the ramifications of filing spurious disqualification motion are great enough to deter most lawyers from doing so.

98. *See* H.R. Rep. No. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355; S. Rep. No. 93-419, at 5 (1973) (noting that the federal judicial disqualification statute "is designed to promote confidence in the impartiality of the judicial process").

99. Not only are judicial disqualification rules ingrained in American history and tradition, they were also an established part of common-law and civil law jurisprudence. *See, e.g.*, Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 DRAKE L. REV. 751, 753 (2010) (noting that Congress passed "the first federal judicial disqualification statute in 1792," but that "the notion that judges should stand fair and detached between the parties who appear before them did not originate with Congress"); John P. Frank, *Disqualification of Judges*, 56 YALE L. J. 605, 610 (1947) (noting that judges were disqualified at common law only for direct pecuniary interests, which "took many forms"); Harrington Putnam, *Recusation*, 9 CORNELL L. Q. 1, 3 (1923) (citing to the *Codex* of Justinian, dated 529-534 A.D.) (noting that "[t]he chief ground of recusation in continental practice . . . has been on the salutary doctrine that the personal attitude of the judge toward the litigant, or toward the cause itself shall be above all suspicion").

judge previously presided in another court.[100] These per se disqualification provisions do not exist to disqualify judges who are actually biased. Rather, they are based on appearances—the appearance that is created when a judge presides over a case in which a relative is involved, including a relative whom the judge may not know, or the appearance that is created when a judge presides over a case in which he has previously ruled, including a case that the judge does not recollect.[101]

Disqualifications based on per se rules rarely seem to trigger negative reactions. The affected judge is not offended; nor is he or she viewed in a negative light. Custom and practice simply dictate that judges will step aside in these cases. In the same manner, and within time, custom and tradition will adhere to other disqualification motions, eliminating negative connotations and replacing the unhelpful undertones with a healthy acceptance of their beneficial purpose.

We are reminded with every new survey that the most important source of public dissatisfaction with the justice system is its perceived unfairness.[102] This source of dissatisfaction becomes clear when we step back and view the system from the perspective of someone who is outside the legal system. The public can almost never know with certainty that a decision is unfair. They will rarely have sufficient information about the legal or factual background to make that determination, but they definitely sense when the system *seems* unfair. It is that perception of unfairness that promotes disrespect and erodes public trust and confidence in the courts. So from the perspective of those for whom the system exists—those who the system is designed to serve—the single most important concern is that the justice system not only be fair but also appear to be fair. Justice is as it is perceived to be.

When a judge receives a disqualification motion, the tendency is for the judge to ask, "Am I biased?"; "Can I be fair?"; or "Did I do something wrong?" These are the wrong questions posed from the wrong perspective. Rather, the judge should ask: "Will the integrity of the system suffer if I hear this case?"; "Will the

---

100. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2), (6) (2011).

101. *See id.* R. 2.11 (A)(6) (setting out *per se* disqualification rules).

102. Research indicates, for example, that the perception of, and thus respect for, the judiciary is influenced not only by the nature of the outcome of its work—that is, the public's agreement or disagreement with court decisions—but also by the degree to which the system is perceived to be procedurally and substantively fair. "People who believe specific decisions are wrong, even wrongheaded, and individual judges unworthy of their office" will continue to accept judicial decisions "if they respect the court as an institution that is generally impartial, just, and competent." Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitmation of Regime Change*, *in* FRONTIERS OF JUDICIAL RESEARCH 275 (Joel B. Grossman & Joseph Tanenhaus eds., 1969). *See* James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 469, 471 (1989); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621, 621-22 (1991).

public's impression of justice be affected negatively if I decide the issue?"; and "Will my sitting as a judge in this case undermine the public's trust and confidence in the judiciary?" At the risk of being overly unsophisticated, the proper inquiry is no more than slightly varied from the ancient Hippocratic oath, often quoted as simply "first, do no harm."[103] When ruling on motions to disqualify, a judge's duty should be first and foremost to do no harm to the institution of justice.

Not long ago, a judge who was at the center of a disqualification controversy confronted me after I had written an article addressing his situation. He scolded me for not calling him and getting his point of view on the disqualification motion. My response was respectful, but candid: "Judge, I'm sorry, but it's just not about you!" Judges should resist viewing disqualification motions as personal accusations because doing so promotes the judges' personal interests above much more substantial concerns about the integrity of the justice system.

CONCLUSION: UNDERTAKING THE "WORK OF A LIFETIME"

As the judicial selection landscape shifts, so too must the perspectives from which judges view disqualification motions. This shift in perspective is a key step to inoculating the justice system against the ill effects of the decisions in *White* and *Citizens United*. As states struggle to draft strong, yet enforceable disqualification standards, judges too must struggle to promote the public good over their personal concerns. Robust disqualification standards will act as a disincentive only to the extent that judges rigorously apply those standards.

Justice Kennedy noted in *White* that "[t]o comprehend, then to codify, the essence of judicial integrity is a hard task."[104] But he cautioned that the enormity and complexity of the task "should not dissuade the profession."[105] States who undertake that hard task have the value of a diversity of opinion on which

---

103. For additional background on the Oath, see Lisa R. Hasday, *The Hippocratic Oath as Literacy Text: A Dialogue Between Law and Medicine*, 2 YALE J. HEALTH POL'Y L. & ETHICS 299, 301, 313 (2002). The oath dates back to the fourth or fifth century B.C. and is generally thought of as an oath taken by members of the medical profession promising to perform their practices ethically. *Id.* at 301. Other professional communities have required similar codes. Kim Economides, then a Professor of Legal Ethics at the University of Exeter School of Law, posed this question in the *London Times*: "Should there not be some kind of Hippocratic Oath for lawyers so that, in the future, lawyers' commitment to justice and the rule of law is more than purely rhetorical?" *Lawyers Take a Stand*, TIMES (London), May 17, 2008. Similarly, the Society of Ethical Attorneys at Law requires its members to take an oath similar to Hippocratic Oath, requiring its members to promote "honesty, clarity and integrity in the practice of law." *Oath*, SOC'Y OF ETHICAL ATTORNEYS AT LAW, http://www.societyofethicalattorneys.org/index.php?p=oath (last visited Nov. 29, 2012).

104. Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

105. *Id.* at 794.

standards should be adopted, but these divergent viewpoints do not dilute the benefit of consensus on the most fundamental issue before us: state courts must maintain public trust and confidence in order to play their vital role in our democracy. Yet even the most well-defined code will fail without judges who embark upon the "work of a lifetime" in a continual struggle for judicial integrity.[106]

106. *Id.*

ASSURING DUE PROCESS THROUGH MERIT SELECTION OF JUDGES

FRANK SULLIVAN, JR.*

Because of recent developments in election campaigns for judicial office, I maintain merit selection systems are a better way to choose judges than popular elections. To understand why, I ask the reader to examine the topic from the viewpoint of a future litigant.[1] Imagine yourself in court for some reason: perhaps a plaintiff in a personal injury case or a collection case; a divorcing husband or wife; or for another reason altogether.

Now that you are in court, what do you want from the judge? To win? Perhaps. But I think, upon reflection, what we really want from the judge is not so much to win but to receive a fair and impartial adjudication of our claim or defense. In point of fact, the United States Constitution—specifically our constitutional right to "due process of law"—guarantees us a fair and impartial judge.[2]

The topic of selecting judges who will render fair and impartial justice is inextricably linked with the subject of holding them accountable when they fail to uphold this standard. Suppose the judge in our case rules against us. Should the judge be disciplined or otherwise held accountable? That depends. If the judge rendered a fair and impartial judgment, the judge should not be disciplined just because we disagree with the result. Conversely, if the judge did not render a fair and impartial judgment, the judge has violated our constitutional rights and probably should be held accountable. Let me use two examples to illustrate.

My first example is from Shakespeare. It's a rather coarse story, but by using Shakespeare, I avoid speaking ill of any judge who has been alive during the last four centuries. The play is *Measure for Measure*, which is not one of Shakespeare's best-known works.[3] In it, Angelo, a judge in Vienna, sentences

---

* Justice, Indiana Supreme Court (1993-2012). LL.M., University of Virginia School of Law (2001); J.D., Indiana University Maurer School of Law (1982); A.B., Dartmouth College (1972).

This Article is dedicated to Randall T. Shepard, Chief Justice of Indiana from 1987 to 2012. His keen observations and broad wisdom on judicial selection matters infuse this entire Article. This Article is based upon remarks first delivered at the Saint John's University Eugene McCarthy Center For Public Policy & Civic Engagement, Collegeville, Minnesota, on January 31, 2011. I thank Thomas Joyce, Tom Read, and the McCarthy Center for their and its hospitality on that occasion. I owe particular thanks to my law clerk, Aaron Craft, for his assistance on this project.

1. This viewpoint was inspired by the insight in a debate over the free speech rights of judicial candidates; the competing constitutional interest is the due process rights of future litigants. Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1083-92 (1996).

2. *See* U.S. CONST. amends. V, XIV, § 1; Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876-81 (2009); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 819-25 (1986); Ward v. Vill. of Monroeville, 409 U.S. 57, 59-60 (1972); *In re* Murchison, 349 U.S. 133, 135-36 (1955); Tumey v. Ohio, 273 U.S. 510, 522-23 (1927).

3. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE.

a young man, Claudio, to death for violating a law against immorality.[4] When Claudio's sister seeks mercy, Judge Angelo offers to pardon Claudio on the condition that she have an affair with him.[5]

Could there be a greater insult to fairness and impartiality than this? A judge is essentially soliciting a carnal bribe for rendering judgment in a particular way. Such a judge should be held accountable for violating Due Process and punished accordingly.

My second example is completely different. It is a true story. In 1931, nine African-American teenaged males were arrested and jailed in Scottsboro, Alabama, for allegedly raping two young white women.[6] Twelve days later, eight of them were convicted and sentenced to death.[7] After the United States Supreme Court reversed the convictions in 1932,[8] a new trial was convened for one of the nine, Haywood Patterson, before a new judge, Judge James E. Horton, Jr.[9] The jury voted to convict and sentence Patterson to death.[10] Judge Horton found the evidence insufficient and set both the verdict and death sentence aside.[11] Judge Horton was defeated in the next election.[12] Here was a judge who provided a litigant due process of law but was punished for it.

Our constitutional right to due process of law guarantees us a fair and impartial adjudication of our case.[13] The stories of Judge Angelo and Judge Horton teach us, first, that a judge who does not behave fairly and impartially should be held appropriately accountable. Secondly, a judge should not be punished, at the ballot box or otherwise, for a fair and impartial decision simply because it is politically unpopular.

This Article is both about selecting judges who will render fair and impartial decisions and about holding them accountable when they do not. The electorate holds elected judges accountable through the ballot box. Alternatively, state codes of judicial conduct[14] and a periodic "retention" vote[15] hold merit-selected

---

4. *Id.* act 1, scs. 2, 4.

5. *Id.* act 2, sc. 4.

6. JAMES GOODMAN, STORIES OF SCOTTSBORO 4-5 (1994).

7. *Id.* at 6.

8. Powell v. Alabama, 287 U.S. 45, 71-73 (1932).

9. GOODMAN, *supra* note 6, at 118, 125-35.

10. *Id.* at 136-46.

11. *Id.* at 173-82.

12. *Id.* at 207. Of further historical note, the Attorney General of Alabama, Thomas E. Knight, Jr., who led the prosecution, was elected to the office of Lieutenant Governor in the same election in which Judge Horton was defeated. *Id.* at 111, 243.

13. U.S. CONST. amends. V, XIV.

14. The state court of last resort enforces the provisions of the code against judges by means of a special disciplinary process. In Indiana, the state constitution establishes an Indiana Commission on Judicial Qualifications ("Commission") consisting of three lawyers selected by the lawyers of the state and three non-lawyers appointed by the governor and chaired by the Chief Justice of Indiana. IND. CONST. art. VII, § 9. Allegations of violations of the code of judicial conduct are investigated by the Commission. IND. ADMISSION & DISC. R. 25(VIII)(E). The

judges accountable.

As a statistical matter, thirty-six states—including my own state of Indiana—select at least some of their judges at the ballot box.[16] The ballot box is, as Judge Horton's case sadly shows, one method of accountability.

In addition, each state has a code of judicial conduct, promulgated by that state's highest court.[17] The use of codes of judicial conduct has at least two major advantages over the ballot box as a judicial accountability measure: enforcing conduct codes provides a far more calibrated method for punishing judges who are not fair or impartial than do elections, and conduct codes cannot be used to punish judges for making unpopular decisions. Thus, under an accountability system utilizing a judicial code of conduct, Judge Angelo would likely be removed from office for his misconduct; whereas, Judge Horton, who committed no misconduct, would not be subject to discipline.

I. ANNOUNCING DISPUTED LEGAL OR POLITICAL ISSUES

Most states' codes of judicial conduct are based upon a model national code of judicial conduct set forth by the American Bar Association, with substantial input from judges, lawyers, and academic experts from around the country.[18] In 1972, the ABA set forth the following rule in its model code: "A candidate, including an incumbent judge, for a judicial office . . . should not . . . announce his [or her] views on disputed legal or political issues . . . ."[19]

---

investigation can result in the Commission filing formal charges against the judge, *id.* Rule 25(VIII)(E)(7)(a), and the case proceeding to a hearing with witnesses and evidence, *id.* Rule 25(VIII)(K). The results of the hearing are presented to the Supreme Court for a final determination as to whether the judge is guilty of violating the code of judicial conduct, *id.* Rule 25(VIII)(N), and, if so, what discipline is appropriate, *id.* Rule 25(IV).

15. "Retention" elections operate as follows: when a sitting judge's term expires, the judge, who desires to remain on the bench, is placed on the ballot in the general election for "retention," a "yes" or "no" vote. This occurs for Indiana Supreme Court justices and Court of Appeals judges at the first statewide election that occurs two full years following their appointment and every ten years thereafter. IND. CONST. art VII, § 11.

16. *See generally* AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2010), *available at* http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf (summarizing the judicial selection methods, retention requirements, and term lengths of all fifty states). According to the American Judicature Society, fourteen states and the District of Columbia use merit selection for the initial selection of all judges; five use gubernatorial or legislative appointment; eight use partisan elections; fourteen use nonpartisan elections; and nine use a combination of methods. *Id.*

17. JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 1.03 & nn.17-21 (4th ed. 2007).

18. *Id.* ("Montana remains as the only non-Code state, although it does have a set of rules of judicial conduct that bear some degree of similarity to the Model Codes.").

19. MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1972); *see* E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 29-30 (1973).

Minnesota adopted this rule in 1974;[20] starting in 1974, any lawyer or incumbent judge seeking election to judicial office was prohibited from "announc[ing] his or her views on disputed legal or political issues."[21] For purposes of the discussion to follow, I will call this the "Announce Clause."

Prohibiting a judge from announcing disputed legal or political issues is one thing, but prohibiting a candidate in an election campaign from announcing disputed legal or political issues keeps a candidate from doing precisely what elections and campaigning are all about. There is an exceptional tension between holding a judge accountable under a judicial conduct code's Announce Clause and a candidate's ability to campaign for judge.

In 1998, a Minnesota lawyer named Gregory Wersal, who was running for a seat on the Minnesota Supreme Court, filed a lawsuit contending that the Announce Clause violated his First Amendment right to freedom of speech.[22] Specifically, Mr. "Wersal alleged that he was forced to refrain from announcing his views on disputed issues during the 1998 campaign, to the point where he declined response to questions put to him by the press and public, out of concern that he might run afoul of the announce clause."[23] Wersal was joined in his lawsuit by the Minnesota Republican Party, which contended that the Announce Clause kept Wersal from expressing his views, the party was unable to learn his views and determine whether to "support or oppose his candidacy."[24]

The freedom of speech provided by the First Amendment is, of course, one of our most cherished freedoms as Americans. Certainly, at its very core, freedom of speech protects political speech.[25] Because freedom of speech is so critical to the very essence of our democracy, the law provides that any content-based government regulation restricting freedom of speech is subject to "strict scrutiny:"[26] an exacting review to see whether the restriction "is (1) narrowly tailored, to serve (2) a compelling state interest."[27]

Let's assume Wersal's freedom of speech was restricted (but I treat this only as an assumption because Minnesota never sought to discipline him for violating the Announce Clause). Was there a compelling state interest that justified this restriction?

Minnesota argued that there was a double-barreled, compelling state interest

---

20. Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002).

21. *Id.* (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000) (internal quotation marks omitted)).

22. *Id.* at 769-70.

23. *Id.* at 770.

24. *Id.*

25. *E.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346-47 (1995); Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 222-23 (1989); Meyer v. Grant, 486 U.S. 414, 421-22 (1988); Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (per curiam).

26. *White*, 536 U.S. at 774.

27. *Id.* at 775; *accord* United States v. Alvarez, 132 S. Ct. 2537, 2551-52 (2012) (plurality opinion); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011); United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000).

justifying the Announce Clause.[28] First, the Announce Clause preserved the impartiality of the Minnesota judiciary, thus protecting the rights of litigants to a fair and impartial adjudication of their disputes.[29] Second, the Announce Clause preserved the appearance of the impartiality of the Minnesota judiciary, thus instilling public confidence that Minnesota courts were fair and impartial.[30]

It is a long-standing tenet of judicial ethics that "no man can be a judge in his own case."[31] This begins with the idea that a judge cannot preside over a case in which he or she has a personal financial interest.[32] In one case, the United States Supreme Court held that this principle prohibited a judge from receiving a portion of the fines collected from defendants whom he found guilty.[33] Why? The Supreme Court explained that such an arrangement gave the judge a "direct, personal, substantial[, and] pecuniary interest in reaching a conclusion against [the defendant] in his case,"[34] and thereby denied the defendant his right to an impartial judge.

The justification for the Announce Clause follows from this principle:

> When a judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for [impartiality and fairness being disregarded] is grave and manifest. . . . If the judge fails to honor [his or] her campaign promises, [he or] she will not only face abandonment by supporters of [his or] her professed views; [he or] she will also "ris[k] being assailed as a dissembler," willing to say one thing to win an election and to do the opposite once in office.[35]

---

28. *White*, 536 U.S. at 775.

29. *Id.*

30. *Id.*

31. *In re* Murchison, 349 U.S. 133, 136 (1955) (Black, J.); *accord* Am. Gen. Ins. Co. v. FTC, 589 F.2d 462, 463-64 (9th Cir. 1979). This principle was articulated more than 400 years ago by Lord Chief Justice Coke who said, "The censors cannot be judges, ministers, and parties; . . . *quia aliquis non debet esse Judex in propria causa*, *imo iniquum est aliquem suæ rei esse judicem*; and one cannot be judge and attorney for any of the parties." Dr. Bonham's Case, (1610) 8 Co. Rep. 114a, 118a (citations omitted). Similarly, Sir William Blackstone wrote that

> if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that; because it is unreasonable that any man should determine his own quarrel.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 91 (Oxford, Clarendon Press 1765).

32. U.S. COURTS, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon(3)(c)(1)(c), *available at* www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx.

33. Tumey v. Ohio, 273 U.S. 510, 531-34 (1927).

34. *Id.* at 523.

35. *White*, 536 U.S. at 816 (Ginsburg, J., dissenting) (last alteration in original) (internal citation omitted).

Indeed, the argument continued,

> A judge in this position therefore may be thought to have a "direct, personal, substantial, [and] pecuniary interest" in ruling against certain litigants, for [he or] she may be voted off the bench and thereby lose [his or] her salary and emoluments unless [he or] she honors the pledge that secured [his or] her election.[36]

Former Chief Justice Randall T. Shepard made this point more bluntly: "[A] campaign promise [may be characterized as] a bribe offered to voters, paid with rulings consistent with that promise, in return for continued employment as a judge."[37]

In short, Minnesota argued the possibility that campaign promises will prevent a judge from ruling impartially on an issue that later reaches the judge's court so interferes with litigants' constitutional due process rights as to outweigh the judge's constitutional right to freedom of speech.[38]

Minnesota's second justification for the Announce Clause was that it preserved the appearance of the impartiality of the Minnesota judiciary, thereby instilling confidence in the public that Minnesota courts were fair and impartial.[39] Minnesota argued as follows: Unlike the executive and legislative branches of government, courts have little in the way of financial or police powers;[40] if courts' rulings are to be respected and obeyed, the public must have faith in their judges.[41] As the United States Supreme Court once said, "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."[42] Yet,

> [w]hen a candidate makes . . . a promise during a campaign, the public will no doubt perceive that [he or] she is doing so in the hope of garnering votes. And the public will in turn likely conclude that when the candidate decides an issue in accord with that promise, [he or] she does so at least in part to discharge [his or] her undertaking to the voters in the previous election and to prevent voter abandonment in the next. The perception of that unseemly *quid pro quo*—a judicial candidate's

---

36. *Id.* (first alteration in original) (citations omitted).

37. Shepard, *supra* note 1, at 1088, *quoted in White*, 536 U.S. at 816-17 (Ginsburg, J., dissenting).

38. *White*, 536 U.S. at 773, 775, 778-79.

39. *Id.* at 775 (majority opinion).

40. *See id.* at 817-18 (Ginsburg, J., dissenting) ("Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe." (citation omitted)); *accord* Bauer v. Shepard, 620 F.3d 704, 712 (7th Cir. 2010) (Easterbrook, C.J.) ("The judicial system depends on its reputation for impartiality; it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and averts vigilantism and civil strife."), *cert. denied*, 131 S. Ct. 2872 (2011).

41. *White*, 536 U.S. at 818 (Ginsburg, J., dissenting).

42. Mistretta v. United States, 488 U.S. 361, 407 (1989), *cited in White*, 536 U.S. at 818.

> promises on issues in return for the electorate's votes at the polls—inevitably diminishes the public's faith in the ability of judges to administer the law without regard to personal or political self-interest.[43]

However, these arguments were rejected by a five-justice majority of the United States Supreme Court, which, in its 2002 *Republican Party of Minnesota v. White* decision, held Minnesota's Announce Clause to be unconstitutional.[44]

The Court did not take a specific position on whether campaign promises to rule a certain way violated due process of law.[45] Rather, the majority said that the Announce Clause went well beyond a ban on campaign promises and commitments.[46] The Announce Clause prohibited a candidate for judicial office from announcing his or her views on "disputed legal or political issues," which includes statements beyond promises.[47] The Court reasoned,

> The proposition that judges feel significantly greater compulsion, or appear to feel significantly greater compulsion, to maintain consistency with *nonpromissory* statements made during a judicial campaign than with such statements made before or after the campaign is not self-evidently true. It seems to us quite likely, in fact, that in many cases the opposite is true. We doubt, for example, that a mere statement of position enunciated during the pendency of an election will be regarded by a judge as more binding—or as more likely to subject him to popular disfavor if reconsidered—than a carefully considered holding that the judge set forth in an earlier opinion denying some individual's claim to justice.[48]

Further, because freedom of speech is such a critically important constitutional right, any unit of government attempting to restrict free speech must prove that the restriction is "(1) narrowly tailored, to serve (2) a compelling state interest."[49] The Court ultimately concluded that Minnesota had not met its burden of proving that campaign statements that did no more than announce a judge's views precluded them from being fair and impartial.[50]

The Court went on to conclude that Minnesota was really complaining about the fact that judges had to stand for election at all because any judge who makes a politically controversial decision runs the risk of being voted out of office regardless of whether the decision was consistent with a "previously announced

---

43. *White*, 536 U.S. at 818 (Ginsburg, J., dissenting).

44. *Id.* at 788 (majority opinion).

45. *Id.* at 770.

46. *Id.* at 775-84.

47. *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000) (internal quotation marks omitted)).

48. *Id.* at 780-81.

49. *Id.* at 775 (citing Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 222 (1989)).

50. *Id.* at 781.

view on a disputed legal issue."[51]

The Court illustrated this last point with an odd analogy. "Surely," the Court wrote, "the judge who frees Timothy McVeigh places his job much more at risk than the judge who (horror of horrors!) reconsiders his previously announced view on a disputed legal issue."[52] Of course, no judge ever freed Timothy McVeigh. Second, Timothy McVeigh was tried in federal court where judges are not subject to election anyway.

The point could have been made with a lot more force by invoking Judge Horton's case. He was voted out of office, not for acting inconsistently with a campaign promise, but for providing Haywood Patterson due process.[53]

II. COMMITMENTS INCONSISTENT WITH IMPARTIAL ADJUDICATION

After *White*,[54] states were no longer able to enforce Announce Clauses in their codes of judicial conduct.[55] But this did not (yet) mean that future litigants risked facing judges who, by remaining true to their announced views on disputed legal issues, would not be fair and impartial in cases involving those issues.

The Supreme Court took only a particular point of disagreement with Minnesota's justification for the Announce Clause—it went well beyond prohibiting promises to rule in a particular way.[56] Would a more narrowly drawn provision, one that prohibited only campaign promises to rule in a particular way, also violate freedom of speech? If not, perhaps future litigants would not risk facing judges who would not be fair and impartial in their cases after all. This question has not yet been decided by the Supreme Court.

Now, I will shift focus from Minnesota to Indiana. Although there was no Announce Clause in the Indiana Code of Judicial Conduct at the time of the *White* decision, state judicial ethics rules have been modified somewhat since then. Indiana now prohibits judges and candidates for judicial office, "in connection with cases, controversies, or issues that are likely to come before the court," from making "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."[57] This has become known as the "Commits Clause."[58] The Commits Clause is a

---

51. *Id.* at 782.

52. *Id.*

53. GOODMAN, *supra* note 6, at 206-07.

54. 536 U.S. at 775-84.

55. *See* Jan W. Baran, *Judicial Candidate Speech After* Republican Party of Minnesota v. White, 39 CT. REV. 12, 13 (2002).

56. *White*, 536 U.S. at 775-84.

57. IND. CODE OF JUDICIAL CONDUCT Rule 4.1(A)(13) (2012); *see* IND. CODE OF JUDICIAL CONDUCT Terminology (2012) ("[Impartial means] absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.").

58. Bauer v. Shepard, 620 F.3d 704, 707 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872

much narrower restriction than the Announce Clause.[59] Candidates are only prohibited from making pledges, promises, or commitments that are inconsistent with impartial adjudication.[60]

The constitutionality of Indiana's Commits Clause was challenged by an Indiana-based interest group and two judicial candidates in *Bauer v. Shepard*[61] (Yes, that Shepard.[62]). The interest group, Indiana Right-to-Life, Inc., contended that the Commits Clause has the effect of prohibiting candidates for judicial office from answering its questionnaire on a variety of abortion-related issues, such as whether a given candidate believes "the right to life of human beings should be respected at every stage of their biological development" or "whether they agree with *Roe v. Wade*."[63] When a judicial candidate does not answer these questions, Right-to-Life argued, it does not know whether to support or oppose the candidate.[64] For their part, the two judicial candidates said that they would have liked to answer Right-to-Life's questionnaire but feared that they would be punished by the Indiana Supreme Court for violating the Commits Clause.[65]

The district court found that the Commits Clause did not violate the candidates' freedom of speech.[66] The decision of the United States Court of Appeals for the Seventh Circuit was written by Chief Judge Frank Easterbrook, a very well-known figure in American law.[67] Chief Judge Easterbrook reached the same conclusion as had the district court—that the Commits Clause did not violate the candidates' freedom of speech.[68]

In fact, he wrote that, on the surface, the plaintiffs' arguments seemed far-fetched: "How could it be permissible to 'make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office'?"[69] Quoting other court decisions, Chief

---

(2011).

59. Bauer v. Shepard, 634 F. Supp. 2d 912, 944-48 (N.D. Ind. 2009), *aff'd*, 620 F.3d 704 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011).

60. *Id.* at 946.

61. *Bauer*, 620 F.3d at 707.

62. Chief Justice Shepard was sued in his capacity as Chair of the Indiana Judicial Qualifications Commission, not in his role as the Chief Justice. *Id.*; *see supra* note 14 and accompanying text.

63. *Bauer*, 620 F.3d at 706-07 (internal quotation marks omitted).

64. *See id.* at 707 ("Most recipients have either ignored this questionnaire or told Indiana Right to Life that they fear giving answers could jeopardize their judicial careers because of provisions in the state's Code of Judicial Conduct.").

65. *Id.*

66. Bauer v. Shepard, 634 F. Supp. 2d 912, 948 (N.D. Ind. 2009), *aff'd*, 620 F.3d 704 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011).

67. *Bauer*, 620 F.3d at 706; *President Chopp's Charge to Frank H. Easterbrook '70*, SWARTHMORE COLLEGE COMMENCEMENT 2012, http://www.swarthmore.edu/commencement-2012/frank-easterbrook-70.xml (last visited Nov. 30, 2012).

68. *Bauer*, 620 F.3d at 713-17.

69. *Id.* at 714 (quoting Carey v. Woinitzek, 614 F.3d 189, 218 app. C (6th Cir. 2010)).

Judge Easterbrook wrote, "A [C]ommits [C]lause 'secures a basic objective of the judiciary, one so basic that due process requires it: that litigants have a right to air their disputes before judges who have not committed to rule against them before the opening brief is read;'"[70] "[j]udges must decide on the basis of the law and the case's facts, not on 'express . . . commitments that they may have made to their campaign supporters or to others.'"[71]

Chief Judge Easterbrook continued,

> Although the [Supreme] Court held in *White I* that judges may state their views on contestable and controversial subjects[,] . . . it did not hold that judges may make commitments or promises about behavior in office. Imagine a judge or judicial candidate who said: "I will issue a search warrant every time the police ask me to." That speaker is promising to defy the judicial oath of office. Or imagine the statement: "I will always rule in favor of the litigant whose income is lower, so that wealth can be redistributed according to the principles of communism." (More plausibly, a candidate might say that he [or she] will award damages against drug companies, whether or not the drug has been negligently designed or tested, because they charge "too much" for their products.). Again that person is promising to disobey the law and disregard the litigants' entitlements. Nothing in *White I* deals with statements of this flavor, or any other promise to act on the bench as a partisan of a political agenda.[72]

This is music to the ears of supporters of the Commits Clause (of whom I am one). (Remember that the Commits Clause is part of the Indiana Code of Judicial Conduct promulgated by the Indiana Supreme Court when I was a member—I voted for it.) But I would be the first to acknowledge that things are not quite as simple as Chief Judge Easterbrook proposes.

Chief Judge Easterbrook himself acknowledged the plaintiffs' point that a good deal of what makes the Commits Clause constitutional is the phrase "inconsistent with the impartial performance of the adjudicative duties of judicial office."[73] Indeed, the plaintiffs contended that this phrase is too vague to permit the regulation to stand: "[W]hat promises *are* 'inconsistent with the impartial performance of the adjudicative duties of judicial office'? Neither the [C]ommits [C]lauses nor the Code's definitions pin the meaning down."[74] They argued that "the Supreme Court of Indiana may treat as 'inconsistent with the impartial performance of the adjudicative duties of judicial office' even the sort of statements that are squarely protected by [the Supreme Court's decision in]

---

70. *Id.* at 715 (quoting *Carey*, 614 F.3d at 207).

71. *Id.* (quoting Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 227 (7th Cir. 1993)) (alteration in original).

72. *Id.*

73. *Id.* at 713, 714, 716 (internal quotation marks omitted).

74. *Id.* at 716.

White."[75]

Chief Judge Easterbrook, however, was unwilling to declare the Commits Clause unconstitutional on these grounds. Rather, he said,

> The best way to find out is to wait and see. . . . Plaintiffs want us to deem the law vague by identifying situations in which state officials *might* take an untenably broad reading of the [C]ommits [C]lauses, and then predicting that they *will* do so. It is far preferable, however, and more respectful of our judicial colleagues in Indiana, to assume that they will act sensibly and resolve the open questions in a way that honors candidates' rights under the [F]irst [A]mendment.[76]

As a result of *White* and *Bauer*, a candidate for judicial office in Indiana is free to *announce* views on disputed legal or political issues but cannot make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.[77] A judicial candidate *can announce* but *cannot commit*.

III. BIG-MONEY INFLUENCE IN JUDICIAL ELECTIONS AFTER *WHITE*

What does this say about our principal concern—the due process rights of future litigants? Won't a judicial candidate, if elected, be able to rule fairly and impartially as long as the candidate cannot "commit" (even if the candidate can "announce")?

That, of course, is the theory behind the Commits Clause. And in point of fact, our discussion thus far has been mostly theoretical. While some of the plaintiffs in *White* and *Bauer* were real candidates for judicial office, neither Minnesota nor Indiana had or has attempted to discipline them. We have been talking a lot more about abstract principles of law than nitty-gritty politics. However, there is nothing theoretical or abstract about what has been happening in judicial elections around the country since the Supreme Court's decision in *White*. Here are just a few stories from states close to Indiana.

In 2004—two years after *White* was decided—two candidates in Illinois, Judge Gordon Maag and Judge Lloyd Karmeier, spent more than $9.3 million during a state supreme court race.[78] The Democratic Party of Illinois contributed

---

75. *Id.*

76. *Id.*

77. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002); Bauer v. Shepard, 634 F. Supp. 2d 912, 946-47 (N.D. Ind. 2009), *aff'd*, 620 F.3d 704 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011).

78. DEBORAH GOLDBERG ET AL., JUSTCE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 18-19 (2005), *available at* http://www.justiceatstake.org/media/cms/NewPoliticsReport 2004_83BBFBD7C43A3.pdf; *see* Paul Hampel, *Big-Money Race Sets Record for a U.S. Judicial Contest*, ST. LOUIS POST-DISPATCH, Nov. 1, 2004, at A1; Abdon M. Pallasch, *Cash Pours in to Heated Downstate Judicial Battle; Each Side Accuses the Other of Leniency Against Child Molester*, CHI. SUN-TIMES, Nov. 1, 2004, at 18.

about $2.8 million to the campaign of Maag, much of it contributed to the Party by plaintiff personal injury lawyers.[79] Maag received another $1.2 million from a political-action committee ("PAC") consisting of trial lawyers and labor leaders.[80] Meanwhile, the U.S. Chamber of Commerce contributed $2.3 million to Karmeier's campaign through the Illinois Republican Party, the Illinois Chamber of Commerce, and a PAC supporting tort reform that also received $415,000 from a national tort reform group.[81]

While this campaign was underway, a multi-million dollar jury verdict against State Farm Insurance was pending before the Illinois Supreme Court.[82] "[O]ver $350,000 of the direct donations to Justice Karmeier's campaign could be *directly traced* to State Farm's employees, lawyers, or amicus and lawyers representing amicus in this case."[83] After the election, the case was decided in favor of State Farm by a 4-3 vote with the deciding vote cast by newly elected Justice Karmeier.[84]

In Ohio, candidates for the Ohio Supreme Court raised more than $21.2 million between 2000 through 2009.[85] During this period of time, "[a]n examination of the Ohio Supreme Court by *The New York Times* found that its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors [seventy] percent of the time."[86]

In Michigan, the political parties nominate candidates for the state supreme court, but the candidates appear on the ballot without partisan affiliation.[87]

---

79. GOLDBERG ET AL., *supra* note 78, at 19.

80. *Id.*

81. *Id.*

82. Avery v. State Farm Mut. Auto Ins. Co., 835 N.E.2d 801, 810-11 (Ill. 2005).

83. Petition for a Writ of Certiorari at *8, Avery v. State Farm Mut. Auto Ins. Co., 547 U.S. 1003 (2006) (No. 05-842).

84. *Avery*, 835 N.E.2d at 801; *see Avery v. State Farm Automobile Ins. Co.*, BRENNAN CTR. FOR JUST. (Feb. 3, 2006), www.brennancenter.org/content/resource/avery_v_state_farm_automobile_ins_co./; Eric Herman, *Justice Rips Majority's Decision in State Farm Class-Action Ruling*, CHI. SUN-TIMES, Aug. 22, 2005, at 68.

85. JAMES SAMPLE ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON MONEY IN STATE POLITICS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE 82 app. 1 (2010), *available at* http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yv pgv.pdf.

86. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all&_r=0 (italics added).

87. *See* Charles Crumm, *Michigan Supreme Court Candidates Want to Change How They're Nominated*, NEWS-HERALD, Nov. 5, 2012, http://www.thenewsherald.com/articles/2012/11/05/news/doc50958b260379a634434709.txt?viewmode=default; *see also* Pat Shellenbarger, *Lawyers Weigh Supreme Court Fallout After Chief Justice Taylor Loses Election*, GRAND RAPIDS PRESS (Nov. 6, 2008, 11:28 AM), http://www.mlive.com/news/grand-rapids/index.SSF/2008/11/lawyers_weigh_supreme_court_fa.html.

However, in a 2008 race between a (Republican) incumbent chief justice and a (Democratic) challenger, in which spending on television ads was four-and-a-half times higher than two years earlier, the political parties took sides.[88] Television ads run by the incumbent's supporters described his opponent as soft on terrorists and sexual predators,[89] while the ads aired on behalf of the challenger depicted the sitting chief justice as a pawn for big business who literally slept on the job.[90] The incumbent raised $1.9 million; the challenger raised $750,000.[91] Political parties and special interests paid for nearly three-fourths of the television ads in this campaign.[92]

West Virginia offers perhaps the worst story of all. In 1998, Harman Coal Company ("Harman") sued Massey Coal Company ("Massey") claiming that Massey had used fraudulent business practices to destroy Harman.[93] In 2002, a West Virginia jury agreed and awarded Harman $50 million.[94] Then, in 2004, while the case was on appeal, Massey's CEO Don Blankenship spent $3 million on an independent campaign to elect lawyer Brent D. Benjamin to the West Virginia Supreme Court of Appeals.[95] This "was three times the amount spent by Benjamin's own campaign."[96] After Benjamin was elected, he cast the deciding vote in a 3-2 decision to overturn the jury verdict and the $50 million judgment.[97]

The previous four stories are part of a national trend over the past decade from which I draw two related inferences. First, interest groups believe that it is worth a substantial investment in campaign contributions to support particular candidates for judicial office. Second, and more subtly, the efforts of state supreme courts, such as Minnesota's and Indiana's, to protect the fairness and impartiality of judges by prohibiting them from making pledges, promises, or commitments do not appear to be working. I will concede for purposes of argument that the Supreme Court was correct in *White* that a judicial candidate's announcing views on disputed legal or political issues alone does not violate due process. But I contend that when a judicial candidate makes such pronouncements on the campaign trail, the judge-to-be signals courtroom rulings in a way that generates significant campaign contributions and other support. Further, it is these substantial campaign contributions and other support that

---

88. SAMPLE ET AL., *supra* note 85, at 30.

89. *Id.* at 35.

90. *Id.* at 30, 35.

91. MICH. CAMPAIGN FIN. NETWORK, MICHIGAN SUPREME COURT CAMPAIGN FINANCE SUMMARY (2008), http://www.mcfn.org/pdfs/reports/MSC_08.pdf.

92. *Id.*; SAMPLE ET AL., *supra* note 85, at 30-31.

93. Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 232-33 (W. Va. 2008), *rev'd*, 556 U.S. 868 (2009).

94. *Id.* at 233.

95. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 873 (2009).

96. SAMPLE ET AL., *supra* note 85, at 56.

97. *Caperton*, 556 U.S. at 874-75.

gives the judge the "direct, personal, substantial, [and] pecuniary interest"[98] in the outcome of future litigations that violates due process.

The campaign funding involved in each of these four stories predates the Supreme Court's decision in *Citizens United v. Federal Election Commission*.[99] In *Citizens United*, the Court overruled prior precedent and held that the First Amendment prohibits the government from suppressing political speech on the basis of the speaker's corporate identity.[100] Consequently, a federal statute prohibiting independent corporate expenditures for electioneering communications was held unconstitutional.[101] Some commentators have argued that *Citizens United* will exacerbate the problem of corporate contributions to candidates for judicial office and expenditures for communications favoring particular candidates.[102]

IV. LITIGATION INVOLVING DISPROPORTIONATELY INFLUENTIAL CONTRIBUTORS

I maintain that this post-*White* explosion in campaign contributions from parties interested in the outcome of litigation was, in fact, caused by *White* itself. That is, once the Announce Clause was held unconstitutional, the genie was out of the bottle. Judicial candidates could signal how they would decide cases even if they could not "commit[]."[103] For example, even Chief Judge Easterbrook, in upholding the Commits Clause in *Bauer*, said that state supreme courts couldn't prohibit judicial campaign statements such as, "'[J]udges have been too ready to find antitrust problems with mergers,' or 'mandatory minimum sentences are unjust, and I will read those statutes narrowly.'"[104] Statements like this provide enough information from which a big contributor can infer that their financial support of the candidate would be a good investment in the outcome of future litigation.

Notwithstanding *Bauer* and the Commits Clauses, will judges who are

---

98. Republican Party of Minn. v. White, 536 U.S. 765, 782 (2002) (internal quotation marks omitted).

99. 130 S. Ct. 876 (2010).

100. *Id.* at 896-913 (overruling Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990); overruling McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003)); *see* Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490, 2491-92 (2012) (per curiam) (invalidating, in a two-paragraph opinion, a Montana statute similar to federal statute struck down in *Citizens United*).

101. *Id.*

102. *See* SAMPLE ET AL., *supra* note 85, at 9, 62-65, 76; ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, BUYING JUSTICE: THE IMPACT OF *CITIZENS UNITED* ON JUDICIAL ELECTIONS 2, 8 (2010), *available at* http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=/; Editorial, *North Carolina, Meet* Citizens United, N.Y. TIMES, June 6, 2012, *available at* http://www. nytimes.com/2012/06/06/opinion/north-carolina-meet-citizens-united.html.

103. Bauer v. Shepard, 620 F.3d 704, 715-16 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011).

104. *Id.* at 716.

elected based on substantial contributions connected to their announced views on disputed legal issues be able to be fair and impartial in cases involving those issues? I answer this question by returning to the Massey Coal Company case from West Virginia, *Caperton v. A.T. Massey Coal Co.*[105]

When the West Virginia Supreme Court of Appeals vacated the $50 million verdict against Massey Coal,[106] the plaintiffs in the case asked the United States Supreme Court to reinstate the verdict.[107] Not every decision made by a state supreme court is subject to review by the United States Supreme Court; it is only when a state supreme court rules contrary to federal law, as opposed to the state's own law, that the United States Supreme Court can overturn the decision.[108]

The plaintiffs suing Massey Coal, therefore, had to contend that West Virginia's high court had acted contrary to federal law in overturning the $50 million judgment.[109] Their argument was the same as a central theme of this Article—the plaintiffs contended that their constitutional right to due process of law had been violated because a "'[t]rial before an 'unbiased judge' is essential to due process.'"[110] They argued that Justice Benjamin should not have acted as a judge over their case, and he should have disqualified or "recuse[d]" himself.[111]

Generally, the Supreme Court has left to state statutes and judicial codes of conduct the question of whether a judge should be disqualified from hearing a case because of bias or prejudice.[112] But at least as long ago as 1975, the Supreme Court concluded that there are circumstances in which "'the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable.'"[113] The question to be answered by the Supreme Court was whether Justice Benjamin's participation in *Caperton* was such a circumstance.[114]

The Supreme Court's analysis was quite interesting. First, the Court noted that Justice Benjamin reported that he had "conducted a probing search into his actual motives and inclinations" and had concluded that he could decide the *Caperton* case impartially and fairly.[115] To this point, the Supreme Court said that it did "not question [Justice Benjamin's] subjective findings of impartiality and propriety."[116] Nor, for that matter, did the Supreme Court "determine

---

105. 679 S.E.2d 223 (W. Va. 2008), *rev'd*, 556 U.S. 868 (2009).

106. *Id.* at 264.

107. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 873-74 (2009).

108. *See, e.g.*, 28 U.S.C. § 1257(a) (2006); Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Murdock v. City of Memphis, 87 U.S. 590, 633-36 (1875).

109. *Caperton*, 556 U.S. at 874.

110. Petition for a Writ of Certiorari, *supra* note 83, at *21 (quoting Johnson v. Mississippi, 403 U.S. 212, 216 (1971)), *Caperton*, 556 U.S. 868 (No. 08-22).

111. *Id.* at **16-17.

112. *Caperton,* 556 U.S. at 876-77; *see* Tumey v. Ohio, 273 U.S. 510, 523 (1927).

113. *Caperton,* 556 U.S. at 872 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

114. *Id.* at 876.

115. *Id.* at 882.

116. *Id.*

whether there was actual bias" on Justice Benjamin's part.[117] Instead, the Supreme Court said that "[t]he difficulties of inquiring into actual bias . . . simply underscore the need for objective rules."[118]

The rule promulgated by the Supreme Court in the *Caperton* case was as follows:

> [T]here is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.[119]

The Supreme Court applied this standard and concluded that there had been a serious, objective risk of actual bias, which indicated that Justice Benjamin should not have participated in the case.[120]

V. ASSURING JUDICIAL FAIRNESS AND IMPARTIALITY IN THE POST-*WHITE*/POST-*CAPERTON* ERA

In *White*, the Supreme Court held that it does not violate due process for a judicial candidate to announce his or her views on disputed legal and political issues.[121] But in *Caperton*, the Supreme Court ruled that it does violate due process for a judge to rule in a case involving a disproportionately influential campaign contributor.[122] Judicial candidates can announce their views, but if they receive disproportionately influential campaign support, they cannot later preside over the cases of parties providing that support, which might well include cases involving their announced views.

I contend that disproportionately influential campaign contributions will only be made to a judicial candidate if the candidate's announced views signal how the candidate, if elected, would vote in litigation of interest to the contributor. Judicial candidates, to repeat, can signal how they would decide cases as long as they do not "commit[]."[123] But does *Caperton* solve this problem? Theoretically, under *Caperton*, if a candidate is elected and presented with a case involving a party that provided disproportionately influential campaign contribution, the judge cannot participate, and *Caperton*'s objective standard removes the threat to fairness and impartialibility.

Even before *Caperton*, there was a groundswell of support for the notion that more stringent recusal rules could eliminate the threat to fairness and impartiality of judges ruling on cases involving disputed legal issues on which they had

---

117. *Id.*

118. *Id.* at 883.

119. *Id.* at 884.

120. *Id.*

121. Republican Party of Minn. v. White, 536 U.S. 765, 787-88 (2002).

122. *Caperton*, 556 U.S. at 885-86.

123. Bauer v. Shepard, 620 F.3d 704, 715-16 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011).

announced their views.[124] The American Bar Association,[125] the Justice O'Connor Project at Georgetown Law School,[126] and prominent law school Dean Erwin Chemerinsky[127] have advocated the proposition that strong recusal rules are an antidote to unfettered judicial campaign speech and the campaign support it appears to generate.

Although I, too, support robust recusal rules, I do not think such rules solve the problem. First, as former Chief Justice Shepard wrote well before *White*, the notion of recusal as the solution to bias from campaign speech is disingenuous because it "disconnect[s] free and unfettered campaign promises from any possibility they will be carried out."[128] Advocates of recusal reform, such as Professor Charles Geyh of the Indiana University Maurer School of Law, believe that tough recusal requirements will prevent judges from announcing their views during campaigns because they will not want to be precluded from participating in cases once elected.[129] Admittedly, some judicial candidates might engage in that calculus, but I think this is unlikely. It seems to me far more likely that a candidate's priority during the campaign will be to get elected, rather than to avoid behavior that might require the candidate's recusal after the election, if elected at all.

Finally, there may well be free speech limits to recusal rules. Could a state re-write its Announce Clause to provide that a candidate for judicial office cannot be punished for expressing views on disputed legal issues but must recuse in any future case involving those issues? Even after *Caperton*, that question remains open.[130]

---

124. *See* Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 948, 953-54, 972.

125. STANDING COMM. ON JUDICIAL INDEPENDENCE, A.B.A. REPORT TO THE HOUSE OF DELEGATES: RES. NO. 107, at 2 (2011), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/ 2011_am_107.authcheckdam.pdf.

126. SANDRA DAY O'CONNOR PROJECT ON THE STATE OF THE JUDICIARY, GEORGETOWN LAW, REPORT OF THE CORPORATE TASK FORCE 1-2 (2009). The Justice O'Connor Project also advocates for merit selection. *Id.* at 4.

127. Erwin Chemerinsky & James J. Sample, Op-Ed., *You Get the Judges You Pay For*, N.Y. TIMES, Apr. 18, 2011, at A23, *available at* http://www.nytimes.com/2011/04/18/opinion/18sample.html (arguing that merit selection is unlikely to displace judicial elections and that, as a result, reform initiatives should focus more on strong recusal rules and limiting spending in judicial elections). *But see* Norman L. Greene, Letter to the Editor, *Ending Judicial Elections*, N.Y. TIMES, Apr. 20, 2011, at A22, *available at* http://www.nytimes.com/2011/04/20/opinion/l20judges.html (criticizing Chemerinsky and Sample and arguing that "[e]liminating all judicial elections . . . is hardly a luxury but rather the means most likely to achieve overall judicial reform").

128. Shepard, *supra* note 1, at 1083.

129. *See generally* Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671 (2011) (discussing the replacement options for the current "regime" of judicial disqualification at the state and federal levels).

130. *See, e.g.*, Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011). In this case, a city council member was censured for violating a state conflict-of-interest statute by voting in favor of

Ultimately, the efforts to bolster recusal will not solve the threats to due process caused by *White* and big-money influence on judicial elections. I maintain that the best way to assure judicial fairness and impartiality in the post-*White*/post-*Caperton* era is to use properly structured merit selection systems[131] to select judges instead of popular elections.[132] In point of fact, this is the view of the American Bar Association[133] and the American Judicature Society.[134]

---

a casino project. *Id.* at 2346-47. A long-time friend and campaign manager of the council member worked as a paid consultant for the company that had proposed the project and would have benefitted from its approval. *Id.* at 2347. The council member argued the restriction on his right to vote impermissibly burdened his constitutional free speech rights. *Id.* However, the Court held that restrictions on legislators' voting rights are not restrictions on their protected speech, stating, "The legislative power . . . is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Id.* at 2350.

In its discussion, the Court alluded to the fact that rules requiring judges to recuse in the face of conflicts-of-interest are also constitutional but noted "that restrictions on judges' speech during elections are a different matter." *Id.* at 2349 n.3. In a concurring opinion, Justice Kennedy emphasized that the case did not address whether the statute imposed any burdens "on the First Amendment speech rights of legislators and constituents apart from an asserted right to engage in the act of casting a vote." *Id.* at 2352 (Kennedy, J., concurring). Justice Kennedy acknowledged,

> The constitutionality of a law prohibiting a legislative or executive official from voting on matters advanced by or associated with a political supporter is therefore a most serious matter from the standpoint of the logical and inevitable burden on speech and association that preceded the vote. The restriction may impose a significant burden on activities protected by the First Amendment.

Id. at 2353. It is true that Justice Kennedy, citing *Caperton*, limited this observation to legislative and executive recusal, but other members of the Court might well not impose the same limitation. *Id.* at 2354.

131. For examples of such merit selection systems, see Ruth V. McGregor, *Arizona's Merit Selection System: Improving Public Participation and Increasing Transparency*, 59 SYRACUSE L. REV. 383, 384-86 (2009); AM. JUDICATURE SOC'Y, *Model Judicial Section Provisions* (2008), *available at* http://www.ajs.org/selection/docs/MJSP_web.pdf; A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, STANDARDS ON STATE JUDICIAL SELECTION 1-2 (2000), *available at* http://www.wvohio.org/assets/attachments/file/Standards%20on%20State%20Judiciary%20Selection.pdf.

132. *See* Republican Party of Minn. v. White, 536 U.S. 765, 788-89 (2002) (O'Connor, J., concurring) ("[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.").

133. *See, e.g.*, A.B.A. REPORT TO THE HOUSE OF DELEGATES: RES. NO. 123 (1999) (affirming the ABA's "commitment to the merit selection of judges, and urg[ing] all jurisdictions to enact constitutional provisions setting out procedures for the merit selection and either appointment or retention election of their judges") [hereinafter RESOLUTION 123].

134. *See, e.g.*, Brief for Am. Judicature Soc'y, Amicus Curiae, in Support of Appellees at 1, Kirk v. Carpeneti, 623 F.3d 889 (9th Cir. 2010) (No. 09-35860).

The American Bar Association first addressed this issue in 1937, when its House of Delegates adopted a policy in favor of the merit selection of judges.[135] That position has been reaffirmed by the ABA in many ways during the succeeding seventy-five years.[136] ABA President Laurel Bellows said earlier this year, "The ABA strongly supports merit selection of state court judges for many reasons, not the least of which is that the administration of justice should not turn on a popularity contest or be subject to the corrosive influence of money."[137]

Additionally, the American Judicature Society, which has consistently supported merit selection since its founding in 1913,[138] recently said,

> An independent judiciary is one of the hallmarks of American democracy. For our judicial system to function independently and effectively, it is imperative that qualified judges be free to make appropriate decisions under the law. To achieve the goal of an independent and highly qualified judiciary, states have tried different methods of selecting judges. These methods range from executive or legislative appointments to partisan or non-partisan elections. Over the past seventy years, the trend among the states, and to a certain degree in the federal system, for ensuring a qualified and independent judiciary is to have some form of merit-based selection in which a non-partisan commission screens judicial applicants and recommends the best qualified candidates for appointment.[139]

In Indiana, we have a merit selection system—in place since 1970—to select members of our appellate courts and hold them accountable that does not utilize partisan elections.[140] When there is a vacancy on the Indiana Supreme Court or the Indiana Court of Appeals, interested lawyers and judges submit applications to the Indiana Judicial Nominating Commission. The Commission is a seven-member body that consists of three lawyers elected by the lawyers of the state; three non-lawyers appointed by the Governor; and the Chief Justice of Indiana, who chairs the Commission.[141] Following the completion of interviews and background checks, the Commission selects the three applicants it considers best and submits those three names to the Governor.[142] The Governor must select the

---

135. *See* Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 855 (2002).

136. *See* RESOLUTION 123, *supra* note 133.

137. *February 2012 Bar Watch Update: Interview with ABA President-Elect*, FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD. (Feb. 3, 2012), www.fed-soc.org/publications/detail/february-2012-bar-watch-update.

138. Brief for Am. Judicature Soc'y, *supra* note 134, at 1 (Albert M. Kales, one of the founders of the American Judicature Society and others "developed the first commission-based and merit-focused judicial selection process. This became known as the 'Missouri Plan,' after the first state to adopt it.").

139. *Id.* at *3.

140. *See* AM. JUDICATURE SOC'Y, *supra* note 16, at 3, 6.

141. IND. CONST. art. VII, § 9.

142. IND. CONST. art. VII, § 10.

appointee from among those three applicants within sixty days of receiving the list.[143] After the new judge takes his or her seat, the judge serves for two full years before standing for a statewide retention vote at the next statewide general election.[144] If retained, the judge must stand for a retention election every ten years thereafter until age seventy-five or earlier resignation.[145]

For many reasons, this method of judicial selection and accountability system assures fair and impartial decision-making more than election systems:

- The involvement of the Chief Justice and Commission lawyers, as well as the public nature of the process, help assure that people of integrity, impartiality, and intelligence are appointed;
- The involvement of the Governor and non-lawyer Commission members, along with periodic retention votes, help assure accountability;
- The absence of contested elections helps alleviate the perception that justice in Indiana is for sale—there can be no perception that lawsuits are decided in response to party or interest-group contributions; and
- Judicial misconduct is punished, while unpopular decisions are not.

The State of Iowa has a system quite similar to this.[146] Yet, in 2010, three members of the Iowa Supreme Court stood for retention vote and received a majority of negative votes[147] because they voted for a decision holding the state's ban on gay marriage violated the Iowa Constitution.[148]

This result was unwarranted and regrettable—the retention vote process is meant to provide an additional measure of accountability, not to be used to remove judges for rendering decisions that are politically unpopular. Despite this unfortunate result, I still believe that the merit selection-retention vote system of judicial selection and accountability is superior to contested elections. The fate suffered by the Iowa justices would have been possible under a contested election system, as Judge Horton's unfortunate experience demonstrates.[149] But the new justices who took their place were selected on the basis of their merit, not on the basis of their ability to win votes after announcing their views on disputed legal and political issues, their ability to raise or attract substantial campaign contributions, or their use of negative attack advertising.[150]

---

143. *Id.*

144. *Id.* § 11.

145. *Id.*; IND. CODE ANN. § 33-38-13-8 (West 2012).

146. *See* AM. JUDICATURE SOC'Y, *supra* note 16, at 3, 6.

147. ADAM SKAGGS ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON MONEY IN STATE POLITICS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10: HOW SPECIAL INTEREST "SUPER SPENDERS" THREATENED IMPARTIAL JUSTICE AND EMBOLDENED UNPRECEDENTED LEGISLATIVE ATTACKS ON AMERICA'S COURTS 8, 9 (2011), *available at* http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf.

148. *See* Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009).

149. *See* GOODMAN, *supra* note 6, at 207.

150. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765 (2002); Liptak & Roberts, *supra* note 86; SAMPLE ET AL., *supra* note 85, at 30, 35.

Indiana's system, which has been in place for more than forty years, has served the State well. I believe it is the best solution to the threat to due process presented by judicial candidates announcing their views on disputed legal and political issues and leveraging those announced views to attract substantial campaign contributions for themselves and negative attack advertising against their opponents.

CONCLUSION

None of us knows for sure when we might find ourselves in court, seeking to vindicate our legal rights or to protect our nearest and dearest interests. The United States Constitution guarantees that when we do so, we will have the right to due process of law, including a fair and impartial judge. As citizens, we must all think about how we can assure that due process of law is available to us and to others in times of need. In this Article, I have discussed how the systems set in place by the highest courts of every state to assure judicial fairness and impartiality by enforcing codes of judicial conduct have run afoul of judicial candidates' freedom of speech in contested elections. We have seen that the current state of the law, while allowing judicial candidates to announce their views on contested legal and political issues, has not been extended to permit judicial candidates to make pledges, promises, or commitments as to how they will vote in particular cases. But we have also seen that, at least concomitant with, if not caused by, the Supreme Court's decision in *White*, huge sums of special interest money have poured into judicial elections, some in such significant ways as to require judicial recusal. While some have suggested that a robust recusal regime is the antidote for judicial campaign practices that impinge upon fairness and impartiality, I advocate a movement away from elected systems altogether and towards a merit selection system like Indiana's.

Indiana Law Review

Volume 46 **2013** **Number 1**

2012 JAMES P. WHITE LECTURE ON LEGAL EDUCATION

THE TRANSFORMATION OF THE LEGAL PROFESSION AND LEGAL EDUCATION*

E. THOMAS SULLIVAN**

I am delighted to be here today, returning to my alma mater, to deliver the James Patrick White Lecture in honor of one of my own teachers, one of my mentors, and my dear friend for forty years.

My topic is "The Transformation of the Legal Profession and Legal Education." My emphasis is on the transformation[1] of American legal education. However, I will begin by mentioning the deep and broad transformation that is taking place in the legal profession, and as a consequence, what effect this transformation is having on legal education. Although it may be fashionable today to blame the 2008 recession as the cause of this transformation, I believe the root causes of the transformation run earlier than September 2008.

I. THE PRACTICE

For many years, critics have sounded the alarm that the pyramid structure of America's largest private law firms was not a financially sustainable model.[2]

---

* These remarks were delivered as the James Patrick White Lecture at Indiana University Robert H. McKinney School of Law on April 3, 2012. Special appreciation is owed to Dean Kent Syverud of Washington University School of Law in St. Louis, Dean David Wippman of the University of Minnesota Law School, and Vice Dean Randy Hertz of New York University School of Law for their review of an earlier draft. The opinions expressed here and any errors are mine alone.

** President of the University of Vermont; former Provost and Senior Vice President of the University of Minnesota; former Dean of the University of Minnesota Law School; former Dean of the University of Arizona College of Law; and former Chair of the ABA Section of Legal Education.

1. For an excellent history of the problems with legal education, see BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 85, 107 (2012); William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Will It Last if Law Grads Can't Pay Bills?*, A.B.A. J. (Jan. 1 2012, 5:20 AM), *available at* www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/.

2. *See, e.g.*, Peter Lattman, *Dewey & LeBoeuf Files for Bankruptcy*, DEALBOOK (May 28, 2012, 10:21 PM), http://dealbook.nytimes.com/2012/05/28/dewey-leboeuf-files-for-bankruptcy/

This model may well have served the leadership and senior partners of the large law firms for many years, but no student of efficiency would have embraced the high-pay associate model for the high-reward partner benefit as sustainable in the long-term. The 2008 recession broke the back on that well-worn model when the clients of private law firms made clear that they were no longer going to pay the high fees that supported the pyramid model.[3] As a result, the practice and financing of the private practice of law has gone through a dramatic change: (1) the top 250 private law firms in the United States have lost over 10,000 jobs since the recession began in 2008;[4] and (2) law firms shrank to profit growth during the recession.[5] In addition, law firms have reorganized their structure to create a second tier of lawyers, whether partners or associates, who no longer are equity owners but now are employees.[6] (3) There is outsourcing of some of the most basic and repetitious practices required in law firms—including work being done by non-lawyers.[7] (4) There is wide use of technology and software to track and utilize enormous amounts of information on behalf of clients. This use of technology and computers replaces much of the labor performed by lawyers, especially in matters of e-discovery that now has overtaken much of the pre-trial discovery world and litigation.[8] (5) Firms continue to move away from the

---

("Many observers say the root causes of Dewey's fall are not unique. Several of the largest firms have adopted business strategies that Dewy embraced: unfettered growth . . . ; aggressive poaching of lawyers from rivals . . . ; and a widening spread between the salaries of the firm's top partners and its most junior ones.").

3. *See* Peter Lattman, *Assigning Blame in Dewey's Collapse*, DEALBOOK (May 14, 2012, 9:12 PM), http://dealbook.nytimes.com/2012/05/13/assigning-blame-in-deweys-collapse/; Catherine Rampell, *At Well-Paying Law Firms, a Low-Paid Corner*, N.Y. TIMES, May 24, 2011, at A1, *available at* http://www.nytimes.com/2011/05/24/business/24lawyers.html?pagewanted=all&_r=0.

4. *See How to Curb Your Legal Bills*, ECONOMIST, May 5, 2011, at 14, *available at* http://www.economist.com/node/18651204; *Law Firms: A Less Gilded Future*, ECONOMIST, May 5, 2011, at 72, *available at* http://www.economist.com/node/18651114; *Not Enough Lawyers?*, ECONOMIST, Sept. 3, 2011, at 28-29, *available at* http://www.economist.com/node/21528280; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, at A1, *available at* www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&_r=0; Henderson & Zahorsky, *supra* note 1.

5. Press Release, NALP, Class of 2010 Graduates Faced Worst Job Market Since Mid-1990s (June 1, 2011), *available at* http://www.nalp.org/uploads/PressReleases/11SelectedFindings.pdf (stating the employment rate of graduates nine months after graduating "has fallen more than four percentage points since reaching a 20-year high of 91.9% in 2007 and marks the lowest employment rate since the aftermath of the last significant recession to affect the U.S. legal economy").

6. Rampell, *supra* note 3.

7. *See* Heather Timmons, *Outsourcing to India Draws Western Lawyers*, N.Y. TIMES, Aug. 5, 2010, at B1, *available at* http://www.nytimes.com/2010/08/05/business/global/05legal.html?pagewanted=all&_r=0.

8. Timothy P. Harkness & Dana L. Post, *Will Computers Soon Replace Your Lawyer?*,

venerable billable hours by lawyers, toward flatter fees, deferred and contingency fees, and particularly value billing concepts.[9] (6) Highly specialized boutique law firms have been created that focus practice on one or a few narrow areas.[10] (7) There is an increased influence of globalization as firms serve their clients with more international with branch offices throughout the world, demonstrating much more global competition among firms.[11] (8) Law firm merger activity and firm dissolutions have increased.[12] (9) Finally, there is the growth of non-law firm alternatives for low-end legal work, such as Legal Zoom and Robert Lawyer.[13]

No lawyer today would disagree with the characterization that the practice of law, be it in the private sector or in the public sector, is going through a very large, structural transformation. Some praise, and others lament, that the practice has gone from a profession to a commodity based business.

II. THE ACADEMY

The implications for American law schools are profound. Fewer law firm and public sector jobs for lawyers has meant exactly that for the graduating law student. The cost of legal education, the tuition students pay for a legal education, and student debt are all inextricably linked to this transformation.

As of today, the number of students taking the Law School Admissions Test dropped 16%, from a high of over 171,000 applicants in the 2009-2010 academic

---

THOMSON REUTERS NEWS & INSIGHT (June 5, 2012), http://newsandinsight.thomsonreuters.com/Legal/Insight/2012/06_-_June/Will_computers_soon_replace_your_lawyer_/.

9. *See* Arthur G. Green, *Thinking Outside the Box*, 13 BUS. L. TODAY 5 (May/June 2004), *available at* http://www.apps.americanbar.org/buslaw/blt/2004-05-06/greene.shtml ("Alternative billing methods will be an important strategy for lawyers seeking to stay at the leading edge of the change the profession will undergo in the 21st century.").

10. Karen Sloan, *Boutique Firms Well-Positioned to Ride It Out*, NAT'L L.J. (Dec. 1, 2008), http://www.law.northwestern.edu/career/markettrends/2008/prle6hoa3oas.pdf.

11. Phil Ciciora ed., *Business Law Expert: Legal Education Must Respond to Market Forces*, NEWS BUREAU/ILL. (Apr. 25, 2011), http://news.illinois.edu/news/11/0425legaleducation_LarryRibstein.html; The Fellows CLE Research Seminar, *What Defines Competence? A Debate on the Future(s) of Lawyering*, 22 RESEARCHING L., Spring 2011, at 1, 1-10, *available at* http://www.americanbarfoundation.org/uploads/cms/documents/rl_Spring_2011.pdf [hereinafter *What Defines Competence?*].

12. *See, e.g.*, Brian Baxter, *Report: Law Firm Merger Boom to Continue in 2012*, AM. L. DAILY (Jan. 4, 2012, 4:35 PM), http://amlawdaily.typepad.com/amlawdaily/2012/01/mergers-2012.html ("[L]aw firm merger activity increased 65 percent between 2010 and 2011.").

13. *What Defines Competence?*, *supra* note 11, at 2-3; William D. Henderson, Professor, Ind. Univ. Maurer Sch. of Law, New Legal Entrepreneurs Don't Need Deregulation to Take Market Share, Address at the ABA Section of Environment, Energy, & Resource Law Summit (Oct. 14, 2011), *available at* http://truthonthemarket.com/2011/09/19/william-henderson-on-are-we-asking-the-wrong-questions-about-lawyer-regulation/.

year to approximately 130,000 this year.[14] We have seen a 25% decrease in applications in the last two years for law school admissions.[15] At the same time, we have approximately 45,000 students expected to graduate in each of the next three years.[16] It is not hard to see that these numbers portend a serious long-term consequence for our American law schools. This is especially true, I believe, at the bottom of the law school rankings order and for schools that are heavily dependent on tuition.

The obvious strategies of cutting class size and lowering admission standards to maintain the present class size will have dramatic consequences on law schools. The context here, of course, is that in today's world, 85% of law graduates from ABA-approved law schools have an average debt upon graduation of $99,000, and only 68% of these graduates from ABA-approved law schools have jobs within nine months after graduation.[17] The relationship among high tuition dependence, fewer higher paying jobs, more moderate incomes, and the high debt load is creating the "perfect storm" for many law students and, of course, now their law schools.

I should note that the debt issue is not one related only to law schools. As a provost for nearly eight years, and now an incoming president of a university, I have watched the alarming statistics. Those debt levels for undergraduate students[18] are, on average, approximately $23,300[19] per year for those who took out loans. For dental schools, the debt averages $175,000 upon graduation; for medical schools, $160,000; and for vet medicine schools, at least that high. It should be no comfort that our law students have less debt substantially than other professional school graduates.

Before considering future dilemmas facing legal education today, perhaps a bit of history will inform how we got to where we are today.

III. HISTORY

As we know, the study of law in the United States during the nineteenth century largely centered around an apprenticeship model rather than formal

---

14. David Segal, *For 2nd Year, a Sharp Drop in Law School Tests*, N.Y. TIMES, Mar. 19, 2012, at B1, *available at* http://www.nytimes.com/2012/03/20/business/for-lsat-sharp-drop-in-popularity-for-second-year.html.

15. *Id.*

16. *Id.*

17. Henderson & Zahorsky, *supra* note 1.

18. *See* Andrew Martin & Andrew W. Lehren, *A Generation Hobbled by the Soaring Cost of College*, N.Y. TIMES, May 12, 2012, at A1, *available at* http://www.nytimes.com/2012/05/13/business/student-loans-weighing-down-a-generation-with-heavy-debt.html?pagewanted=all (stating that 60% of students who earn a bachelor's degree take out loans, in part, to pay for their education), *reprinted in* N.Y. TIMES, May 13, 2012, at A1 (correcting percentage of students who take out loans).

19. *Id.*

instruction.[20] It was not until the late 1800s that a formal curriculum, under the leadership of Dean Christopher Columbus Langdell at the Harvard Law School, attempted to create law as an academic discipline.[21]

From the writings of Plato, Langdell considered that the study of law should be a science that systemized data in a deductive structure.[22] Although this "autonomous Platonic science" was not completed or integrated into the Harvard curriculum as Langdell imagined, we all know what emerged was the "case law method" of education.[23] Unlike the curriculum at our best law schools today, the Langdellian approach did not envision interdisciplinarity as a core of the study of law.[24] Such interdisciplinary connections would have seemed to Langdell to violate the "autonomy" of law as a science.[25]

Roscoe Pound, in 1923, noted the importance of taking Plato's suggestion that the study of the science of law is important, stating,

> If we are to do our duty by the common law in the [twentieth] century, we must make it a living system of doing justice for the society of today and tomorrow, as the framers of our polity made of the traditional materials of their generation an instrument of justice for that time and ours.[26]

Many tensions, of course, have surfaced since the early development of the American law school, including the observations shared by William Twining, who in 1994, noted,

> [A]ll Western societ[y] law school[s] are typically caught in a tug of war between three aspirations: to be accepted as full members of the community of higher learning; to be relatively detached, but nonetheless engaged, critics and censors of law in society; and to be the service-institutions for a profession which is itself caught between noble ideals, lucrative service of powerful interests and unromantic cleaning up of society's messes.[27]

---

20. MARTHA NUSSBAUM, THE LAW SCHOOL AND THE UNIVERSITY; Patricia Mell, *Not the Primrose Path: Educating Lawyers at the Turn of the Last Century*, 79 MICH. B.J. 846, 846 (2000).

21. NUSSBAUM, *supra* note 20.

22. *Id.*; Gary D. Finley, Note, *Langdell and the Leviathan: Improving the First-Year Law School Curriculum by Incorporating* Moby Dick, 97 CORNELL L. REV. 159, 163 (2011).

23. *See* Steven B. Dow, *There's Madness in the Method: A Commentary on Law, Statistics, and the Nature of Legal Education*, 57 OKLA. L. REV. 579, 580-84, 593-94 (2004).

24. *See* John Veilleux, *The Scientific Model in Law*, 75 GEO. L. REV. 1967, 1975-76 (1987).

25. *See* Dow, *supra* note 23, at 593-94.

26. Martha Minow, Dean of the Faculty of Law, Harvard Law Sch., Legal Education: Past, Present and Future, Address Before the Harvard Law School Community 1 n.1 (Apr. 5, 2010) (quoting ROSCOE POUND, THE WORK OF THE AMERICAN LAW SCHOOL (1923), *reprinted in* STEVE SHEPPERD II, THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 687 (1999)).

27. *Id.* at 3 (quoting WILLIAM TWINING, BLACKSTONE'S TOWER: THE ENGLISH LAW SCHOOL 2 (1994)).

We can all observe the internal tensions implicit in Twining's summary. The greatest tension among them, I might suggest, for American legal education, has been the appropriate balance between theory and practice (or the academic side and the applied skills side). I suggest that our very best law schools today fully accept this challenge and are doing very well in being serious, contributing members to the higher education and the research university community, as well as offering students a high level of clinical and practical lawyering skills opportunities. This point was lost in the recent series of articles written in the *New York Times*.[28]

Although it is no secret, nor should it be, that American law schools have come under much critique and criticism since Langdell's roll out of the "case method" in 1870,[29] much of the criticism today, as repeated in the recent *New York Times* stories,[30] is simply not current or accurate as representative of American legal education. To be sure, there are many challenges ahead, as I will note later in this White Lecture, but those challenges are not on whether we should have clinical legal education or practical lawyering skills integrated into the curriculum or how successful those efforts have been.

Spurred on, in part, by the Carnegie Foundation for the Advancement of Teaching's report, *Educating Lawyers: Preparation for the Profession of Law*,[31] and by the ABA accreditation standards,[32] our very best law schools today are incorporating clinical education and lawyering skills courses broadly and deeply within the curriculum.[33] This conclusion, I believe, is broadly understood and shared by those who are and have been participating in legal education and observing its transformation, incrementally, in at least the last thirty years. As one who has been a part of the legal academy for thirty-three years beyond my law school student days, and having chaired nearly twenty ABA-AALS inspection visits during this period of time, as well as chairing the ABA Section on Legal Education, I can attest to the remarkable improvement in American legal education across a wide spectrum of law schools. Importantly, this includes our most distinguished law schools that may have been the most recent converts

---

28. *See* Segal, *supra* note 14.

29. *See* C. Michael Bryce & Robert F. Seibel, *Trends in Clinical Legal Education*, 70 N.Y. ST. B.J. 26, 26 (1998).

30. Segal, *supra* note 14.

31. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

32. A.B.A., SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 17 (2012-2013), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf.

33. *See* Hannah Hayes, *Recession Places Law School Reform in the Eye of the Storm*, 18 PERSPECTIVES, Spring 2010, at 8, 8-9, 14, *available at* http://www.americanbar.org/content/dam/aba/publishing/perspectives_magazine/women_perspectives_spring10_recession_law_school.authcheckdam.pdf.

to high quality and easily accessible clinics and practical skills courses.

The ABA created a survey of law school curricula which was to be released in the summer of 2012. The survey found that "[o]ver 85% of respondents regularly offered in-house live-client clinical opportunities and 30% of respondents offered off-site, live-client clinical opportunities."[34] The section committee study report, chaired by Professor Catherine Carpenter of South Western Law School, concludes that the curricular developments of the past decade evidence a firm "commitment to clinical legal education" and rich and creative approaches to "experiential learning."[35] The survey also found that legal writing has grown in stature and has been expanded and strengthened throughout the three-year curriculum.[36]

IV. A PRESCRIPTION GOING FORWARD

But these remarkable "quality" developments have come with big costs.[37] Critics of higher education and law schools today forget that with "quality" comes costs. The key is clearly identifying the "costs" of legal education and accordingly "prioritizing" those expenditures. Here, it is important for each school to identify the "distinctiveness" and "comparative advantage" of the school so that each does not replicate, at additional costs, the same features at other schools.

The prescription for this dilemma, while not easy, is twofold: (1) we must substantially reduce the cost of legal education, and (2) we must increase revenue in a way to support the fundamental priorities that remain. I suggest that the following are the "core" cost drivers today:

(1) faculty salary and benefits (We are all familiar with the arms race that has taken place in the last twenty years regarding the star salaries that are being paid to recruit and retain our very best faculty.);[38]

(2) the increased number of faculty who have been added to our law schools largely without regard to the size of the student body;[39]

---

34. A.B.A. SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010, at 16 (Catherine L. Carpenter ed., 2012) (stating that response rate represented 83% of ABA approved law schools in 2010).

35. *Id.*

36. *Id.*

37. N. William Hines, *Ten Major Changes in Legal Education Over the Past 25 Years*, ASS'N OF AM. LAW SCH., http://www.aals.org/services_newsletter_presNov05.php (last visited Nov. 11, 2012) ("Higher tuitions mean greater institutional investments in student financial aid, particularly in an increasingly competitive marketplace for students, and this in turn drives costs even higher.").

38. *See* Fabio Arcila, *Whither Law Professor Salaries: Let's Talk Money*, PRAWFSBLAWG (Dec. 14, 2009, 10:00 AM), http://prawfsblawg.blogs.com/prawfsblawg/2009/12/whither-law-professor-salaries-lets-talk-money.html.

39. *See, e.g.*, Brian Tamanaha, *The Coming Crunch for Law Schools*, BALKINIZATION (June 28, 2011), http://balkin.blogspot.com/2011/06/coming-crunch-for-law-schools.html ("Law schools now pump out about 45,000 graduates annually at a time when the Bureau of Labor Statistics

(3) substantial reduction in teaching loads of faculty;
(4) the high cost of maintaining research libraries, given the near monopoly pricing that takes place in the world book market;
(5) the enormous costs associated with building and maintaining very large facilities (again, part of the arms race);[40]
(6) the arrival of the high use of IT, as a research tool as well as the infrastructure to help manage and run our law schools;[41]
(7) the very large increase in the budget for financial aid, both merit and need, to recruit the talented, diverse student bodies we have today (This is driven, in part, by U.S. News ratings' focus on high GPA/LSAT numbers.);[42] and
(8) the significant cost of running small classes with far fewer students than the large lecture classes, including the small student to faculty ratio in clinical education and practical lawyering skills courses.

Who among us would say that some or all of these were not top priorities?

But, the budget expansion in each of these categories is having a dramatic "cumulative" effect on the costs of legal education both from the institution's perspective as well as that of the student.[43]

Putting all of this together, we clearly have both a supply and a demand market problem. Law schools are enrolling too many students at the very time that employment prospects are poor.[44] I suspect for many of our law schools these factors are forcing law schools to admit more students, while at the same time the market is rejecting, for employment purposes, a very high percentage of those graduates. I suggest, as I have for twenty-two years as a law school and university administrator, and I hope what I have actually practiced, is that we should not let budget revenues dictate the optimal number of students that should be admitted and graduated from our law schools.

Thus, today, I suggest to you in this White Lecture that all of our law schools need to seriously consider rolling back their admission numbers. Now to be sure,

---

projects about 28,000 new lawyer positions per year.").

40. *See* Harrison Okin, *As Law Faculty Increases, School Plans Expansion*, CORNELL DAILY SUN, Nov. 22, 2011, http://cornellsun.com/node/49072.

41. *E.g.*, *Information Technology*, VANDERBILT L. SCH., http://law.vanderbilt.edu/about-the-school/information-technology/index.aspx (last visited Jan. 9, 2013).

42. Bob Morse, *U.S. News Looks at the Rise in Merit Aid at Law Schools*, U.S. NEWS (May 5, 2011), http://www.usnews.com/education/blogs/college-rankings-blog/2011/05/05/us-news-looks-at-the-rise-in-merit-aid-at-law-schools.

43. I should note the very important work being done by two of our colleagues in the legal academy on the cost and financing of legal education, including Brian Tamanaha at Washington University in St. Louis, and Bill Henderson at Indiana University, Bloomington. TAMANAHA, *supra* note 1; *see also* Henderson & Zahorsky, *supra* note 1; Henderson, *supra* note 13; William Henderson, *The Hard Business Problems Facing U.S. Law Faculty*, LAW SCH. REV. (Oct. 31, 2011), http://legaltimes.typepad.com/lawschoolreview/2011/10/ the-hard-business-problems-facing-US-law-faculty.html.

44. Tamanaha, *supra* note 39.

as an antitrust lawyer and antitrust scholar, I am *not* calling for collective action by our law schools or by our institutions of law. Rather, I am suggesting that individual institutions take a very serious "relook" and "reset" on their own. Each institution has, of course, its own history, culture, and mission. I make this recommendation in that context, that *each* individual institution should reevaluate its mission and its ability to support that mission.

The one "commonality" among these costs, as you know, is the H.R. factor—the size of the student body and the corresponding size of the faculty.

But, while I recommend a significant decrease in the number of seats open for law students, serious care needs to be taken to ensure that middle-class students, as well as students coming from the lower economic sectors of society and diverse populations, do not suffer the burden of this restructuring.

The transformation of the legal profession clearly has signaled to us that the traditional means and ways of hiring law students is largely gone. For example, one managing partner of one of our largest law firms told me in a confidential conversation last year that his firm had reduced from "on average, eighty summer associates down to four or five." As Professor Tamanaha of Washington University has boldly, but correctly, noted, the economic model of law schools is broken.[45] He concludes that "the cost of a law degree is now vastly out of proportion to the economic opportunities obtained by the majority of graduates."[46] And that is my point about the interaction of the supply and demand market in the legal world today! At least in the short to mid-range term, Professor Tamanaha notes that the disconnect between the cost of legal education and the economic return it brings is out of line.[47]

Unlike some of the critics, I *do* believe that law schools *can* reform themselves individually, without governmental intervention or increased regulatory oversight by accrediting agencies.

I am aware also that some people today either believe there are too many lawyers in society, or they believe the opposite—that there are barriers to legal education that have provided too few lawyers.[48] I disagree with both propositions.

We have a maldistribution of lawyers, to be sure, the result of which is we have many sectors of society that are not being serviced optimally or at all.[49] There continue to be real "access" and justice issues because of this maldistribution.[50]

---

45. Brian Z. Tamanaha, Op-Ed., *How to Make Law School Affordable*, N.Y. TIMES, June 1, 2012, at A27, *available at* http://www.nytimes.com/2012/06/01/opinion/how-to-make-law-school-affordable.html.

46. *Id.*

47. Tamanaha, *supra* note 39.

48. *Not Enough Lawyers?*, *supra* note 4.

49. David Segal, *Is Law School a Losing Game*, N.Y. TIMES, Jan. 9, 2011, at BU1, *available at* http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all.

50. *Id.*

On the other hand, for these critics, and some economists,[51] who claim that the legal profession and the accreditation process have created barriers to entry, I note that at least twelve new law schools have opened since 1999.[52] Given this evidence, I know of no other professional graduate education where the "output" expansion has been so great. It is just the opposite of an antitrust cartel or concern, I might add.[53]

Finally, I leave you with my belief that the legal profession and law schools today are *not* in crisis. They are, instead, in a large transition. Law schools will continue to balance the tensions between educating and graduating the generalist or the specialist, as well as between academic/research responsibilities and the practice of skills development. These are healthy tensions that have been present since the Langdellian changes in the 1870s.[54] Each school will need to find its own "distinctiveness" on this educational spectrum.

In sum, although I am suggesting a prescription here that may seem provocative, I do want to suggest a clarion call for an appropriate balance and proportion of consideration of all of the trade-offs involved. The American legal education's greatest strength has been its value of turning out well-educated generalists, much like the theme expressed in Dean Tony Kronman's wonderful book, *The Lost Lawyer*.[55] On reflection, however, the supply side of this market—the firms and entities that employ our law graduates—are telling us that our graduates must come out more focused, more finely educated, and practice-ready in more specific areas.[56]

I lament this direction or trend because while it may lead to greater depth of technical knowledge, I am not sure it builds the requisite judgment and wisdom that come from a more generalist-centered legal education experience.

And for our senior lawyers who remember the golden era[57] of law and urge us to produce the "perfect lawyer" in three years, recall our own educational progression. I offer you an idea: judgment and wisdom are the application of knowledge shaped through experience; and learning is incremental, informed

---

51. *Not Enough Lawyers?*, *supra* note 4.

52. *See Alphabetical School List*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order.html (last visited Nov. 11, 2012).

53. *See generally* THOMAS D. MORGAN, ANTITRUST IMPLICATIONS OF ACCREDITATION STANDARDS THAT LIMIT LAW SCHOOL ENROLLMENT, 86 BNA INSIGHTS (July 15, 2011).

54. Bryce & Seibel, *supra* note 29.

55. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (Harv. Univ. Press 1995).

56. *See generally* Alfred S. Konefsky & Barry Sullivan, *There's More to the Law Than 'Practice-Ready,'* CHRON. HIGHER EDUC. (Oct. 23, 2011), http://chronicle.com/article/Theres-More-to-the-Law-Than/129493/ (discussing the need for law schools to teach more than theory so that lawyers are prepared to practice upon graduation).

57. Rachel M. Zahorsky, *Can a Return to 'Golden Era' Values Prevent Your Firm from Becoming the Next Dewey?*, A.B.A. J. (May 24, 2012, 5:16 PM), http://www.abajournal.com/news/article/can_a_erturn_to_golden_era_values_prevent_your_frim_from_becoming_the_next.

through experience.

In closing, I return to the central dilemmas faced by law students and law schools—the relationship between (1) high tuition, (2) high debt (and the looming "federal loan bubble"),[58] and (3) more modest salaries and fewer jobs.

I have suggested that law schools need to look more closely at how to (1) enhance their comparative advantage by focusing on their distinctiveness or uniqueness, (2) avoid replicating all the same things that their competitors are doing, and (3) cut costs by reducing enrollments, individually, and by moderating the growth of law faculties and the concomitant "arms race."[59]

Each of these strategies will drive down costs related to facilities, financial aid, IT capacity, libraries, and salaries, while leaving opportunities to reinvest savings in the real priorities of schools such as enhanced educational distinctiveness and quality. While some of these may be considered fixed rather than variable costs, over a longer term these, too, can be changed.[60]

I understand that if class size is reduced, so, too, will the revenue derived from tuition. The key is striking the right balance among revenue, costs, and enhanced reputation and quality. Above all, recall that (to the critics) "quality" requires investment that raises costs.[61] This will demand a greater focus on prioritization and the going without of some things that simply are not core or fundamental to the institution. The same strategies apply to the legal profession.

---

58. John Paul Cassil, *The Recession and the Menacing Higher Education Bubble*, WASH. TIMES, Nov. 30, 2011, http://communities.washingtontimes.com/neighborhood/conserving-freedom/2011/nov/30/looming-recession-higher-education/.

59. *See* John A. Byrne, *An Unexpected B-School Arms Race for Top Students*, CNN MONEY (Dec. 12, 2011, 9:35 AM), http://management.fortune.cnn.com/2011/12/12/mba-scholarship-arms-race/.

60. For example, a reduction of faculty numbers, increased teaching loads, and more reliance on professors of practice will help drive down costs.

61. *See, e.g.*, David Segal, *For Law Schools, a Price to Play the A.B.A.'s Way*, N.Y. TIMES, Dec. 18, 2011, at BU1, *available at* www.nytimes.com/2011/12/18/business/for-law-schools-a-price-to-play-the-abas-way.html?pagewanted=all ("Members of the A.B.A. Section say the point of the standards is not to raise the cost of law school, or to limit competition. The point is to ensure lawyers are well trained and that the public gets quality legal services.").

Indiana Law Review

Volume 46 **2013** **Number 1**

TRIBUTES

FRANK SULLIVAN, JR., THE VERY MODEL OF A MODERN JUSTICE

RANDALL T. SHEPARD*

It is in the nature of modern leadership style to talk about enterprises as being led forward by virtue of collective judgment and the shared commitment of all those who are engaged in the endeavor. Still, there are those among us whose individual approach to improving the institution places them conspicuously above the crowd.

So it is with the American judiciary. One can acknowledge both the benefit of collegial leadership and the importance of impartial decisionmaking, while still admitting that some among us have mattered more than the rest of us.

No one has done more to advance a modern judiciary in this state and elsewhere than Justice Frank Sullivan, Jr. From the courts of small towns to discussions on an international stage, Frank Sullivan has been a figure who mattered.

There are at least two reasons why we ought pause to celebrate the contributions of such a transformative leader. First, there is the matter of simple justice. Equity commands that we take the time to recognize great achievers for what they have done. Second, public recitation of their superb leadership may well inspire the rest of us to reach for higher goals in light of the inspiration they have provided.

While there are many prisms through which one might view the multiple contributions of Frank Sullivan to the American bench, I choose here to focus on four.

I. "JUDGING *IN* INDIANA"

There was a time within memory when nearly all the work done by judges was undertaken by single judicial officers sitting as the sole arbiters of cases in each of the nation's courthouses. The system of justice proceeded one case at a time, decided by one judge at time, and judges seldom had reason to do business with other judges, save perhaps very occasionally those in the county next door.[1]

---

* Chief Justice of Indiana, 1987-2012. A.B., Princeton University, 1969; J.D., Yale Law School, 1972; LL.M., University of Virginia, 1995.

1. *See, e.g.*, John Baker, *The History of the Indiana Trial Court System and Attempts at Renovation*, 30 IND. L. REV. 233, 250-51 (1997) (discussing the general assembly's tendency "to create an autonomous court . . . [w]hen a need for additional judicial resources arose," leading to

Even our vocabulary has long emphasized the value of such individual decisionmaking. For example, we often speak of fostering "judicial independence" as assuring fair and impartial decisionmaking, and by this we mean decisions made by the judge alone without participation by anyone outside the courtroom.[2]

The evolving nature of the nation's court systems has altered how we go about the business of running them and improving them. In this state, for example, the annual caseload has grown from less than a million a year during the early 1980s to roughly two million a year by the time the first decade of the new century ended.[3] Likewise, the number of judges at work on this mass of disputes has grown from perhaps two hundred just thirty-five years ago to some five hundred in the present moment. The complexity of the work has surely grown at rates that match the increase in the quantity of the work. The judiciary has thus accelerated the means and expanded the institutions by which it works to devise more effective and efficient techniques.

The changes in how courts function have demanded a higher level of collaboration and purposefulness than would have been adequate even half a century ago. Frank Sullivan has lived this idea, and he has preached it.

It was Justice Sullivan who devised a phenomenally good description of the ways by which a modern judge might decide to pursue his or her work. Addressing judges who were about to begin their careers after the elections of 2006, he told them he intended to describe "not what it is to be a judge in Lake or Cass or Clark County—or, for that matter, to be a judge in a broad, transcending jurisprudential sense—but what it is to be a judge in the statewide system of approximately 350 men and women, now including each of you."[4] He outlined the ways trial judges were involved in the many instrumentalities of the profession and the courts, focusing on what Sullivan often labeled "Supreme Court Enterprises," activities like those in bar admission, lawyer discipline, the Indiana Judicial Center, and the Division of State Court Administration. All these, he pointed out, make it possible for today's Indiana judges to devise and

---

a proliferation of courts at the end of the 20th century "which included: [t]he supreme court, court of appeals, circuit, superior, criminal, juvenile, probate, municipal, justice of the peace, city, town, and magistrate courts").

2. *See* Matthew W. Green, Jr. et al., *The Politicization of Judicial Elections and its Effect on Judicial Independence*, 60 CLEV. ST. L. REV. 461, 470-71 (2012) (discussing the widely accepted virtues of judicial independence to upholding fair and impartial rulings).

3. *See* Niki Kelly, *Trial Courts' Caseload Slips for a 3rd Year*, J. GAZETTE (Oct. 30, 2012, 10:08 AM), http://www.journalgazette.net/article/2012/1030/LOCAL/310309969/-1/LOCAL11 (noting the 2011 caseload to be at "[a]bout 1.68 million cases," which is down from "a peak of 2 million new cases in 2008"); *see also* Maureen Hayden, *Case Load: Indiana Court Filings on the Rise*, NEWS & TRIB. (Apr. 22, 2010), http://newsandtribune.com/local/x1612547671/Case-load-Indiana-court-filings-on-the-rise/ (recognizes a 29% increase in criminal and civil cases and a 25% increase in child services cases over the span of a decade).

4. Justice Frank Sullivan, Jr., Ind. Supreme Court, Remarks to the Indiana Judicial Center New Judges Orientation: Judging in Indiana (Jan. 26, 2007) (transcript on file with the author).

implement new methods for pursuing justice, like court-appointed special advocates, mediation, senior judgeships, public defender improvement, court interpreters, drug courts, and trial court technology. He highlighted the fact that much of the reform in such fields "represents the implementation of discrete ideas first offered up by Indiana judges."[5]

And then he wrapped up by exhorting the class of new recruits to be a certain kind of judge:

> I have concluded that there are two types of Indiana judges. One, I must say rapidly diminishing in number, views his or her courtroom as a castle neither to be breached nor ventured out of. I could say more but you get the idea. The second type of Indiana judge is of the kinds of have described in my remarks: one who views himself or herself as an integral member of a statewide judicial family, a family not bounded by courtroom or courthouse or county or judicial district. These Indiana judges are deeply engaged in the work of the Indiana Judicial Center and Judges Association. They are a font of new ideas. They recognize that both the adjudicative work, and the administrative work of our judiciary is statewide in nature and they are totally committed to a vision at least similar to that I have described—that vision becoming a reality not just for their court or for their county but for our entire state.[6]

Sullivan's conviction about the value of statewide collaboration in court reform, often led by judges, was a hallmark of his work in juvenile justice and in court technology, to name two fields where he has been especially important. Most justice happens in the county courthouses, after all, because 98% of all litigation begins and ends in the county courthouse without ever seeing an appellate tribunal. Sullivan's energetic approach to modernizing trial court technology led Marion County prosecutor Scott Newman to say, "The Supreme Court cares about the cases it never sees."

As I shall argue later, Frank Sullivan magnificently enriched our jurisprudence, but his approach to being a justice reflected a broad idea of the good he could do for the whole of the bench. In this respect, his judicial career echoed what a member of the Massachusetts Supreme Judicial Court once wrote: "No judicial system can be stronger than its trial judges. A learned and brilliant court of last resort can give a system a high reputation abroad, but that reputation will be hollow unless nearly equal merit is found in the trial court."[7]

II. SULLIVAN ON THE NATIONAL STAGE

Frank Sullivan's achievements during his career as a justice have been such that reformers in other states have found them to be valuable guidance. One could mention, for instance, the dramatic improvement in the representativeness

---

5. *Id.* at 5.
6. *Id.* at 5-6.
7. HENRY T. LUMMUS, THE TRIAL JUDGE 7 (Foundation Press 1937).

of juries, achieved by the Judicial Technology and Automation Committee, which he chaired. This achievement, completed with important leadership from Justice Theodore Boehm and others, has led to more representative juries in thousands of trials in hundreds of courtrooms.[8] It has been a monument to reinvigorating trial by jury, resulting in national recognition for Indiana and emulation elsewhere.[9]

I choose to record here, however, a heroic rescue engineered by Sullivan that has fostered better judging in virtually every state of the union. Only a few people in Indiana know the story.

For at least several decades, the Appellate Judges Conference of the American Bar Association has staged national educational events for members of the state and federal judiciary. These opportunities were particularly valuable because the relatively small number of judges who hear appeals in any given state or circuit meant that it was economically difficult for individual court systems to sustain ongoing judicial education designed for appellate judges. Staging such educational events for a national market, however, made is feasible.

Around the turn of the century, however, subsidies from the State Justice Institute and other financial supporters waned to the point that it seemed these valuable national sessions might disappear altogether. The team of judges who had originally engineered these events had dispersed or gone far enough into retirement that the cause seemed all but lost.

Fortunately, as this crisis loomed, Frank Sullivan served on the executive committee of the Appellate Judges Conference, and indeed served as the chair of the conference. Sullivan rallied an army of the willing to redesign and rescue this important national asset. He forged a new alliance between the ABA and the Dedman School of Law at South Methodist University, one that has persisted to this day.[10] He engineered a collaboration with leading appellate practitioners that has broadened the audience for these events, and he connected these seminars with the national group that trains the lawyers who staff appellate courts. All in all, the enterprise has found a solid new footing and continues to serve the American bench and bar. It has happened only because of the talent and determination of Frank Sullivan. This has not been front page news anywhere,

---

8. *See, e.g.*, *Jury Management System*, COURTS.IN.GOV, http://www.in.gov/judiciary/jtac/2647.htm (last visited Dec. 5, 2012); *see also Statewide Jury Pool Projects*, COURTS.IN.GOV, http://www.in.gov/judiciary/ jtac/2645.htm (last visited Dec. 5, 2012).

9. *See* Nina Settappa, *Court Receives Award for Improving Jury Selection*, IND. NEWS CTR. (2009), http://www.indiananewscenter.com/news/local/78509562.html?m=y (noting the Indiana Supreme Court's receipt of "the 2009 G. Thomas Munsterman Award for Jury Innovations" from the "National Center for State Courts" for work done by "the Judicial Technology and Automation Committee" in its efforts "to create a broader, more accurate jury system including a statewide master jury pool list that's available to courts through a secure Web site") (last visited Dec. 1, 2012).

10. *See* APP. JUDGES EDUC. INST., http://www.law.smu.edu/AJEI/Home (last visited Dec. 5, 2012) (advertising the co-sponsorship of the SMU Dedman School of Law for the November 2012 summit).

but it is an achievement that has made for better justice throughout the whole country.

Achievements of national scope are the most that many can manage, but Frank Sullivan has also been tapped for international activities in the name of legal reform and public policy. Britain's legendary Ditchley Foundation, created in 1958, assembles small groups of the highest-level leaders from the worlds of politics, business, the academy, and the media.[11] The objective is to analyze the challenges of modern society and build bridges of understanding across the Atlantic. Ditchley's work now reaches beyond this original foundation to take up issues of concern from all over the globe. Justice Sullivan and his wife, Cheryl Sullivan, have been called upon to confer with international partners on subjects ranging from devolution and subsidiarity, to the role of the family in public policy, to society's resilience in withstanding disasters. Indeed, Justice Sullivan served as a director of the American Ditchley Foundation, where he sat alongside such figures as John Brademas, Joseph Califano, and Donald McHenry.

In the course of his associations with so many global leaders from many walks of life, Frank Sullivan has built special connections with people who serve the judiciary in places like Scotland, England, and Germany. He has tapped these connections over and over in recruiting scholars and judges to participate in law-related events here in Indiana and elsewhere in America. I think it fair to say that no one since Justices Shake and Richmond at Nuremberg[12] has been so integrally connected to the legal profession overseas as Frank Sullivan.

III. WALKING THE WALK OF EQUAL OPPORTUNITY

The bench and bar and the nation's law schools rightly celebrate the fact that graduating classes of recent decades have been demographically vastly more diverse. Still, the reality is that helping the large numbers of women, African-Americans, Asians, and Hispanics move up the ladders of success and influence is a task with plenty remaining to be done.

Frank Sullivan has toiled in this vineyard on the national stage and in his own backyard. One need only have observed who worked in his office to see his appreciation of how the credential of an appellate court clerkship can help propel a young lawyer's career. The long line of women and minority graduates whom Justice Sullivan recruited to his chambers was a vivid demonstration of an influence of Sullivan that will last for decades to come.[13] Fully half of the Sullivan clerks were minority lawyers. No trumpets sounded; no press releases came out of the machine. Just solid and demonstrable progress at the hands of a judge determined to find good talent and nurture it.

---

11. DITCHLEY FOUND., http://ditchley.co.uk/ (last visited Dec. 4, 2012).

12. *See* SUZANNE S. BELLAMY, HOOSIER JUSTICE AT NUREMBERG (Ind. Historical Soc'y Press 2010).

13. *Indiana Law—Justice Sullivan Chairs National Program Urging Minority Law Students to Seek Judicial Clerkships*, IND. LAW BLOG (Feb. 10, 2004), http://www.indianalawblog.com/archives/2004/02/indiana_law_jus.html.

This commitment reached across the country, as with so much else that Frank Sullivan has touched. He has been a leading figure in promoting minority clerkships since the American Bar Association began its Judicial Clerkship Program in 2001.[14] Alternately recruiting schools, judges, and students, Sullivan assisted and inspired others to add to the progress he so demonstrably made here at home.

For all these reasons and more, the ABA Section of Litigation named Frank Sullivan an early winner of its Diversity Leadership Award, recognizing those whose special efforts make the professional "more welcoming, inclusive, and truly representative of the population we serve."[15] Receiving this award in New York City in the presence of his wife, Cheryl, and a number of his clerks, Justice Sullivan gave a compelling explanation of why he thought this important:

> It assures that where we have the power to select, or to mentor, or to promote, we will consider men and women different than ourselves, not just those who are the same. To be sure, this is a moral imperative, if not a legal one. But beyond that, when we do bring into our professional and personal orbit men and women different than ourselves, we invariably enrich ourselves by their markedly different experiences and perspectives.[16]

The remarkable young men and women who were Sullivan recruits over the nineteen years of his service as a Justice have now begun to achieve and contribute in their own right. Others who are still just beginning their careers will doubtless add value that is yet unimagined, doing so partly because of the chance Frank Sullivan gave them. This will be what Holmes called "the subtile rapture of a postponed power."[17]

IV. SCHOLARSHIP AND SULLIVAN AT THE CONFERENCE TABLE

For the equivalent of nearly a whole generation, I spent most of my Thursdays sitting down the table from Frank Sullivan in the conference room where the Indiana Supreme Court actually makes decisions. Around that table,

---

14. *See* Justice Frank Sullivan, Jr., Ind. Supreme Ct., Remarks to Judges and Faculty at the University of St. Thomas School of Law (Feb. 1, 2011), *available at* http://blogs.stthomas.edu/ethicalleadership/2011/03/09/ remarks-of-indiana-supreme-court-justice-frank-sullivan-jr-to-judges-and-faculty-at-ust/.

15. Press Release, A.B.A., Second Annual Diversity Leadership Awards Recognizes Indiana Justice Frank Sullivan, Jr. and the Coca-Cola Company Legal Division (Mar. 2, 2010), http://www.abanow.org/2010/03/second-annual-diversity-leadership-awards-recognizes-indiana-justice-frank-sullivan-jr-and-the-coca-cola-company-legal-division/.

16. Frank Sullivan, Jr., Justice, Ind. Supreme Court, Remarks Accepting the ABA Section of Litigation 2010 Diversity Leadership Award (Apr. 21, 2010).

17. G. Edward White, *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. REV. 1409, 1467 (1990) (quoting THE OCCASIONAL SPEECHES OF JUSTICE HOLMES 73 (M. Howe ed. 1962)).

the state's court of last resort decides which of the thousand annual petitions for further appellate review will be granted—and then deliberates on the results after those cases have been argued. Over time, those discussions have become more regular and more fulsome, such deliberations having dwindled nearly to extinction during the decades when the court was constitutionally obliged to spend nearly all its time on mandatory direct criminal appeals.

When it came to discussing legal issues around the conference room table, Frank Sullivan was both a master at describing where we had been before and an engaging contributor who enriched the discussion about where we should go next. Aside from his own impressive memory, his command of our recent past flowed from the individual memoranda he wrote about every single case that was the subject of a petition to transfer. He had prepared each of these himself (the first person I knew who mastered voice recognition software), and he could search them all on his computer while the discussion progressed. As best I can recall, I never actually saw one of these memos, but they were Justice Sullivan's record of where we had encountered similar issues to the ones we were debating on any given conference day. He could let us know why the former case was similar or a little dissimilar and, more importantly, how each of us had voted and often what we had said in casting our votes. It was a powerful tool in the hands of a gifted combatant (I use that last word without meaning to suggest that the proceedings were other than cordial, though Justice Brent Dickson once said to his staff while headed out the door, "I'm going to a wage conference.").

While I remember Justice Sullivan's memos fondly, far more important was the intellectual power and curiosity that Frank Sullivan brought to the court's weekly discussions. Over and over again, these encounters led to writing opinions of some elegance. Sometimes they produced both an elegant majority opinion and a first-rate dissent. The higher caliber of the written product led to more and more Indiana Supreme Court opinions being cited by courts in other states and to more Indiana entries in legal texts used to train the next generation of lawyers. It had not always been so.

A satisfactory accounting of Frank Sullivan's contribution to this improving body of work will need to await another day, so I will content myself with praise for one of his later opinions, which I think illustrated the remarkable caliber of his thinking and his craftsmanship.

The appeal of *Synder v. King*[18] arose because David Snyder, convicted of misdemeanor battery, was dropped from the voter registration rolls while incarcerated for his crime. Rather than simply re-register as he was entitled to do, Snyder filed a civil rights action in U.S. District Court. He claimed that he was wrongly dropped because battery was not an "infamous crime" for which the Indiana General Assembly was empowered to disenfranchise him under article II, section 8 of the Indiana Constitution. The issue of what constituted an "infamous crime" came to the Indiana Supreme Court as a certified question. This avenue itself was an innovation that took full bloom during the Sullivan era; in earlier years, the Indiana Supreme Court accepted questions only from the

18. 958 N.E.2d 764 (Ind. 2011).

federal circuits.

Justice Sullivan's opinion for a unanimous court was a work of art. The state's existing decisional law, going back the better part of a century, meandered a bit. The notion of disenfranchisement for certain offenses had ancient origins, and to examine whether Indiana caselaw was on respectable footing, Sullivan examined authority from the likes of Lord William Eden Auckland, the English Reports, the works of Jeremy Bentham, and the debates of Indiana's constitutional convention. This was no mere frolic and detour; it was an important step in deciding whether *stare decisis* should carry the day or whether we needed a fresh start.

Aside from this substantial venture in legal history, Justice Sullivan did three things that reflected the care and thoughtfulness of his judicial craftsmanship. For one thing, he identified issues the litigants themselves had not raised but which seemed very important to the question sent over by the district court. Even if battery was not an infamous crime, as the court finally concluded, it was not unconstitutional to remove Snyder from the registration rolls while he was in prison and leave it to him to re-register when he was out of jail. After all, nearly all states disqualify incarcerated convicts from voting while they are imprisoned. The real upshot of Snyder's claim, Justice Sullivan wrote, was in effect a contention "that the Indiana Constitution compels the General Assembly either to release imprisoned convicts on Election Day so that they may vote at the polls, to provide polling places at the myriad correctional and jail facilities throughout the State, or to provide incarcerated convicts with absentee ballots."[19]

Second, Justice Sullivan took time to outline the disadvantages of resolving issues of constitutional law through the technique of certified questions. Among other things, it runs counter to the judicial principle of examining the constitutionality of a decision by one of the other branches of government only when a live dispute cannot be resolved through non-constitutional means.

Third, Sullivan laid out in vivid detail how Snyder's decision to file in federal court when his only real question was one of state constitutional law was an unattractive circumvention of the regular course of litigating in Indiana courts.[20] He described the disadvantages of the technique employed and urged litigants to consider the other tools available to them.

Frank Sullivan's opinion in *Snyder v. King* will rightly be cited multiple times in many future cases for its elegant explication of the question at hand. It will also stand as a roadmap for future judges on prudential issues and judicial behavior worthy of emulation.

I lift up the *Snyder* opinion while holding firmly to the view that it was not, as the saying goes these days, a "one-off." It stands alongside scores of superb pieces of scholarship and judicial craftsmanship that will continue to shed light on important questions for decades to come.

---

19. *Id.* at 785.

20. *Id.* at 787-88 ("Thus, both parties wanted this Court to resolve at least a part of their dispute but apparently did not want to go through the 'trouble' of developing the issues in lower state courts, preferring to litigate the matter in the first instance here.").

CONCLUSION

So what to make of these few accounts that only begin to outline the many ways Indiana and its lawyers and judges have benefitted from the service and the leadership of Frank Sullivan, Jr.?

I say this. As Indiana closed in on celebrating its first hundred years of statehood, the prevailing judgment of scholars and close observers was that the most impressive period in the Indiana Supreme Court's history had been a time in the 1840s that coincided with the service of Indiana's earlier Justice Sullivan, or rather of Judge Sullivan, as the Indiana Supreme Court members were then called.[21] As a friend of mine might have said, it was more than a golden moment.

The judicial career of the present Justice Sullivan stands as proof that we have once again been the beneficiaries of an extraordinary talent.

---

21. *See, e.g.*, HUGH MCCULLOCH, MEN AND MEASURES OF HALF A CENTURY 48 (Scribner's, New York, 1900); JOHN B. STOLL, HISTORY OF THE INDIANA DEMOCRACY 389 (Indiana Democratic Publishing Co., Indianapolis, 1917); I LEANDER J. MONKS, COURTS AND LAWYERS OF INDIANA 204-05 (Federal Publishing Co., Indianapolis, 1916). Judge Jeremiah Sullivan contributed even more by inspiring his son Algernon to become a lawyer and found the legendary New York firm of Sullivan & Cromwell. Brandon T. Rogers, *Jeremiah C. Sullivan*, *in* JUSTICES OF THE INDIANA SUPREME COURT 30-31 (Linda C. Gugin & James E. St. Clair eds., 2010).

TRIBUTE TO JUSTICE (NOW PROFESSOR) FRANK SULLIVAN, JR.

GARY R. ROBERTS*

Though he is perhaps best known for his time as an Associate Justice on the Indiana Supreme Court, Frank Sullivan, Jr., brings a broad range of legal and public service experience to the law school as he begins the next chapter in his career as our first professor of practice. Sullivan is no stranger to the law school. He has been a frequent guest at our lectures,[1] and he taught public finance law here as an adjunct professor from 2007-2009.

Justice Sullivan was a lawyer at what is now the state's largest law firm, Barnes & Thornburg, before leaving to become the state budget director from 1989 to 1992. After that, he served as then-Governor Evan Bayh's executive assistant for fiscal policy, where he directed the preparation of the Bayh Administration's budget proposals and oversaw the implementation of state budgets passed by the legislature. But the legal community esteems him for his work on the Indiana Supreme Court, following his appointment by Governor Bayh in 1993.[2]

He is known for his tenacious questioning of lawyers during their presentations in oral argument. Litigants could count on Justice Sullivan insisting that they join with him in a verbal exploration of the potential outcomes of their cases.[3] The court holds about seventy oral arguments each year;[4] that's a lot of sparring and speculating about the future of the law. He wrote approximately 500 majority opinions while on the court.[5]

---

* Dean and Gerald L. Bepko Professor of Law, Indiana University Robert H. McKinney School of Law. B.A., 1970, Bradley University; J.D., 1975, Stanford University.

1. *See, e.g.*, *Fellowship* Symposium, *Maximizing Judicial Fairness & Efficiency: Should Indiana Consider Creating an Office of Administrative Hearings?*, IND. UNIV. ROBERT H. MCKINNEY SCH. OF LAW, PROGRAM ON LAW & STATE GOV'T 2 (Oct. 1, 2004), *available at* http://indylaw.indiana.edu/programs/law_state_gov/archive/Brochure04.pdf ("reflect[ing] on whether a central office of administrative hearings [would have] implications for judicial review . . . and the constitutional distribution of powers among the branches of government" as a featured speaker of the program); Symposium, *Reflecting on Forty Years of Merit Selection*, IND. UNIV. ROBERT H. MCKINNEY SCH. OF LAW, IND. L. REV. (Apr. 5, 2012), http://indylaw.indiana.edu/cle/events.cfm?eid=492 (delivering a welcome address).

2. *Justice Frank Sullivan, Jr.*, COURTS.IN.GOV, http://www.in.gov/judiciary/citc/2831.htm (last visited Dec. 20, 2012).

3. The Indiana Supreme Court provides both live webcasting and archived recordings of its oral arguments. To view Justice Sullivan's questioning techniques in specific cases, see *Oral Arguments Online*, IND. COURTS, https://mycourts.in.gov/arguments/default.aspx?&id=&view=table&yr=&when=&court=sup&page=1&search=&direction=%20ASC&future=False&sort=&judge=&county=&admin=False (last visited Dec. 20, 2012).

4. *See Ind. Supreme Court: Quick Facts*, COURTS.IN.GOV, http://www.in.gov/judiciary/files/media-supreme-facts.pdf (last visited Dec. 20, 2012).

5. Lesley Weidenbener, STATEHOUSE FILE, Ind. *Supreme Court Justice Sullivan to Retire*, NUVO (Apr. 3, 2012), http://www.nuvo.net/indianapolis/ind-supreme-court-justice-sullivan-to-

He is recognized for his work in making Indiana courts more connected. Justice Sullivan chaired the court's Judicial Technology and Automation Committee from its inception in 1999, and he has tirelessly advocated for adequate funding for this work.[6] He also championed the implementation of the Odyssey system, which connects courts with each other, as well as with police and other state agencies, while at the same time making court information available online at no cost.[7] The goal is for the system ultimately to be implemented in every Indiana county; it is in place in well over 100 courts and more than forty Indiana counties at the time of this writing.

He is a national leader, having served as chair of the Appellate Judges Conference of the American Bar Association from 2008-2009, and chair of the Board of Directors of the Appellate Judges Education Institute from 2009-2010.[8] Justice Sullivan's service to the profession truly shines in the area of diversity. He served as a leader of the ABA Judicial Clerkship Program that encourages minority law students to seek judicial clerkships[9] and has received several awards for advancing opportunities for minority lawyers in the legal profession.

Justice Sullivan has been recognized for his work and the tangible results he has achieved in the field of diversity. In 2002, he was honored with the Rabb Emison Award from the Indiana State Bar Association.[10] The Indiana State Bar Association created the award in 1996 and bestows it each year on an attorney "who best serves the goal of assisting minority lawyers" achieve their career

---

retire/Content?oid=2436096#.ULpr8WftlJE

6. *See Judicial Technology and Automation Committee*, COURTS.IN.GOV, http://www.in.gov/judiciary/admin/2336.htm (last visited Dec. 20, 2012); *see also* Michael W. Hoskins, *Justice: Fee Hike Could Mean Statewide Case Management System by 2017*, IND. LAWYER (Aug. 26, 2010), http://www.theindianalawyer.com/justice-fee-hike-could-mean-statewide-case-management-system-by-2017/PARAMS/article/24594 (briefing the Commission on Courts about the progress of JTAC and its need for additional funding, Justice Sullivan stated, "The reason good technology costs so much is because the economic and intangible benefit is so great.").

7. *See* Jennifer Nelson, *Justice Touts Odyssey, Counties Seek Addition Judicial Officers*, IND. LAW. (Aug. 25, 2011), http://www.theindianalawyer.com/justice-touts-odyssey-counties-seek-addition-judicial-officers/PARAMS/article/27008.

8. *Justice Frank Sullivan, Jr.*, *supra* note 2.

9. For more information about the ABA Judicial Clerkship Program from Justice Sullivan's perspective, see Frank Sullivan, Jr., *The ABA Judicial Clerkship Program Celebrates its 10th Anniversary*, 48 JUDGES' J. 14 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/PublicDocuments/Sullivan_JCP.authcheckdam.pdf.

10. *See Racial Diversity in the Legal Profession*, IND. STATE BAR ASS'N, http://www.inbar.org/ISBALinks/Committees/Diversity/tabid/129/Default.aspx (last visited Dec. 20, 2012) (listing the individual recipients of the Rabb Emison award since its creation by the Indiana State Bar Association in 1996); *See also* DIV. OF SUPREME COURT ADMIN., INDIANA SUPREME COURT 2008-2009 ANNUAL REPORT 11-12 (2008-2009), available at http://www.in.gov/judiciary/supreme/files/0809report.pdf (describing his receipt of the award for his "significant contribution made in advancing opportunities for minority lawyers in legal employment and the legal profession").

aspirations.[11] In 2010, Sullivan was presented with the Diversity Leadership Award of the American Bar Association Section of Litigation.[12] The group cited his "conviction and passion to making a difference in improving the opportunities for minorities in the judicial system. He has become an inspirational role model for others to follow in his footsteps."[13] "The award was established in 2008 to recognize individuals or organizations who have demonstrated a commitment to promoting full and equal participation in the legal profession through proactive encouragement and inclusion of women, people of color, persons with disabilities, and persons of differing sexual orientations and gender identities."[14]

We couldn't ask for a better example of a fine lawyer for our students have as a role model. The IU Robert H. McKinney School of Law is truly fortunate to have Justice Sullivan here to impart his vast knowledge to students, as well as to mentor and guide them to become attorneys with integrity of whom we can all be proud.

---

11. Michael W. Hoskins, *Former ISBA President Rabb Emison Dies*, IND. LAWYER (Sept. 15, 2010), http://www.theindianalawyer.com/former-isba-president-rabb-emison-dies/PARAMS/article/24710.

12. *See Section of Litigation Recognizes Diversity, Pro Bono and Public Service*, ABA NOW (May 7, 2010), http://www.abanow.org/2010/05/section-of-litigation-recognizes-diversity-pro-bono-and-public-service/.

13. Meghan Lazier, *Justice Frank Sullivan, Jr. Receives the Section of Litigation's 2010 Diversity Leadership Award*, A.B.A. (Mar. 2, 2010), http://www2.americanbar.org/divisions/Judicial_migrated/Lists/Announcements/DispFormNew.aspx?List=b7d42f44-edf2-4bde-a477-5c7a6e0e29fa&ID=14.

14. *Diversity Leadership Award*, A.B.A. SECTION OF LITIGATION, http://www.americanbar.org/groups/litigation/initiatives/diversity_initiatives/award.html (last visited Dec. 1, 2012).

Indiana Law Review

Volume 46 **2013** **Number 1**

NOTES

A CRITICAL ANALYSIS OF *PLIVA, INC. V. MENSING*

MATTHEW J. CLARK*

INTRODUCTION

A wealthy business executive gives her pharmacist a prescription from her doctor for a drug to help treat her disease. The pharmacist informs her that the doctor has prescribed the brand-name of the drug, but she could save 80% of the cost by getting the generic of the same drug. The business executive informs the pharmacist that she always buys brand-name. The pharmacist replies that there is absolutely no difference between the drugs other than the company that manufactures them; both of the drugs are equally effective. The business executive refuses the offer, convinced that the brand-name has to be better. Later, a blue-collar worker gives the pharmacist a prescription for the same drug to treat the same disease. The pharmacist informs him of the same information she gave the business executive. The man's face lights up at the sound of saving 80% of the price, and the pharmacist fills his order with the generic drug.

As a result of taking the drug for several years, both the business executive and the blue-collar worker develop a debilitating neurological disorder. Unfortunately, the warnings on the drugs' labels did not adequately inform practitioners of the dangers of taking the drug for more than one year. Even more unfortunate is both the brand-name manufacturer and the generic manufacturer had an abundance of medical information that established there was an extremely high risk of consumers developing the neurological disorder if the drug was taken longer than one year. Despite this information, neither manufacturer changed its label or even sought to supplement its label with a warning regarding this risk of the drug.

Because of this lack of warning, the business executive files a successful state failure-to-warn claim against the brand-name drug manufacturer. After hearing of the business executive's success in receiving compensation for her injury, the

---

* J.D. Candidate, 2013, Indiana University Robert H. McKinney School of Law; M.F.A., 2006, Chapman University, Orange, California; B.A., 2001, Ball State University, Muncie, Indiana. First and foremost, I would like to thank my wife, Jennifer, for all her support, encouragement, and understanding. I would like to thank my family for their support as well. I am grateful to everyone who assisted in the development of this Note, especially all the editors of the *Indiana Law Review*. I would also like to give a special thanks to David Meehan for his efforts in getting this Note published. I dedicate this work to my son and best little buddy, Flynn.

blue-collar worker decides to sue the generic drug manufacturer. To his surprise, his lawyer informs him that he does not have a failure-to-warn claim against the generic drug manufacturer. The worker is confused because his situation is identical to the business executive's situation. The only distinction is that he took the generic form of the drug rather than the brand-name version. The lawyer informs the worker that taking the generic drug was his mistake.

The lawyer explains that as a result of the Supreme Court's decision in *PLIVA*, *Inc. v. Mensing*;[1] state failure-to-warn claims against generic drug manufacturers are preempted by federal drug regulations because the federal regulations require that a generic drug's label be the same as its equivalent brand-name drug's label at all times.[2] In other words, if a brand-name drug manufacturer fails to warn of a danger, then the generic equivalent, in order to keep the label the same, must fail to warn of the danger too. It would be unfair if a person injured from taking a generic drug could sue the generic drug manufacturer for failing to warn because it was just fulfilling its federal duty.[3] A brand-name manufacturer, on the other hand, can "unilaterally" change its label to add or update warnings on its label; hence, a person injured by a brand-name drug can sue the manufacturer.[4]

With a puzzled look on his face, the worker inquires whether he can sue the brand-name drug manufacturer because his generic drug had to have the same label. The lawyer sadly informs him that the worker's state, like most states, does not allow a person injured by the use of a generic drug to sue the manufacturer of its brand-name equivalent.[5] The lawyer regretfully tells the worker that, unlike the business executive, he has no remedy for his injury.[6]

As the lyric from the Genesis song "Land of Confusion" says, "This is the world we live in."[7] An injured person's ability to sue turns on whether the drug he or she had taken was either brand-name or generic.[8] The Supreme Court's

---

1. 131 S. Ct. 2567 (2011).

2. *Id.* at 2577-78.

3. *See id* ("It was not lawful under federal law for the Manufacturers to do what state law required of them.").

4. *Id.* at 2581.

5. Kellogg v. Wyeth, 762 F. Supp. 2d 694, 706-07 (D. Vt. 2010); *see also* Foster v. Am. Home Prods. Corp., 29 F.3d 165, 171 (4th Cir. 1994) ("As Wyeth has no duty to the users of other manufacturers' products, a negligent misrepresentation action cannot be maintained against it on the facts of this case."). *But see* Conte v. Wyeth, Inc., 85 Cal. Rptr. 3d 299, 320-321 (Cal. Ct. App. 2008) (holding that a brand-name drug manufacturer's duty to use care extends to users injured by the generic equivalent if the doctor relied on the brand-name drug's warning when prescribing the brand-name or generic drug).

6. *See PLIVA*, 131 S. Ct. at 2592 (Sotomayor, J., dissenting) ("The majority's pre-emption analysis strips generic-drug consumers of compensation when they are injured by inadequate warnings.").

7. GENESIS, *Land of Confusion*, *on* INVISIBLE TOUCH (Atlantic Recording Corp. 1986).

8. *PLIVA*, 131 S. Ct. at 2592 (Sotomayor, J., dissenting) (disagreeing with the majority's finding that an individual's right to a remedy "turns on the happenstance of whether her pharmacist

decisions in *Wyeth v. Levine*,[9] which held that federal law does not preempt state failure-to-warn claims against brand-name drug manufacturers,[10] and *PLIVA, Inc. v. Mensing* has set up this bizarre reality. As Justice Sotomayor, writing for the dissent in *PLIVA*, points out, the majority "decision leads to so many absurd consequences."[11] One absurd result of the *PLIVA* decision is that Americans are supposed to believe that Congress intended to deprive people injured by generic drugs of a remedy while simultaneously promoting the use of generic drugs.[12] Another absurd result is that in a market with generic drugs constituting 75% of prescription drugs,[13] and in which many brand-name manufacturers leave the market once their patent expires, "there will [now] be no manufacturer subject to failure-to-warn liability."[14]

This decision is especially unfortunate in that it comes at a time when people in the United States are protesting on Wall Street about corporate accountability and economic inequality.[15] Although the hypothetical given in this introduction does not have to be cast in terms of a wealthy individual compared with a middle class individual, it logically could be a likely effect because wealthier individuals, for the most part, are probably more able and willing to pay the higher cost of a brand-name drug. Thus, this decision might result not only in a drop in demand for generics,[16] but could also add a little fuel to the fire on class distinction amongst people in this country. This may be overstating the situation somewhat, but these are the types of ramifications that can come from absurdity. On the other hand, the *PLIVA* decision will most definitely add to the distrust and opposition of corporations. As Justice Sotomayor explains, "[M]any generic manufacturers . . . are huge, multinational companies . . . [that have] sold an estimated $66 billion of drugs in [the United States] in 2009."[17]

This Note analyzes the *PLIVA, Inc. v. Mensing* decision. Although Justice Thomas, writing for the majority, admitted that its decision could be seen as making "little sense" to the plaintiffs, he informed them that the majority's hands were tied by the supremacy of federal law.[18] Despite the majority's apparent dislike for the result of its decision, this Note argues that the majority's hands were not as tied down by federal regulation and the supremacy of federal law as it so determined. Part I discusses the background of the case, starting with how

---

filled her prescription with a brand-name drug or a generic").

9. 555 U.S. 555 (2009).

10. *Id.* at 580-81.

11. *PLIVA*, 131 S. Ct. at 2592 (Sotomayor, J., dissenting).

12. *Id.* at 2583-84, 2592.

13. *Id.* at 2583.

14. *Id.* at 2593.

15. Andrew Ross Sorkin, *On Wall Street, A Protest Matures*, N.Y. TIMES, Oct. 4, 2011, at B, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C04E1D91E31F937A35753C1A9679D8B63.

16. *PLIVA*, 131 S. Ct. at 2593 (Sotomayor, J., dissenting).

17. *Id.* at 2584.

18. *Id.* at 2581-82 (majority opinion).

the FDA approves drugs and how changes are made to drug labels and then recapitulates the Court's decisions in *Levine* and *PLIVA*. Part II of this Note continues with the analysis of the *PLIVA* decision. Finally, Part III summarizes the analysis by concluding that the Court's deference to the FDA's interpretation of its regulations, rather than the regulations themselves, was ultimately responsible for denying the plaintiffs in *PLIVA* compensation for their injuries.

I. BACKGROUND

A. The Drug Approval Process

Prior to 1906, food and drug safety was overseen only by the states through regulations and common law liability.[19] After the Civil War, the drug industry saw a boom in manufacturing and "secret formula" drugs, meaning drugs whose ingredients were not disclosed to the public.[20] Because "neither medicine nor pharmacy had a firm scientific basis" during this time, public concern grew over the quality of drugs.[21] In addition, because of the inexpensive manufacturing cost for secret formula drugs, "pharmacists adulterat[ed] legitimate drugs in an attempt to compete" with "grocers and other uneducated formulators."[22] For example, public opposition existed during this time over "addictive 'soothing syrups,'"[23] which were "[r]ecommended for 'teething babies'" and contained morphine sulfate.[24] Obviously, these products were effective but addictive, and at the same time, imitations existed "with no effective active ingredients."[25] Fearing these altered and misbranded drugs were traveling through interstate commerce, state regulators urged the federal government to aid in the protection of consumers from fraudulent drugs.[26] In 1906, Congress responded by passing the Pure Food and Drugs Act,[27] which established the Food and Drug Administration (FDA)[28] and made the manufacturing or shipping of altered or misbranded drugs illegal.[29]

In the 1930s, sulfa was "one of the first effective anti-infective drugs . . .

---

19. Wyeth v. Levine, 555 U.S. 555, 565-66 (2009); *see also* Mary J. Davis, *The Battle Over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089, 1100 (2007) ("State regulators encouraged . . . the national government to create a federal agency to aid in regulation because of concerns over the States' inability to reach the interstate sale of fraudulent products.").

20. FOOD & DRUG LAW INST., FDA: A CENTURY OF CONSUMER PROTECTION 30-31 & 273 n.31 (Wayne L. Pines ed., 2006).

21. *Id.* at 30.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Davis, *supra* note 19, at 1100.

27. 21 U.S.C. § 14 (repealed 1938).

28. U.S. Food & Drug Admin., *History*, FDA.GOV, http://www.fda.gov/AboutFDA/WhatWeDo/History/default.htm (last updated July 29, 2010).

29. Wyeth v. Levine, 555 U.S. 555, 566 (2009).

developed," but it could not be given to children because sulfa's composition as a "bulky powder" required oral administration via a large capsule.[30] In 1937, a chemist discovered that sulfa could be made into a liquid formulation by dissolving it in diethylene glycol, which is known today as antifreeze.[31] The only premarket test performed was a taste test.[32] After it was sold on the market, numerous "infants suffered slow, painful death[s] as the diethylene glycol . . . produced irreversible liver toxicity."[33] In 1938, in part to respond to this tragic disaster, Congress went further for the protection of consumers by enacting the Federal Food, Drug, and Cosmetic Act ("FDCA").[34] The FDCA not only prohibited the sale of altered or misbranded drugs, but it also required the FDA's approval of any new drug before sale on the market.[35] As a result, drug manufacturers wanting to market a new drug had to submit to the FDA a new drug application ("NDA") that included investigative reports about the drug and proposed labeling.[36] Although the manufacturer was prohibited from distributing the drug until it received approval from the FDA, the burden, prior to 1962, was on the FDA to prove the drug was unsafe.[37] If the FDA determined the drug was safe for its intended use as shown on the label, the manufacturer could sell the new drug on the market.[38]

Despite the FDCA requirement for premarket approval, drug testing was not very intensive.[39] Clinical trials of new drugs were not used for evaluation, labeling was more "promotional"[40] rather than informative, and the FDA only had a small staff to review the safety of drugs.[41] In 1961, the manufacturers of thalidomide, a drug used in Europe and Japan to help pregnant women manage morning sickness, was seeking approval in the United States.[42] While the drug was still pending approval, thousands of children in Europe and Japan were born with birth defects to mothers who had taken thalidomide.[43] Subsequently,

---

30. FOOD & DRUG LAW INST., *supra* note 20, at 161.

31. *Id.* at 161-62.

32. *Id.* at 162.

33. *Id.*

34. Davis, *supra* note 19, at 1100; Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301-399(d) (2006)).

35. *Id.*

36. Wyeth v. Levine, 555 U.S. 555, 566 (2009).

37. *Id.* at 566-67; *see also* Charlotte J. Skar, *Products Liability—Conflict Preemption: The United States Supreme Court Denies Preemption Defense for Drug Manufacturers Using FDA-Approved Warning Labels* Wyeth v. Levine*, 129 S. Ct. 1187 (2009)*, 86 N.D. L. REV. 405, 409 (2010).

38. Kellogg v. Wyeth, 612 F. Supp. 2d 421, 424 (D. Vt. 2008).

39. FOOD & DRUG LAW INST., *supra* note 20, at 165.

40. *Id.*

41. *Id.*

42. *Id.* at 19, 166.

43. *Id.*; *see also* U.S. Food & Drug Admin., *History*, FDA.GOV, http://www.fda.gov/AboutFDA/WhatWeDo/History/Overviews/ucm056044.htm (last updated Dec. 14, 2011).

Congress passed amendments to the FDCA in 1962 that further strengthened control over new drugs.[44] The 1962 amendments required not only that the new drug be safe but also that it be effective for its intended use.[45] It also shifted the burden of proving the safety and effectiveness of the new drug to the manufacturer.[46] As part of the NDA, a manufacturer must include "full reports of investigations"[47] into the drug's safety and effectiveness gathered from clinical trials and other adequate data; a list of the drug's ingredients; a full statement of the drug's composition; a description of how the drug was made, processed, and packaged; samples, if needed; and the manufacturer's proposed labeling.[48] The FDA must disapprove the application if the FDA finds that the investigations lacked adequate tests, the reports indicate that the drug is unsafe for its intended use as described in the label, the methods used to manufacture and pack the drug were inadequate to preserve the drug's purity, the information gathered from the reports was inadequate to make a determination of the drug's safety or effectiveness, or the labeling is false or misleading.[49]

In addition to the 1962 amendments, Congress added a saving clause,[50] which stated, "a provision of state law would only be invalidated upon a direct and positive conflict with the FDCA."[51] Later, in 1976, Congress enacted an express preemption clause for medical devices as part of the Medical Device Amendments[52] but declined to do so for prescription drugs.[53]

In an effort to make low-cost generic drugs more available to consumers, in 1984 Congress enacted the Drug Price Competition and Patent Term Restoration Act,[54] often referred to as the Hatch-Waxman Amendments, to the FDCA.[55] In the amendments, Congress established an abbreviated new drug application ("ANDA") to allow generic drug manufacturers to gain FDA approval by showing that its new drug was essentially the same as the "bioequivalent" of the listed

---

44. FOOD & DRUG LAW INST., *supra* note 20, at 166.

45. Kellogg v. Wyeth, 612 F. Supp. 2d 421, 424 (D. Vt. 2008).

46. Skar, *supra* note 37, at 409-10.

47. 21 U.S.C. § 355(b)(1) (2006).

48. *Id.*; *Kellogg*, 612 F. Supp. 2d at 424.

49. 21 U.S.C. § 355(d), *amended by* Pub. L. No. 112-144, § 3187, 126 Stat. 993 (2012); *Kellogg*, 612 F. Supp. 2d at 424-25.

50. "A saving clause is generally used in a repealing act to preserve rights and claims that would otherwise be lost." BLACK'S LAW DICTIONARY 1146 (9th ed. 2010). Here, the saving clause is saying that a state law would be repealed by the FDCA only if the state law presented a direct and positive conflict with the FDCA.

51. Wyeth v. Levine, 555 U.S. 555, 567 (2009) (internal quotation marks omitted).

52. Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539 (codified as amended at 21 U.S.C. § 360(k) (2006)).

53. *Levine*, 555 U.S. at 567.

54. Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended at 21 U.S.C. § 355 (2006)).

55. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2583 (2011) (Sotomayor, J., dissenting).

drug, i.e., the approved brand-name drug.[56] Two drugs "are 'bioequivalent' if they are given at the same dose, contain the same active ingredient, and reach the same level at the site of action. Two bioequivalent drugs . . . are absorbed the same way by the body and result in the same clinical response in the patient."[57]

Therefore, along with other requirements, a generic drug manufacturer must show that its drug has the same active ingredients as the brand-name drug, "the route of administration, the dosage form, and the strength of the new drug are the same as the brand-name drug," its drug is the bioequivalent of the brand-name drug,[58] and that proposed labeling of the new drug "is the same as the labeling approved for the [brand-name] drug," with some exceptions.[59] By establishing the ANDA, Congress was able to increase the availability of generic drugs because generic manufacturers did not have to conduct the costly clinical trials to get approval and thus could "bring [their] drugs to market . . . less expensively."[60]

In implementing the Hatch-Waxman Amendments, the FDA requires the generic drug's proposed labeling be the same as the labeling of its brand-name equivalent except for some allowed differences.[61] These exceptions include differences because of "expiration date, formulation, bioavailability,[62] or pharmacokinetics,[63] labeling revisions made to comply with current FDA labeling guidelines or other guidance."[64] If any drug manufacturer obtains newly acquired information about the drug after it has been on the market that shows "reasonable evidence of an association of a serious hazard with a drug," the drug manufacturer must revise the label.[65] All drug manufacturers are prohibited from distributing "a 'misbranded' drug, . . . including a drug whose 'labeling is false or misleading in any particular.'"[66]

---

56. *Id.*; 21 U.S.C. § 355(j) (2006).

57. Melanie McLean, *ONADE Participates in Bioequivalence Workshop*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/AnimalVeterinary/NewsEvents/FDAVeterinarianNewsletter/ucm222135.htm (last updated Jan. 26, 2011).

58. *PLIVA*, 131 S. Ct. at 2583 (Sotomayor, J., dissenting); 21 U.S.C. § 355(j)(2)(A)(ii)-(iv).

59. *PLIVA*, 131 S. Ct. at 2574 (alteration in original); 21 U.S.C. § 355(j)(2)(A)(v).

60. *PLIVA*, 131 S. Ct. at 2583 (Sotomayor, J., dissenting); *see also* Mensing v. Wyeth, Inc., 588 F.3d 603, 606 (8th Cir. 2009) (noting that Congress passed the Drug Price Competition and Patent Term Restoration Act in order "to bring more affordable generic drugs to [the] market").

61. Kellogg v. Wyeth, 612 F. Supp. 2d 421, 426 (D. Vt. 2008); 21 C.F.R. § 314.94(a)(8)(iii) (2011).

62. Bioavailability means a drug's absorption into the blood. PHARMACOTHERAPY: A PATHOPHYSIOLOGIC APPROACH 53 (Joseph T. DiPiro et al. eds., 6th ed. 2005).

63. Pharmacokinetics is "the absorption, distribution, metabolism, and elimination of drugs in patients requiring drug therapy." *Id.*

64. 21 C.F.R. § 314.94(a)(8)(iv) (2011).

65. *Id.* § 201.80(e); *accord id.* § 201.57(c)(6)(i).

66. Mensing v. Wyeth, Inc., 588 F.3d 603, 606 (8th Cir. 2009) (quoting 21 U.S.C. §§ 331(a)-(b), 352(a) (2006), *amended by* Pub. L. No. 112-144, § 3187, 126 Stat. 993 (2012)), *vacated in part, reinstated in part*, 658 F.3d 867 (8th Cir. 2011).

FDA regulations establish a few ways in which a drug manufacturer may change its labeling. For major changes, defined as having "a substantial potential to have an adverse effect on the identity, strength, quality, purity, or potency of the drug,"[67] a manufacturer must submit a supplemental application and receive FDA approval of the label change before it can distribute the drug.[68] For moderate changes, defined as having a "moderate potential to have an adverse effect,"[69] which includes changes in the labeling "[t]o add or strengthen a . . . warning,"[70] a manufacturer can make the change and distribute the drug prior to obtaining approval from the FDA by submitting a supplemental application labeled "Changes Being Effected" (CBE).[71] In summary, to make any major changes to the drug, the manufacturer must get prior approval from the FDA, whereas for a moderate change that includes updating warnings, a manufacturer may change the label prior to FDA approval through the CBE process.

B. The Wyeth v. Levine *Decision*

Diana Levine, a musician, developed gangrene in her arm as a result of an injection of the brand-name drug Phenergan, which required the amputation of her right forearm.[72] Phenergan can cause gangrene if it makes contact with a patient's arterial blood.[73] The drug was administered to Levine via an IV-push method, meaning it was injected into her arm with a needle, and thus the needle either directly made contact with an artery, or the drug escaped the vein and entered an artery.[74] Levine sued the manufacturer, Wyeth, for failing to have a strong enough warning of the danger of administering the drug via an IV-push method when it could have been more safely administered via an IV-drip method, where the drug is mixed "into a saline solution in a hanging intravenous bag and slowly descends through a catheter inserted in a patient's vein."[75]

Wyeth argued that federal regulations preempted[76] Levine's suit because it

---

67. 21 C.F.R. § 314.70(b)(1).
68. *Id.* § 314.70(a)-(b).
69. *Id.* § 314.70(c)(1).
70. *Id.* § 314.70(c)(6)(iii)(A).
71. *Id.* § 314.70(c)(3)-(6)(iii)(A).
72. Wyeth v. Levine, 555 U.S. 555, 559 (2009).
73. *Id.*
74. *Id.*
75. *Id.* at 559-60.
76. The Supreme Court has developed three ways in which to find preemption of state law. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000). First, express preemption occurs when Congress has enacted a provision that specifically states that it is preempting state law. *Id.* Second, field preemption occurs when nothing in a federal statue explicitly states it is preempting state law, but the statutory scheme so dominates a field that it must be implied because "'Congress left no room for the States to supplement it.'" *Id.* at 227 (quoting English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990)). Finally, conflict preemption may exist if state law and federal law either conflict in a way that it is physically impossible to comply with both, or if state law "'stands as an obstacle to

was impossible for Wyeth to comply with both state law—requiring a safer label—and federal law—prohibiting Wyeth from "unilaterally" changing its label.[77] Wyeth also argued that allowing a state failure-to-warn claim created an "'obstacle to the . . . full purposes and objectives of Congress' because it substitute[d] a . . . jury's decision about drug labeling for" that of the FDA's judgment.[78]

The Court began its analysis of the case with what it considered to be the "two cornerstones of . . . pre-emption [sic] jurisprudence"[79]: Congress's intent is the ultimate guiding light, and when a case involves the police powers of the states, the Court needs "clear and manifest" proof that it was Congress's intent to preempt state law.[80] Using this guidepost, the Court held that it was not "impossible for Wyeth to comply with both federal and state [law]."[81] Although Wyeth needed FDA approval of a label change, it could have unilaterally changed its label before receiving approval using the CBE process.[82] Newly acquired information, which the CBE process requires to make a change, did not have to come from new clinical trials, but instead also could come from new analysis of old data.[83] In addition, before Levine's injury, she had submitted evidence of twenty incidents in which patients had developed gangrene after receiving Phenergan from the IV-push method.[84] The Court also found that unilaterally changing the label did not make it automatically misbranded because Wyeth would be fulfilling its federal duty to have adequate warnings.[85] To show impossibility, Wyeth needed "clear evidence that the FDA would not have approved a change," and Wyeth had not done so in this case.[86] The Court stated:

> [T]hrough many amendments to the FDCA and to FDA regulations, it has remained a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times. It is charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market.[87]

The Court also held that state failure-to-warn claims did not serve as an obstacle to Congress's purposes in enacting federal drug labeling regulations.[88]

---

the accomplishment and execution of the full purposes and objectives of Congress.'" *Id*. at 227-28 (quoting Boggs v. Boggs, 520 U.S. 833, 844 (1997)).

77. *Levine*, 555 U.S. at 563, 570.
78. *Id.* at 563-64 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
79. *Id.* at 565.
80. *Id.*
81. *Id.* at 571.
82. *Id.*
83. *Id.* at 569.
84. *Id.*
85. *Id.* at 570.
86. *Id.* at 571-72.
87. *Id.* at 570-71.
88. *Id.* at 573.

Instead, "Congress enacted the FDCA to bolster consumer protection."[89] Congress must have been aware of state tort actions, but despite this information, it never enacted a federal remedy for injured consumers.[90] The Court reasoned that this was evidence of Congress's belief that state tort actions provide injured consumers with enough relief, as well as evidence of Congress's possible recognition of the fact that state tort actions help to protect consumers by incentivizing "manufacturers to produce safe . . . drugs" with "adequate warnings."[91] Thus, "Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness."[92]

As further evidence that state tort actions are not an obstacle, the Court examined the FDA's long history of supporting state tort law.[93] The FDA had consistently presented federal drug labeling regulations "as a floor upon which states could build."[94] In fact, the FDA had previously stated that it did not believe state tort law would "'be at odds with [its] regulations,'"[95] and that it did not want to stop states from "'imposing additional labeling requirements.'"[96] The Court believed this to be evidence of the FDA's belief that state tort law served a "complementary" position with federal regulation.[97] In addition, the Court found that this belief supported the reality that manufacturers were in the better position to monitor their drugs because they had better access to data, and the FDA lacked the resources necessary to oversee the 11,000 drugs on the market.[98] Finally, the Court stated that "[f]ailure-to-warn actions, in particular, lend force to the FDCA's premise that manufacturers . . . bear primary responsibility for their drug labeling at all times."[99] As a result, the Court concluded that federal law did not preempt state failure-to-warn claims against brand-name manufacturers.[100]

C. The PLIVA, Inc. v. Mensing *Decision*

Gladys Mensing suffers from diabetic gastroparesis,[101] a disorder that slows the digestion of food and, as a result, can worsen diabetes by making it harder to

---

89. *Id.* at 574.

90. *Id.* at 574-75.

91. *Id.* at 574.

92. *Id.* at 575.

93. *Id.* at 577-79.

94. *Id.* at 577.

95. *Id.* at 578 (quoting Prescription Drug Product Labeling; Medication Guide Requirements, 63 Fed. Reg. 66,378, 66,384 (Dec. 1, 1998)).

96. *Id.*

97. *Id.*

98. *Id.* at 578-79.

99. *Id.* at 579.

100. *Id.* at 581.

101. Mensing v. Wyeth, Inc., 588 F.3d 603, 605 (8th Cir. 2009), *vacated in part, reinstated in part*, 658 F.3d 867 (8th Cir. 2011).

control blood glucose.[102] In 2001, Mensing's doctor prescribed the brand-name drug Reglan to treat her gastroparesis, and her pharmacist, following Minnesota law, substituted the Reglan with its generic bioequivalent, metoclopramide.[103] Mensing took the generic metoclopramide for four years as prescribed.[104]

Julie Demahy suffers from gastroesophageal reflux,[105] a disease that can cause frequent heartburn and regurgitation and, in severe cases, can cause narrowing of the esophagus.[106] In 2002, Demahy's doctor prescribed Reglan as well, and her pharmacist, following Louisiana law, substituted it with generic metoclopramide.[107] Like Mensing, Demahy took the drug for four years as prescribed.[108]

Metoclopramide is a drug that speeds digestion of food by "enhancing . . . contractions of the esophagus, stomach, and intestines,"[109] as well as blocking dopamine receptors in the brain,[110] which helps to prevent nausea and vomiting.[111] Because metoclopramide acts on dopamine receptors, it can affect the body's extrapyramidal system, which is responsible for controlling fine motor skills.[112] One type of severe extrapyramidal symptom is tardive dyskinesia, a severe neurological disorder that is "characterized by grotesque involuntary movements of the mouth, tongue, lips, and extremities, involuntary chewing movements, and a general sense of agitation."[113]

The FDA approved Reglan in 1980 for short-term use only, with no indication over twelve weeks.[114] In 1985, generic manufacturers were receiving approvals to make generic metoclopramide.[115] Although the drugs were intended for short-term use, data revealed that doctors were prescribing Reglan and metoclopramide for longer than one year.[116] Despite this information, from 1985 to 2005 (the years during which Mensing and Demahy were taking metoclopramide), the labels for Reglan and generic metoclopramide presented the

---

102. *Living with Diabetes*, AM. DIABETES ASS'N, http://www.diabetes.org/ living-with-diabetes/complications/gastroparesis.html (last visited Jan. 16, 2012).

103. *Mensing v. Wyeth, Inc.*, 588 F.3d at 605.

104. *Id.*

105. Demahy v. Actavis, Inc., 593 F.3d 428, 430 (5th Cir. 2010), *overruled by* PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011).

106. McNeil v. Wyeth, 462 F.3d 364, 366 (5th Cir. 2006).

107. *Demahy*, 593 F.3d at 430.

108. *Id.*

109. *McNeil*, 462 F.3d at 366.

110. *Id.*

111. *See* Mayo Clinic, *Metoclopramide (Oral Route)*, MAYO CLINIC, http://www.mayoclinic.com/health/drug-information/DR600921 (last visited Jan. 16, 2012).

112. *McNeil*, 462 F.3d at 366.

113. *Id.*

114. *See* Mensing v. Wyeth, Inc., 588 F.3d 603, 606 (8th Cir. 2009), *vacated in part, reinstated in part*, 658 F.3d 867 (8th Cir. 2011).

115. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2572 (2011).

116. *McNeil*, 462 F.3d at 369.

risk of developing tardive dyskinesia at about .2%.[117] During this period, however, studies showed that 29% of patients taking metoclopramide for several years developed tardive dyskinesia.[118] One study in 1994 even found that 27% of patients taking metoclopramide for longer than thirty days developed tardive dyskinesia.[119] In 2004, the manufacturer of Reglan requested and received an approval from the FDA for a change in the label that stated "'[t]herapy should not exceed [twelve] weeks in duration.'"[120] The previous version stated less strenuously that therapy longer than twelve weeks was not recommended.[121] Finally, in 2009, acting on its own initiative, the FDA ordered brand-name and generic manufacturers of metoclopramide to add a black box warning—the FDA's strongest warning—to their labels stating that "[t]reatment with metoclopramide can cause tardive dyskensia," and that "[t]reatment . . . longer than [twelve] weeks should be avoided in all but rare cases."[122]

After taking generic metoclopramide for four years, both Mensing and Demahy developed tardive dyskinesia.[123] Both women sued the generic manufacturers of metoclopramide for failing to provide an adequate warning as the risk of developing tardive dyskinesia was much higher than indicated on their labels.[124] The generic manufacturers argued federal drug regulations preempted state failure-to-warn claims because the federal regulations required them to have the same label "as their brand-name counterparts."[125] As a result, the manufacturers argued it was impossible for them to modify their labels to comply with state law.[126]

The Court framed the issue of the case as whether generic manufacturers could make changes to their label after initial approval of an ANDA.[127] The FDA interpreted its regulations to mean a generic manufacturer has a "duty of sameness,"[128] meaning its label must be the same as its brand-name counterpart at all times.[129] The Court began its analysis by indicating that it would follow *Auer v. Robbins*[130] in deferring to the FDA's interpretation.[131] *Auer* held that a

---

117. *Id.* at 370; *Mensing v. Wyeth, Inc.*, 588 F.3d at 606.

118. *PLIVA*, 131 S. Ct. at 2572 (citing *McNeil*, 462 F.3d at 370 n.5).

119. *McNeil*, 462 F.3d at 370 n.5.

120. *PLIVA*, 131 S. Ct. at 2572-73 (alteration in original) (quoting Brief for the United States as Amicus Curiae Supporting Respondents at 8, *PLIVA*, 131 S. Ct. 2567 (Nos. 09-993, 09-1039, 09-1501)).

121. *Id.*

122. *Id.* at 2573.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 2574.

128. *Id.* at 2574-75 (internal quotation marks omitted).

129. *Id.*

130. 519 U.S. 452 (1997).

131. *PLIVA*, 131 S. Ct. at 2575.

federal agency's interpretation is "'controlling unless plainly erroneous or inconsistent with the regulation[s]' or there is any other reason to doubt that they reflect the FDA's fair and considered judgment."[132]

The plaintiffs, Mensing and Demahy, first argued that the generic drug manufacturers could have used the CBE process to change their label.[133] The FDA, however, determined that the CBE regulation only allowed the generic manufacturers to use that process to change their labels to match their brand-name counterpart that had recently changed its label.[134] The Court simply stated that it deferred to the FDA's interpretation because it was not "'plainly erroneous or inconsistent with the regulation.'"[135] The plaintiffs also argued that the manufacturers could have utilized "Dear Doctor" letters, letters sent to health care professionals, that could have advised the professionals of the additional warnings.[136] The FDA argued that "Dear Doctor" letters qualified as "labeling" under 21 U.S.C. § 321(m).[137] The Court, again, stated that it deferred to the FDA for the same reasons as its prior interpretation.[138]

Although the FDA interpreted its regulations as prohibiting generic manufacturers from unilaterally changing their labels to strengthen a warning, it also interpreted its regulations as imposing an affirmative duty on generic manufacturers to propose stronger warnings to the FDA if needed.[139] According to the FDA, this duty exists under 21 C.F.R. § 201.57(e), which states, "'[L]abeling shall be revised to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug.'"[140] If the FDA agreed with the generic manufacturer, it would then work with the brand-name manufacturer to update the label.[141] The FDA believed this process allowed a generic manufacturer to simultaneously maintain its duty of sameness and its statutory obligation under 21 U.S.C. § 352(f)(2) to not distribute a drug misbranded with inadequate labeling.[142]

Assuming this duty existed, the Court still found preemption.[143] The Court

---

132. *Id.* (quoting *Auer*, 519 U.S. at 461-62).

133. *Id.*

134. *Id.*

135. *Id.* (quoting *Auer*, 519 U.S. at 461).

136. *Id.* at 2576.

137. *Id.*; *see* 21 U.S.C. § 321(m) (2006) (stating that "'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article").

138. *PLIVA*, 131 S. Ct. at 2576.

139. *Id.*

140. *Id.* (quoting 21 C.F.R. § 201.57(e) (2011)).

141. *Id.*

142. *Id.* (quoting 21 U.S.C. § 352(f)(2) (2006), *amended by* Pub. L. No. 112-144, § 3187, 126 Stat. 993 (2012)) ("[A] drug is 'misbranded . . . [u]nless its labeling bears . . . adequate warnings against . . . unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users.'") (omissions in original).

143. *Id.* at 2577.

explained that state law required the manufacturers to use a different label, but federal law required generic manufacturers to keep the label the same as its brand-name drug counterpart and to propose a different label to the FDA.[144] Proposing a change in the label did not satisfy the state duty because "[s]tate law demanded a safer label; it did not instruct the [m]anufacturers to communicate with the FDA about the possibility of a safer label."[145] Rather than beginning its analysis of these requirements with the two cornerstones of preemption cases, as it did in *Levine*, the Court just reiterated the basic idea of preemption—federal law is "the supreme Law of the Land."[146] Although the Court admitted it was ultimately possible for the generic manufacturers to comply with both state law and federal law if the manufacturers had proposed stronger warnings and the FDA then approved of it and ordered the change, the Court thought that these additional actions made conflict preemption meaningless because many situations could be made possible by the actions of third parties.[147] As a result, the Court stated the test for impossibility was "whether the private party could independently do under federal law what state law requires of it."[148] Therefore, because a generic manufacturer could not use the CBE process to unilaterally change its label prior to FDA approval, it could not independently comply with what state law requires.[149] Acknowledging that its decision from the perspective of the plaintiffs made "little sense" in light of the Court's decision in *Levine*, this inability to use the CBE process, from the Court's perspective, distinguished the plaintiffs' case from *Levine*.[150] Realizing, too, that compensation turned on which version of the same drug was taken by the injured plaintiffs, the Court concluded that federal drug regulation had dealt the plaintiffs an "unfortunate hand,"[151] but reminded them it was up to Congress and the FDA to change the law.[152]

II. ANALYSIS OF THE *PLIVA* DECISION

Because the Court in *Levine* found that federal law did not preempt state failure-to-warn claims as a brand-name drug manufacturer could use the CBE process to unilaterally strengthen the warnings on its label,[153] the dispositive issue in *PLIVA* was whether a generic drug manufacturer could utilize the CBE process as well.[154] In deciding this issue, the Court used the deference standard

144. *Id.* at 2578.
145. *Id.*
146. *Id.* at 2577 (internal quotation marks omitted).
147. *See id.* at 2578-79.
148. *Id.* at 2579.
149. *Id.* at 2575, 2578, 2581.
150. *Id.* at 2581.
151. *Id.*
152. *Id.* at 2581-82.
153. Wyeth v. Levine, 555 U.S. 555, 573 (2009).
154. *PLIVA*, 131 S. Ct. at 2574.

established in *Auer*.[155] Therefore, it makes sense to review how the Court developed this deference and subsequent decisions interpreting this standard of deference.

A. Auer Deference

In *Auer v. Robbins*, the Supreme Court held that a federal agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation,"[156] or if there is some "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment."[157] In *Auer*, St. Louis sergeants sued the city commissioners for overtime pay under the Fair Labor Standards Act of 1938 (FLSA).[158] In response, the commissioners argued the sergeants were not entitled to overtime pay because they were exempt from such pay under the FLSA.[159] The Secretary of Labor had established regulations that determined exempt status, one of which was the "salary-basis test."[160] According to the salary-basis test, an employee qualified for exemption if he received "a predetermined amount"[161] as compensation that is "not subject to reduction because of variations in the quality or quantity of the work performed."[162] The sergeants argued they failed this test because their salary could be subject to reductions for disciplinary infractions based on the "quality or quantity" of their work.[163] Thus, the primary issue of the case was whether a hypothetical possibility of a reduction in pay qualified as being "subject to" such reductions.[164]

At the Court's request, the Secretary of Labor filed an amicus brief interpreting the salary-basis test.[165] Specifically, the Secretary of Labor interpreted the "subject to" language to mean that there was "an actual practice of" deductions in compensation, or that there was a policy that made such deductions significantly likely.[166] The Court deferred to the Secretary's interpretation finding it was not "'plainly erroneous or inconsistent with the regulation'"[167] ("*Auer* deference"). The Court reasoned that the Secretary's

---

155. *Id.* at 2575.

156. 519 U.S. 452, 461 (1997) (internal quotation marks omitted).

157. *Id.* at 462.

158. *Id.* at 454-55; Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2006)).

159. *Auer*, 519 U.S. at 455.

160. *Id.* at 454-55.

161. *Id.* at 455.

162. *Id.*

163. *Id.* (internal quotation marks omitted).

164. *Id.* at 459 (internal quotation marks omitted).

165. *Id.* at 461.

166. *Id.*

167. *Id.* (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

interpretation of "subject to" easily fell within the phrase's ordinary meaning.[168] The Court found that the police manual containing the rule violations applied to all employees, some of whom were not paid salary.[169] As a result, it was unclear whether the "pay deductions [were] an anticipated form of punishment for employees in [the sergeants'] category."[170] Furthermore, the Court found that the single deduction in pay for one sergeant did not establish a significant likelihood of deductions.[171] Finally, the Court also held there was no reason to doubt the Secretary's interpretation as reflecting the agency's fair and considered judgment because it did not come as a "'post hoc rationalizatio[n]'" in response to a "past agency action [under] attack."[172]

The Supreme Court further clarified its *Auer* deference in *Christensen v. Harris County*,[173] in holding the *Auer* deference to be only necessary when the agency's regulation is ambiguous.[174] In *Christensen*, deputy sheriffs sued Harris County, Texas for violating the FLSA by making them use compensatory time they had accumulated by working overtime.[175] Under the FLSA, counties are allowed to compensate employees for overtime work by giving them compensatory time—time off work with full pay—instead of having to pay the higher hourly wage rate, provided the employee agrees to it.[176] Yet, when an employee reaches the maximum hours of compensatory time allowed, the employer must pay the employee the overtime rate for the overtime hours.[177] Because Harris County was afraid they would not be able to afford the overtime pay for the deputy sheriffs who had accrued the maximum amount of compensatory time, the County developed a policy under which it could order the deputy sheriffs to use their compensatory time.[178] The deputy sheriffs argued that the County's policy violated 29 U.S.C. § 207(o)(5) of the FLSA, which provides that an employer could not deny a request of compensatory time off unless it would "unduly disrupt the operations of the public agency"[179] because that provision provided the only way to use compensatory time absent an agreement.[180]

Although the Court agreed with the principle "that when a statute limits a

---

168. *Id.*

169. *Id.* at 461-62.

170. *Id.* at 462 (emphasis omitted).

171. *Id.*

172. *Id.* (alternation in original) (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)).

173. 529 U.S. 576 (2000).

174. *Id.* at 588.

175. *Id.* at 578, 581.

176. *Id.* at 578-79.

177. *Id.* at 579-80.

178. *Id.* at 580-81.

179. *Id.* at 582.

180. *Id.* at 581-82.

thing to be done in a particular mode, it includes a negative of any other mode,"[181] the Court rejected the deputy sheriffs' argument that the "thing to be done" was the use of compensatory time.[182] Rather, the Court found the "thing to be done" was the approval of the request, meaning the county could not reject a request for any reason other than undue disruption of operations.[183] As a result, § 207(o)(5) restricted the employer's ability "to *prohibit* the use of compensatory time" but did not restrict the employer from compelling the use of compensatory time.[184] The Court found support for its interpretation "in two other features of the FLSA"—one being that the FLSA allows an employer to reduce the hours an employee works, and the other being that 29 U.S.C. § 207(o)(3)(B) allows an employer to "cash out accumulated compensatory time by paying the employee his regular hourly wage for each hour accrued."[185]

The deputy sheriffs also argued for deference to the Department of Labor's interpretation of its regulations as prohibiting an employer from requiring the use of compensatory time without obtaining prior consent of the employee.[186] The Court held *Auer* deference was not applicable because the agency's regulation was not ambiguous.[187] The Court reasoned the Secretary of Labor's regulations clearly permitted compelled compensatory time.[188] The regulation implementing § 207(o)(5) prohibits an employer from using compensatory time to avoid paying overtime compensation.[189] The Court read this as confirming § 207(o)(5)'s purpose of safeguarding the employee from not being compensated at all for overtime work.[190] Another regulation stated that the agreement between the employer and employee regarding the use of compensatory time instead of overtime pay "*may* include other provisions governing the preservation, use, or cashing out of compensatory time . . . consistent with [§ 207(o)]."[191] The Court found this regulation unambiguously permissive, meaning nothing within it suggested that compelled compensatory time had to have been included within an agreement.[192] The Court further held that "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."[193]

The two prior cases detail the proper analysis to give to an interpretation of

---

181. *Id.* at 583 (internal quotation marks omitted).

182. *Id.* (referring to the definition of "thing to be done" set forth in 29 U.S.C. § 207(o)(5) (2006), *preempted by* Jones v. United States, 88 Fed. Cl. 789 (Fed. Cl. 2009)).

183. *Id.*

184. *Id.* at 585.

185. *Id.*

186. *Id.* at 586.

187. *Id.* at 588.

188. *Id.*

189. *Id.* at 584 (paraphrasing 29 C.F.R. § 553.25(b) (1999)).

190. *Id.*

191. *Id.* at 587-88 (alteration in original).

192. *Id.* at 588.

193. *Id.*

an agency regulation, beginning with whether the regulation in question is ambiguous and next providing a flushed-out analysis of whether the interpretation is plainly erroneous or inconsistent or whether some other reason exists to doubt the interpretation. Unfortunately, since *Auer*, most courts rarely conduct this type of thorough analysis when reviewing an agency's interpretation of its own regulation.[194] *PLIVA* is a case on point because the majority opinion only states that it defers to the FDA's interpretation regarding the CBE regulation without providing any reasoning behind its decision.[195] Because the Court does not provide any analysis, it appears that the Court is assuming the regulation is ambiguous. In addition, the lack of analysis suggests that the Court is relying heavily on the plainly erroneous standard of the *Auer* test because it does not take much for an interpretation to overcome it. Based on precedent and the importance of the issue, the majority in *PLIVA* should have provided a more thorough analysis, starting with whether the FDA regulations were ambiguous.

1. The FDA's Regulations Are Unambiguous.—Much like the analysis in *Christensen* that turned on the Secretary of Labor's use of the word "may" in its regulation, *PLIVA*, too, should have turned on the FDA's use of a particular word in its regulation. Before 2007, 21 C.F.R. § 201.57 specified the requirements for label content and form for both brand-name and generic drug manufacturers;[196] however, in 2006, the regulation was amended to divide the label content and form requirements between the two, with § 201.80 applying to generic drug manufacturers and § 201.57 applying to brand-name manufacturers.[197] Despite this amendment, the language regarding the revision of warnings on the label remains the same for generic drug manufacturers under both versions.[198] The FDA's regulation requires warnings on the drug's label "be revised . . . as soon as there is reasonable evidence of an association of a serious hazard with a drug."[199] In *PLIVA*, the FDA interpreted this regulation to mean only that a generic manufacturer had "to propose [a] stronger warning label[ ]" to the FDA if it deemed one was necessary.[200] If the FDA agreed, it would work with both the brand-name and generic drug manufacturer to change the label, and then the generic drug manufacturer could use the CBE process to adhere to the FDA's direction and match the brand-name drug's change in label.[201]

This interpretation does not make sense with the language in § 201.80(e).[202]

---

194. *See* Claire R. Kelly, *The Brand X Liberation: Doing Away with Chevron's Second Step as Well as Other Doctrines of Deference*, 44 U.C. DAVIS L. REV. 151, 204-06 (2010) (discussing a review of district courts showing they applied the doctrine in roughly half of the applicable cases from 2008-2009).

195. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2575-76 (2011).

196. *See* 21 C.F.R. §§ 201.56 to -.57(e) (1998).

197. *Id.* §§ 201.56 to -.57(c)(6), 201.80(e) (2007).

198. *Compare id.* § 201.57(e) (1998), *with id.* § 201.80(e) (2011).

199. *Id.* § 201.80(e) (2011); *PLIVA*, 131 S. Ct. at 2576.

200. *PLIVA*, 131 S. Ct. at 2576.

201. *Id.* at 2575-76.

202. *See* Kellogg v. Wyeth, 612 F. Supp. 2d 421, 435-36 (D. Vt. 2008).

The dictionary definition of "revise" means "to make a new, amended, improved, or up-to-date version of."[203] In contrast, "propose" means "to form or put forward a plan or intention," or "to engage in talk or discussion."[204] The two verbs cannot be reconciled because putting forth a new plan or intention, in this case an intention to strengthen a warning, does not result in any change of the warning. Proposing a strengthening of a warning is strictly preparatory. Actually changing the warning results in a revision. In other words, to "propose" occurs before the action of changing the warning, and to "revise" occurs during and after the change in the warning. As the Court pointed out in *Christensen*, the word "may" is clearly permissive, and similarly here, the word "revise" clearly means an actual change. The requirement under former § 201.57(e) and current § 201.80(e) requires a revision, not a discussion about a revision.[205]

Furthermore, the amendment to move generic drug manufacturers' label content and form requirements to § 201.80 affirms the argument that "revise" really means "revise" and not "to propose." Again, under § 201.80(e) the FDA kept the same language regarding revisions under the warning section of the labeling as it had when the regulation applied to both brand-name and generic drugs under § 201.57(e) before the amendment.[206] If the FDA interpreted "revise" to mean "revise" for brand-name manufacturers but to mean "propose" for generic manufacturers, then the FDA would have changed the wording in its 2006 amendments. In other words, surely the FDA, when given the chance to rewrite its regulation in which it interprets a single word to have two different meanings for two different parties, would take advantage of that opportunity and apply the actual meaning and words it had intended from the start for each manufacturer.

A counterargument to this analysis is that § 201.80 does not necessarily apply to generic drug *manufacturers*, but rather it applies strictly to the generic drug's label itself. In that respect, the regulation does not address who should implement the revision but rather only provides that the label needs to be changed when reasonable evidence exists suggesting it should be updated with a new warning; however, the FDA's interpretation undermines this argument. The FDA determined a generic drug manufacturer had a duty to report the need for a stronger warning based on the language in § 201.57(e) (now codified at § 201.80(e)).[207] In support for this proposition, the FDA stated in its amicus brief to the Court that the language in § 201.57(e) "reflect[ed] the 'central premise of federal drug regulation that the manufacturer bears responsibility for the content

---

203. MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/revise (last visited Oct. 29, 2011).

204. MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/propose (last visited Oct. 29, 2011).

205. *See* 21 C.F.R. § 201.57(e) (1998); *id.* § 201.80(e) (2011); *Kellogg*, 612 F. Supp. 2d at 436.

206. *See* 21 C.F.R. § 201.57(e) (1998); *id.* § 201.80(e) (2011).

207. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2576 (2011) (referring to the FDA's interpretation of 21 C.F.R. § 201.57(e) (1998) (codified at 21 C.F.R. § 201.80(e) (2011)).

of its label at all times.'"[208] As this statement shows, the FDA interprets § 201.57(e), and thus § 201.80(e), as applying to the manufacturer. In addition, other language within § 201.80(e) suggests the FDA is addressing generic drug manufacturers in regards to the requirements within the section. For example, the regulation explains that certain serious problems might need to be placed in a boxed warning and that the FDA itself will determine when it is necessary and where it will be placed on the label.[209] This language suggests the other language within the section, specifically the language regarding the revising of labels, is directed to generic drug manufacturers because if it was not, the FDA would have stated that it would revise the label to add new warnings. In other words, it would be odd for the FDA explicitly to state its responsibilities in some parts of the section and in other parts state its responsibilities implicitly.

Another counterargument is that the FDA construes § 201.80(e) to mean both a proposal and a revision, meaning that the generic drug manufacturer is supposed to propose a change in its label, and it actually accomplishes the revision by updating its label to match the brand-name drug. In other words, the generic drug manufacturer fulfills the mandate of revising its label per § 201.80(e) when it updates its label to match the brand-name drug label. Yet, this argument is undermined with the remaining language in the requirement. Again, § 201.80(e) mandates that the drug's label "be revised . . . as soon as there is reasonable evidence of an association of a serious hazard with a drug."[210] If the revision applies within the context of updating the generic drug's label to match the brand-name drug label, then "reasonable evidence" necessarily means the direction from the FDA to the generic drug manufacturer to change its label and/or the brand-name drug's actual change to its label. It makes no sense for the FDA to refer to either action—its own order to do something or a brand-name drug manufacturer's change in label—as "reasonable evidence." Only two actions could prompt the generic drug manufacturer to update its label; thus, it is reasonable to expect the FDA to explicitly state those occurrences when a generic drug manufacturer needed to revise its label.

In addition, § 314.97 of the FDA's regulation requires generic drug manufacturers to follow the requirements under § 314.70 when submitting supplemental applications or other changes.[211] Section 314.70 details how a generic drug manufacturer can make changes to its approved application.[212] The regulation requires a generic drug manufacturer to notify the FDA of any changes via the prior approval process, CBE process, or in an annual report, depending on the type of change.[213] It also requires that when a generic drug manufacturer is

---

208. Brief for the United States as Amicus Curiae Supporting Respondents at 12, PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011) (Nos. 09-993, 09-1039, 09-1501) (quoting Wyeth v. Levine, 555 U.S. 555, 570-71 (2009)).

209. 21 C.F.R. § 201.80(e) (2011).

210. *Id.*

211. *Id.* § 314.97.

212. *Id.* § 314.70.

213. *Id.*

making a change in accordance with an FDA regulation or guideline, the manufacturer is required to make the change in a way that provides for the least burdensome way of notifying the FDA of the change.[214] In other words, if a generic drug manufacturer is making a change that falls under the CBE procedure, then it must make the change using that procedure.[215] Thus, if a generic manufacturer had reasonable evidence of a hazard that required it to revise its warning on its drug's label, as required by § 201.80(e), then to comply with § 314.70(a)(3) the generic manufacturer would have to submit the change to the FDA via the CBE process because it is a change that either adds or strengthens the warning, one of the changes falling under the CBE process.[216]

Again, if the FDA's interpretation is correct that the generic drug manufacturer cannot make a change to its label with the CBE process unless to match its brand-name drug label and thus could only propose a change to the FDA upon reasonable evidence of hazard, then § 314.70(a)(3) is meaningless to generic drug manufacturers.[217] The FDA's interpretation means the generic drug manufacturer is not required to notify the FDA of a change in the least burdensome way. In fact, the FDA's interpretation requires the generic drug manufacturer to notify the FDA of a change in the *most* burdensome way, as evidenced by the requirement to work with the brand-name manufacturer to change its label first.[218] Like the Court in *Christensen* found that to defer to the Secretary of Labor's "interpretation 'would be to . . . create *de facto* a new regulation,'" here too, the FDA's interpretation creates a new regulation because it requires a unique process of notification for a particular section of a regulation, § 201.80(e), that is not found in the words of the regulation.[219]

The FDA bases its interpretation that a generic drug manufacturer can only use the CBE process to match a brand-name's drug label on the definition of an abbreviated application, which includes the application under § 314.94 and supplements to it.[220] Under § 314.94(a)(8)(iv), a generic drug's label must be the same as its brand-name drug that it is using to gain approval. Because supplements are a part of the abbreviated application, the FDA interprets this to mean the generic's drug label must always be the same as the brand-name drug's label.[221]

This interpretation, however, is undermined by language in the same section that the FDA purports requires the constant "sameness." Under § 314.94(a)(8)(iv), generic and brand-name drug labels are allowed to have differences, one of which being "labeling *revisions* made to comply with current

---

214. *Id.* § 314.70(a)(3).

215. *Id.*

216. *See id.* § 314.70(c)(6)(iii)(A).

217. *See* Kellogg v. Wyeth, 612 F. Supp. 2d 421, 436 (D. Vt. 2008).

218. *See* PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2575-76 (2011).

219. *See Kellogg*, 612 F. Supp. 2d at 436 (quoting Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000)).

220. Brief for the United States, *supra* note 208, at 16; 21 C.F.R. § 314.3(b).

221. Brief for the United States, *supra* note 208, at 15-16; 21 C.F.R. § 314.3(b).

FDA labeling guidelines or other guidance."[222] Section 201.80 is an effective FDA guideline that details labeling requirements, and prior to that § 201.57 was an effective guideline that detailed labeling requirements. In other words, the guideline dictating when a warning on a label needs to be revised has always been effective since at least 2001 when Gladys Mensing received generic metoclopramide.[223] As a result, complying with § 201.80(e) is an allowed difference in labeling according to § 314.94(a)(8)(iv).

In summary, the regulations regarding the revising of warnings for generic drug manufacturers are clearly unambiguous. Section 314.3 defines an abbreviated application that generic drug manufacturers use for approval as the application described in § 314.94 and supplements to it. Section 314.94 requires that the labeling for the generic drug be the same as the brand-name drug it is seeking approval under except for certain differences, such as labeling revisions done in compliance with other FDA guidelines. Section 201.80, an aforementioned FDA guideline, details the requirements for the content and form of generic drug labels, one of which being that the label must "be revised to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug."[224] In making this change to the label, § 314.97 requires generic drug manufacturers to follow the requirements for supplements to an approved application under § 314.70, which requires applicants to make a change in the least burdensome way as allowed under the section. Because adding or strengthening a warning is allowed under the CBE process, the generic manufacturer is required to use that process to make the change.

2. The FDA's Interpretation Is Inconsistent with Its Regulation.—Even if the FDA's regulations are ambiguous, the FDA's interpretation that a generic drug manufacturer could only use the CBE process to match a brand-name drug's label[225] is inconsistent with its regulations because it conflicts with a guiding principle of FDA regulation: to "protect the public health by ensuring that . . . drugs are safe and effective."[226] Congress empowered the Secretary of Health and Human Services to promulgate regulations to effectuate that purpose.[227] As the FDA confirmed in *PLIVA*,[228] and as the Supreme Court articulated in *Levine*, "a central premise" of FDA regulation in advancing this purpose is "that the manufacturer bears responsibility for the content of its label at all times."[229] The Court found this premise of FDA regulation evident in the CBE process because it put "ultimate responsibility" on the manufacturer for its label and provided a procedure in which it could add safety information before receiving FDA

222. 21 C.F.R. § 314.94(a)(8)(iv) (emphasis added).
223. *See PLIVA*, 131 S. Ct. at 2573; 21 C.F.R. § 201.57(e); *id.* § 201.80(e).
224. 21 C.F.R. § 201.80(e).
225. *PLIVA*, 131 S. Ct. at 2575.
226. 21 U.S.C. § 393(b)(2)(B) (2006).
227. *Id.* § 371(a).
228. *PLIVA*, 131 S. Ct. at 2576.
229. Wyeth v. Levine, 555 U.S. 555, 570-71 (2009).

approval.[230] The premise is further supported under the FDA's regulation § 314.80, which requires both brand-name and generic drug manufacturers to review adverse drug experiences and report them to the FDA.[231]

If the FDA's interpretation is correct, then a generic manufacturer effectively has no responsibility for the content of its label *at any time* because having responsibility for content means being held accountable for its substance.[232] Here, any inadequacy with the substance of the label's content can be directed away from the generic drug manufacturer if it can show it matches the brand-name drug label. Thus, the FDA's interpretation actually means a generic drug manufacturer only has responsibility in confirming that its label is the same as its brand-name drug counterpart at all times. If a generic manufacturer could use the CBE process unilaterally to update its warning in compliance with § 201.80(e), then at some point in time it would be true that the generic manufacturer has actual responsibility for its label content because it could make a change to its label. It is implied in *Levine* that the Court found this ability to make a change to the label before FDA approval as a touchstone for responsibility.[233]

The responsibility of keeping the label the same as the brand-name drug does not advance the purpose of ensuring a drug is safe; in fact, this duty decreases a drug's safety because it safeguards a generic manufacturer from liability and disincentives the generic manufacturer from proposing a change.[234] Furthermore, if the brand-name drug leaves the market, as is often the case, the responsibility for providing adequate warnings is entirely on the FDA.[235] This proposition goes against the Court's finding in *Levine* that the reason the FDA puts the onus on manufacturers is because the FDA lacks the capability to oversee the 11,000 drugs on the market, and thus, the manufacturers are in the best position to monitor the information regarding their drugs.[236] Therefore, not only is the FDA's interpretation inconsistent with its regulations, but it is also inconsistent with the FDCA.

Furthermore, the FDA's interpretation of an "ongoing . . . sameness" in the warning labels[237] is inconsistent with the regulation because it is contrary to the section of federal regulation describing the content of an abbreviated application. As stated before, § 314.94(a)(8)(iv) allows many differences between the generic drug label and the brand-name drug label, including differences in "expiration date, formulation, bioavailability, . . . pharmacokinetics, [and] labeling revisions

---

230. *Id.* at 571.

231. 21 C.F.R. § 314.80 (2011); *id.* § 314.98.

232. *See* MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/responsible (last visited Nov. 5, 2011) (defining "Responsible" as "liable to be called to account as the primary cause, motive, or agent" and "able to answer for one's conduct and obligations").

233. *Levine*, 555 U.S. at 571.

234. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2592-93 (2011) (Sotomayor, J., dissenting).

235. *See id.* at 2593.

236. *Levine*, 555 U.S. at 578-79.

237. *PLIVA*, 131 S. Ct. at 2574-75.

made to comply with current FDA labeling guidelines or other guidance."[238] Besides the general tenor of non-sameness this language exudes, § 314.94(a)(8)(iv) makes reference to revisions in compliance with current FDA labeling guidelines, which implies changes throughout its time on the market, as what is "current" is constantly evolving. Section 314.94(a)(8)(iv) precedes this list of allowed differences by explicitly saying, "differences between the [generic drug manufacturer's] proposed labeling and labeling approved for the [brand-name] drug *may* include."[239] Just as the Court in *Christensen* found the word "may" is unambiguously permissive,[240] here, too, "may" indicates that the FDA can disapprove of a label revision but is in no sense required to disapprove of it. Thus, to say there is an ongoing sameness requirement is contrary to the language in § 314.94(a)(8)(iv).

B. The Supremacy Clause Containing a Non Obstante Provision

Unlike *Levine*, the Court did not begin its analysis with a presumption against preemption.[241] Instead, a plurality of the Court relied on a theory that the Supremacy Clause contained a non obstante provision—a theory presented in a law review article written by University of Virginia law professor Caleb Nelson.[242] The plurality used this theory to bolster their conclusion that the Court should not consider the actions of the FDA in determining whether it was possible for a generic drug manufacturer to comply with both state and federal law.[243]

According to Professor Nelson, two legal principles of legislative drafting were well established by the late eighteenth century: one, that newer laws abrogated older, conflicting laws, and two, a presumption against implied repeals, meaning a new law should not be read to conflict with an older law if it could be harmonized.[244] The presumption against implied repeals reflected the courts' traditional reluctance to find that a new law repealed an older law.[245] These two principles conflicted when state legislatures actually wanted the new law to abrogate conflicting laws, and they did not want to distort the new law so as to harmonize it with the older law.[246] To solve this problem, state legislatures would add a non obstante clause, taken from the Latin word for "notwithstanding," to the new law that said it would apply "notwithstanding any provisions to the contrary in prior laws."[247] A non obstante clause informed courts that the state

238. 21 C.F.R. § 314.94 (2011).
239. *Id.* § 314.94(a)(8)(iv) (emphasis added).
240. Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000).
241. *See PLIVA*, 131 S. Ct. at 2575-81; *Levine*, 555 U.S. at 565.
242. *PLIVA*, 131 S. Ct. at 2579-80 (plurality opinion); *see generally* Nelson, *supra* note 76.
243. *PLIVA*, 131 S. Ct. at 2579-80 (plurality opinion).
244. Nelson, *supra* note 76, at 235-41.
245. *Id.* at 241.
246. *Id.*
247. *Id.* at 238-41.

legislature did not want it to try and harmonize the new law with the older law.[248] In other words, a non obstante clause told the court not to apply the presumption against implied repeals and instead give the new law its ordinary meaning.[249]

The Supremacy Clause of the United States Constitution states that the "Constitution, and the Laws of the United States . . . and all Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[250] This clause means state laws that interfere with, or are contrary to, federal law must yield to federal law.[251] In other words, federal law nullifies contrary state law.[252] Professor Nelson argues that the end phrase of the Supremacy Clause is a non obstante provision and is intended to fulfill its traditional purpose—telling the "court[] not to apply the . . . presumption against implied repeals."[253]

Professor Nelson first notes that the Court has interpreted the Supremacy Clause to mean that federal law is a part of state law and thus forms one jurisprudence within the state.[254] Second, the section of the Supremacy Clause describing federal law as supreme "substitute[d] a federal rule of priority for the traditional temporal rule of priority."[255] This means that rather than having the temporal rule of priority in which new laws abrogate old, conflicting laws, the federal rule of priority provides that a federal law will reign supreme over a state law, even if a state law comes later in time.[256] Because the Supremacy Clause means that federal law and state law form one jurisprudence, and federal law always reigns supreme, "courts are always bound to apply the federal portion of in-state law."[257]

Although the Supremacy Clause mandates courts to apply federal law, the federal rule of priority occurs only when state law forces the court to choose between them.[258] Like the test for implied repeals, the test for preemption is whether both state law and federal law can be followed or whether they create contradictory rules.[259] As a result, the last section of the Supremacy Clause works like a traditional non obstante provision because without it courts might seek to avoid finding a contradiction.[260] Rather than having each federal statute or treaty contain a non obstante provision, the founders established a "global non obstante

---

248. *Id.* at 241-42.
249. *Id.*
250. U.S. CONST. art. VI, cl. 2.
251. Gibbons v. Ogden, 22 U.S. 1, 210-11 (1824).
252. *Id.* at 210.
253. Nelson, *supra* note 76, at 232, 245-46.
254. *Id.* at 246-49, 246 n.61.
255. *Id.* at 250.
256. *Id.* at 250-51.
257. *Id.* at 252 (internal quotation marks omitted).
258. *Id.* at 251.
259. *Id.* at 252.
260. *Id.* at 255.

provision" in the Supremacy Clause.[261] Nelson argues the non obstante provision of the Supremacy Clause forces the Court to abandon its longstanding presumption against preemption because it actually instructs the Court not to try to harmonize state and federal law.[262]

As stated before, the plurality in *PLIVA* used this theory of the Supremacy Clause containing a non obstante provision to support its finding of impossibility.[263] The plurality reasoned that because the non obstante provision of the Supremacy Clause instructed the Court not to distort federal law so as to reconcile it with state law, the Court should "look no further than the ordinary meaning of [the] federal law."[264] The plurality thought that considering the possible actions of the FDA and brand-name drug manufacturers in response to a generic drug manufacturer's proposal for stronger warnings went beyond the ordinary meaning of the federal law because the supremacy of federal law would always be dependent on these third-party actions.[265] Thus, the non obstante provision supported the Court's conclusion that determinations of impossibility should depend only on whether a generic drug manufacturer could independently do what state law required of it.[266] Because a generic drug manufacturer could not independently strengthen the warnings on its label without prior approval from the FDA, the Court determined it could not satisfy its state law duty to have a safer label, and thus state law was preempted.[267]

As the dissent in *PLIVA* points out, the plurality's new theory of the Supremacy Clause goes against more than a half century of precedent of applying a presumption against preemption.[268] The dissent believed that if the Court had used its typical presumption against preemption, as it did in *Levine*, then it would have not found impossibility.[269] Although Professor Nelson's article is very persuasive, the plurality missed several key points within the article. Of course, the majority is free to interpret the article as it pleases because it is not an authoritative document the majority must follow to the letter, like the Constitution; however, when the majority is effectively overturning a half-century of precedent, and potentially denying plaintiffs suffering a debilitating neurological disorder any remedy, based on one law review article, it is hard to argue that the author's other views contained in the article are not important or informative. With this in mind, contrary to the dissent's belief, if the plurality had closely followed Professor Nelson's article on which it so heavily relied in reaching its decision, the plurality should not have found impossibility, even viewing the Supremacy Clause as containing a non obstante provision.

---

261. *Id.*
262. *Id.* at 304.
263. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2579-80 (2011) (plurality opinion).
264. *Id.* at 2580 (internal quotation marks omitted).
265. *Id.*
266. *Id.*
267. *Id.* at 2581 (majority opinion).
268. *Id.* at 2590-91 (Sotomayor, J., dissenting).
269. *Id.* at 2591-92.

The overall purpose of Professor Nelson's article is to simplify the Court's preemption analysis.[270] He sets out to convince readers that the Court's current preemption analysis, which contains three types of preemption (express, field, and implied), is confusing and preempts too much state law.[271] Nelson argues that, because the Supremacy Clause contains a non obstante provision, the doctrine of preemption should work like the "traditional doctrine of repeals," and as such, the Court should not use a presumption against preemption.[272] Thus, the only test for preemption is that the "[c]ourts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law."[273] In other words, courts should disregard state law only in situations when they are forced to choose between both laws.[274]

Nelson refers to this test as the "logical-contradiction test," and he warns that it is not the same as the physical impossibility test that the Court uses to find conflict preemption under the umbrella of implied preemption.[275] Nelson states that many situations will prove physically possible, while still forcing the Court to choose between laws, such as a federal law giving a person a right to join a union and a state law prohibiting that person from joining a union.[276] Both laws may physically be possible to comply with if the person does not join a union, but a court is still forced to choose between them because enforcing the state law would require disregarding the federal law.[277]

In *PLIVA*, the Court does not use the notion of the Supremacy Clause containing a non obstante provision to overhaul its preemption analysis, but instead uses it only to buttress its new theory that proving physical impossibility within the context of an implied preemption analysis requires a determination of whether a party can take unilateral action.[278] The Court does not use the non obstante provision as a springboard for finding a contradiction between the laws, but instead uses it to establish how to determine whether something is physically impossible.[279] The Court does exactly what Nelson cautions not to do by confusing the concept of physical impossibility with the concept of contradiction.

If the Court had used the logical-contradiction test that necessarily follows from the Supremacy Clause's mandate to apply federal law, the Court would not have found a contradiction, and thus, no preemption of state law. For starters, federal law requires a drug manufacturer to have adequate warnings on its labels.[280] As the Court pointed out, Minnesota and Louisiana state law also

---

270. Nelson, *supra* note 76, at 231, 260.
271. *Id.* at 225-35.
272. *Id.* at 232, 245-46.
273. *Id.* at 260.
274. *Id.* at 251, 261.
275. *Id.* at 260-61.
276. *Id.*
277. *Id.* at 261.
278. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2589-90 (2011) (Sotomayor, J., dissenting).
279. *Id.* at 2579-80 (plurality opinion).
280. 21 U.S.C. § 352(a), (f) (2006); 21 C.F.R. § 201.57(e) (1998); *id.* § 201.80(e) (2011).

require that a drug manufacturer have labels with adequate warnings.[281] No contradiction exists here because clearly both federal and state laws express the same requirement. In other words, the Court is not forced to choose between state law and federal law.

Furthermore, assuming that federal law does prevent a generic drug manufacturer from using the CBE process to unilaterally change its drug label, and instead requires it to propose a label change to the FDA, this still does not reveal a contradiction with state law. The Court found that the state law duty required generic drug manufacturers "to use a different, stronger label than the label they actually used."[282] Yet, this duty does not force the Court to choose between both federal and state law. State law only mandates that a drug manufacturer have an adequate label and does not prescribe how a manufacturer is to affect that change.[283] Federal law, on the other hand, does instruct a manufacturer as to how it can make a change to its label.[284] In contrast, a contradiction between state law and federal law would exist if the state law required a manufacturer to not only have adequate warnings, but it also required the manufacturer to unilaterally update its label to address any new or stronger warnings. This would force the Court to choose between the state law and federal law because, according to the Court, federal law would not allow a generic drug manufacturer to unilaterally update its label.[285]

Although the Court states there is a contradiction between the state law duty for adequate labeling and the federal law duty of sameness for a generic drug manufacturer regarding its label,[286] this is not a contradiction because it is not a duty of sameness no matter what. The duty of sameness, according to the FDA, is not telling a manufacturer that despite whatever evidence it finds that the current label is inadequate and not safe that it must keep the label the same and sit idle.[287] As the FDA argues, and the Court assumes to be true, the FDA requires the generic drug manufacturer to seek help from the FDA in effecting a change to make the label adequate.[288] This is how the FDA argues that a generic drug manufacturer fulfills its other duty to have adequate warnings under 21 U.S.C. § 352(f)(2) regarding misbranding.[289] If a generic drug manufacturer's action of seeking help from the FDA to update a warning is good enough to fulfill

---

281. *PLIVA*, 131 S. Ct. at 2577; *see also* MICHAEL K. STEENSON, MINNESOTA PRACTICE SERIES: PRODUCTS LIABILITY LAW §§ 4.1, 16.6 (West 2011); LA. REV. STAT. ANN. §§ 9:2800.54, *preempted by* Green v. BDI Pharm., 803 So. 2d 68 (La. Ct. App. 2001), 9:2800.57 (West 2011), *preempted in part by PLIVA*, 131 S. Ct. 2567.

282. *PLIVA*, 131 S. Ct. at 2577.

283. *See* STEENSON, *supra* note 281, at §§ 4.1, 16.6; LA. REV. STAT. ANN. §§ 9:2800.54, 9:2800.57 (West 2011).

284. 21 C.F.R. § 314.70 (2011).

285. *See PLIVA*, 131 S. Ct. at 2575, 2578.

286. *PLIVA*, 131 S. Ct. at 2576-78.

287. *Id.* at 2576.

288. *Id.*

289. *Id.*

its federal duty of having adequate warnings, why would that not be good enough to fulfill the same state duty to have adequate warnings?

Although Professor Nelson argues the Supremacy Clause's non obstante provision instructs courts not to use a presumption against preemption, he makes a qualification regarding this premise. He warns about taking the non obstante provision's mandate "too far."[290] The goal in deciding preemption cases is "to give effect to congressional intent."[291] Although the non obstante provision of the Supremacy Clause instructs courts not to apply a presumption against preemption, it does not prevent courts from applying other rules of statutory interpretation.[292] Nelson points out that even without a presumption, "there may well be other reasons to believe that Congress did not intend a particular statute to have much preemptive effect," as evidenced, for example, in either the context of the federal law or even within a "pattern of legislation."[293]

One reason Congress might not have intended the FDCA or the federal regulations implementing it to have a preemptive effect on state law is that it did not want to deny a person any compensation for harm caused by an inadequate warning. As the dissent in *PLIVA* points out, 75% of prescriptions in the United States are for generic drugs.[294] With so many consumers using generic drugs, it is not plausible that Congress intended to deny such a large portion of the population a remedy if harmed by an unsafe or ineffective drug. Moreover, the purpose of the Hatch-Waxman Amendments is to increase Americans' accessibility to inexpensive drugs.[295] With no right to compensation for an injury, people might be inclined to seek expensive brand-name drugs, thus decreasing the demand for generic drugs.[296] This in turn could have an adverse effect on consumer health as many consumers would likely curb their medication plans to adjust to the increase in prices.

As Nelson suggests, other evidence that Congress did not intend to have preemptive effect on state law is observed through its pattern of legislation. As the Court stated in *Levine*, Congress enacted the FDCA "to bolster consumer protection against harmful products."[297] The Court found further support for this proposition in the 1962 amendments to the FDCA, which shifted the burden of proof of a drug's safety to the manufacturers;[298] this strengthened consumer protection because manufacturers have better access to information regarding

---

290. Nelson, *supra* note 76, at 294.

291. *See id.* at 292.

292. *Id.* at 294.

293. *Id.*

294. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2583 (2011) (Sotomayor, J., dissenting).

295. *Id.*; *see also* Mensing v. Wyeth, 562 F. Supp. 2d 1056, 1059-60 (D. Minn. 2008) (stating that the "primary purpose" of the Hatch-Waxman Amendments "was to increase the availability of low cost generic drugs" via the abbreviated application process), *rev'd*, 588 F.3d 1056 (8th Cir. 2011), *vacated in part, reinstated in part by* Mensing v. Wyeth, Inc., 658 F.3d 867 (8th Cir. 2011).

296. *PLIVA*, 131 S. Ct. at 2592-93 (Sotomayor, J., dissenting).

297. Wyeth v. Levine, 555 U.S. 555, 574 (2009).

298. *Id.* at 567.

their drugs than the FDA.[299] This, in conjunction with state failure-to-warn claims, which provide the incentive for manufacturers to pay attention to data and studies regarding their drugs, increases the chances of discovering and disclosing drug risks.[300] The Court stated that the importance of the state failure-to-warn claims in this process was evidenced within the same 1962 amendments to the FDCA by the enactment of the saving clause that stated, "a provision of state law would only be invalidated upon a direct and positive conflict with the FDCA."[301] Ultimately, the Court found that because Congress had never enacted an express preemption provision, like it had done for medical devices, along with its apparent awareness of state failure-to-warn claims, Congress did not intend for federal law to preempt state law in this area.[302]

Finally, the Court's acceptance of the FDA's interpretation of a constant duty of sameness in *PLIVA* is inconsistent with its established opinion in *Levine* that the Congressional purpose of the FDCA is to bolster consumer protection. In *Levine*, the Court rejected the FDA's interpretation that the point of the FDCA was to "entrust an expert agency to make drug labeling decisions that strike a balance between competing objectives."[303] However, an interpretation requiring generic manufacturers to have the same label at all times as their brand-name counterpart supports the FDA's interpretation in *Levine* because it effectively makes the FDA the decision maker for generic drug labeling. The Court arguably is now interpreting the point of the FDCA, at least as it applies to generic drug manufacturers, as to establish an expert, decision-making agency.

Again, all the non obstante provision is telling the Court is "not to assume automatically that Congress did not want to displace state law[ ]."[304] If the majority in *PLIVA* had kept this in the forefront of its analysis, the other normal tools of statutory construction would have led the majority to the same conclusion reached in *Levine*.

CONCLUSION

Although Justice Thomas believed that federal regulation had dealt the plaintiffs an "unfortunate hand,"[305] the reality is the judicial deference given to the FDA's interpretation of its regulations dealt the plaintiffs the unfortunate hand. This is evident in the inconsistency between the Court's interpretation of state law and the FDA's interpretation of its regulations regarding label content. The Court stated that Minnesota law required that "'where the manufacturer . . . of a product has actual or constructive knowledge of danger to users, the . . .

299. *Id.* at 578-79.

300. *Id.*

301. *See id.* at 567 (internal quotation marks omitted).

302. *Id.* at 574-75.

303. *Id.* at 573 (internal quotation marks omitted).

304. Nelson, *supra* note 76, at 295.

305. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2581 (2011).

manufacturer has a duty to give warning of such dangers.'"[306] The Court stated that under the applicable Louisiana law, "'a manufacturer's duty to warn includes a duty to provide adequate instructions for safe use of a product.'"[307] From this language, the Court interpreted Minnesota and Louisiana state law as "*demand[ing]* a safer label."[308] Both laws actually use somewhat broad language in regards to the manufacturer's duty: Minnesota's duty "to give" a warning and Louisiana's duty "to provide" a warning. One can imagine the many ways a drug manufacturer could fulfill this duty. For example, a drug manufacturer could post the added warning on its website. Yet, the Court infers from this language a commandment to literally have a different label with nothing short of that satisfying the duty.[309] On the other hand, FDA regulations specifically applying to label content require a manufacturer to revise its label.[310] Revise has a narrow meaning, yet the Court defers to the interpretation of the FDA and gives it a broad meaning that includes merely proposing a change, which, as stated earlier, does not even fall within the definition of revise.[311] It seems apparent then that had the Court interpreted the FDA regulations without any deference, the Court would have interpreted "revise" to mean generic drug manufacturers had to literally change the label. In other words, if "to give" and "to provide" are interpreted by the Court to be commands to have a different label, then surely "to revise" would mean the same thing.

The Court apparently finds value in the legal teachings of the eighteenth and early nineteenth century, as shown in its reliance on Professor Nelson's theory of the Supremacy Clause.[312] In expounding the meaning of the Supremacy Clause to the plaintiffs, however, the majority could have also harkened back to Justice Marshall's declaration in *Marbury v. Madison*[313] to explain the Court's role in preemption cases—that "[i]t is emphatically the province and duty of the judicial

---

306. *Id.* at 2573 (omissions in original) (quoting Frey v. Montgomery Ward & Co., 258 N.W.2d 782, 788 (Minn.1977)); *see also* STEENSON, *supra* note 281, at §§ 4.1, 16.6 (stating that the Minnesota Supreme Court has embraced the principle that "[o]ne who supplies directly or through a third person a chattel for another to use, is subject to liability . . . for bodily harm caused by the use of the chattel . . . if the supplier . . . fails to exercise reasonable care to inform them of its dangerous condition or of the facts, which make it likely to be so").

307. *PLIVA*, 131 S. Ct. at 2573 (quoting Stahl v. Novartis Pharm. Corp., 283 F.3d 254, 269–70 (5th Cir. 2002); *see also* LA. REV. STAT. ANN. §§ 9:2800.54, *preempted by* Green v. BDI Pharm., 803 So. 2d 68 (La. Ct. App. 2001), 9:2800.57 (West 2011) ("A product is unreasonably dangerous because an adequate warning about the product has not been provided if . . . the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic."), *preempted in part by* PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011).

308. *PLIVA*, 131 S. Ct. at 2578 (emphasis added).

309. *See id.*

310. 21 C.F.R. § 201.57(e) (1998); *id.* § 201.80(e) (2011).

311. *See PLIVA*, 131 S. Ct. at 2576-78.

312. *See id.* at 2579-80.

313. 5 U.S. (1 Cranch) 137 (1803).

department to say what the law is."[314] Unfortunately, this role seems to be greatly diminished when the Court exercises such a high degree of deference. It seems especially harmful and contradictory to the Court's stated role when it is very likely the Court would have reached a different interpretation. This begs the question whether the Court is saying what the law is, or merely just saying what the law is not. There is a difference, and unfortunately Gladys Mensing and Julie Demahy learned this the hard way.

314. *Id.* at 177.

THE BEST CHOICE OUT OF POOR OPTIONS: WHAT THE GOVERNMENT SHOULD DO (OR NOT DO) IF CONGRESS FAILS TO RAISE THE DEBT CEILING

KELLEIGH IRWIN FAGAN*

INTRODUCTION

On August 2, 2011, Congress passed the 2011 Budget Control Act[1] raising the debt ceiling by $2.4 trillion, increasing it from $14.294[2] trillion to $16.694 trillion.[3] This increase should postpone another debt ceiling crisis until early 2013.[4] Prior to this passage, political tension was inflamed, and the ability for members of the U.S. Congress to compromise was seriously questioned.[5] If the conduct of politicians does not improve in the next two years, the United States could again face another political battle over the debt ceiling; based on the most recent negotiations, the likelihood that negotiations will fail is relatively high.[6] If the debt ceiling is not raised, a myriad of questions arise: *What will happen? What should be done? What can be done? Who should act? Should anything be done?*

During the 2011 debt crisis, economic and legal scholars discussed a mechanism[7] that received considerable debate: a rarely used, almost forgotten,

---

* J.D. Candidate, 2013, Indiana University Robert H. McKinney School of Law, B.A., 2009, University of Indianapolis. I am grateful to everyone who helped along the way and thank each of you: Professor Peter Prescott, Professor Gerard Magliocca, Bruce Hitchcock, Matt Gaudin, and editors of the *Indiana Law Review*. A special thank you to my husband, parents, sisters, and in-laws for their unwavering support, patience, and encouragement.

1. Budget Control Act of 2011, Pub. L. No. 112-25, §§ 101, 301, 302, 401, 125 Stat. 240 (codified in scattered sections of the U.S. Code) (debt ceiling will increase incrementally).

2. 31 U.S.C. § 3101 (2011). This statute, prior to the most recent increase, set the debt limit at $14.294 trillion in February 2010.

3. §§ 101, 301, 302, 401, 125 Stat. 240 (debt ceiling will increase incrementally).

4. *Federal Debt Ceiling (National Debt)*, N.Y. TIMES, updated Dec. 26, 2012, http://topics.nytimes.com/topics/reference/timestopics/ subjects/n/national_debt_us/index.html.

5. Jay Newton-Small, *Obama vs. Cantor: Tempers Flare as Debt-Ceiling Negotiations Take a Dramatic Turn*, TIME (July 14, 2011), http://swampland.time.com/2011/07/14/obama-vs-cantor-tempers-flare-as-debt-ceiling-negotiations-take-a-dramatic-turn/.

6. Stephen C. Webster, *McConnell: Republicans Will Block Debt Ceiling Again in 2013*, RAW REPLAY (Aug. 2, 2011), http://www.rawstory.com/rawreplay/2011/08/mcconnell-republicans-will-block-debt-ceiling-again-in-2013/ (quoting Senator McConnell, "I expect the next president, whoever that is, is going to be asking us to raise the debt ceiling again in 2013, so we'll be doing it all over.").

7. Scholars have debated other mechanisms, such as an argument that Congress implicitly raised the debt ceiling when it passed the 2011 appropriations acts because the debt limit statute and appropriations act are "irreconcilably conflicting," and the appropriations act was last in time. *See* TODD B. TATELMAN & KENNETH R. THOMAS, CONG. DISTRIBUTION MEMORANDUM FROM THE CONG. RESEARCH SERV., CONSTITUTIONAL AND LEGAL ISSUES RELATED TO THE DEBT LIMIT 13-14

constitutional principle, Section Four of the Fourteenth Amendment of the U.S. Constitution, referred to as the Public Debt Clause (hereinafter "Public Debt Clause" or "Section Four").[8] The Public Debt Clause reads: "The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned."[9] Some scholars and journalists argued that the Public Debt Clause was a tool the President could use to unilaterally raise the debt ceiling if Congress refused to raise it by the deadline imposed by the U.S. Treasury.[10] Before this argument can be evaluated, the Public Debt Clause must be interpreted so that an understanding can be reached as to its meaning and effect, if any, on the debt ceiling debate. Once the clause is properly interpreted, solutions to the potential problems created by failing to raise the debt ceiling can then be discussed.

(2011) (quoting Watt v. Alaska, 451 U.S. 259, 266 (1981)), *available at* http://op.bna.com/der.nsf/id/csaz-8vetcw/$File/CRS%20Debt%20Limit%20Legal%20Issue%20CD%20Memo.pdf (referring to the debt limit statute passed in 2011, Pub. L. No. 111-139, and the Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, 125 Stat. 38.). Thus, the appropriations act supersedes the debt limit statute, according to canons of statutory construction. *Id.* Scholars have also argued that the debt limit statute itself is unconstitutional. *See* Neil H. Buchanan, *The Debt Ceiling Law Is Unconstitutional*, JUSTIA (July 11, 2011), http://verdict.justia.com/2011/07/11/the-debt-ceiling-law-is-unconstitutional. *But see* Laurence H. Tribe, Op-Ed., *A Ceiling We Can't Wish Away*, N.Y. TIMES, July 7, 2011, at A23, *available at* http://www.nytimes.com/2011/07/08/opinion/08tribe.html?_r=2 (Professor Buchanan argues that the debt limit statute is unconstitutional, and Professor Tribe suggests that such an argument is unpersuasive). A third mechanism proposes using a potential violation of the Public Debt Clause to trigger a Fiscal Commitments Amendment. *See* Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561, 567-81 (1997). Two other suggestions include the President "unilaterally rais[ing] taxes, thus usurping congressional power to tax; or unilaterally cut[ting] spending, thus usurping congressional power to make spending decisions and arguably violating Section [Four] of the Fourteenth Amendment as well." Paul L. Caron ed., *Buchanan Presents* Lessons From the 2011 Debt Ceiling Standoff *Today at Duke*, TAXPROF BLOG (Jan. 25, 2012), http://taxprof.typepad.com/taxprof_blog/2012/01/buchanan-presents-lessons.html.

8. U.S. CONST. amend. XIV, § 4; *see also* Abramowicz, *supra* note 7, at 561 (referring to Section Four of the Fourteenth Amendment as the Public Debt Clause).

9. U.S. CONST. amend. XIV, § 4.

10. *See, e.g.*, Garrett Epps, *The Speech Obama Could Give: 'The Constitution Forbids Default*,' ATLANTIC (Apr. 28, 2011, 3:56 PM), http://www.theatlantic.com/politics/archive/2011/04/the-speech-obama-could-give-the-constitution-forbids-default/237977/; Zachary A. Goldfarb, *Obama, Democrats Not Ready to Play 14th Amendment Card with Debt Ceiling*, WASH. POST, July 6, 2011, http://www.washingtonpost.com/business/economy/obama-democrats-not-ready-to-play-14th-amendment-card-with-debt-ceiling/2011/07/06/gIQAVU1O1H_story.html; MINDY R. LEVIT ET AL., CONG. RESEARCH SERV., R41633, REACHING THE DEBT LIMIT: BACKGROUND AND POTENTIAL EFFECTS ON GOVERNMENT OPERATIONS 1 (2011), *available at* http://www.fas.org/sgp/crs/misc/R41633.pdf (The Treasury will exercise is authority "to pay federal obligations to delay the date by which the current debt limit would be reached.").

This Note analyzes and interprets the scope of the Public Debt Clause in order to identify and discuss potential remedies regarding Congress's failure to raise the debt ceiling should the crisis arise again in 2013 or at another later date.[11] Ultimately, this Note will advocate for one remedy. Regardless of what the Public Debt Clause actually means, none of the solutions that result from Congress failing to raise the debt ceiling are appealing. In fact, most raise considerable legal, economic, and policy issues. This discussion aspires to make clear that the real solution to a debt ceiling crisis is for politicians to realize that they must compromise more willingly to avoid subjecting the United States to a host of bad options. Part I of this Note discusses the history of Section Four. Part II discusses potential interpretations of Section Four. Part III discusses the advantages and disadvantages of potential remedies to avoid a constitutional violation of Section Four. This Note proposes that the Public Debt Clause should be interpreted to prohibit repudiating or defaulting on debt owed to bondholders. To avoid violating the Public Debt Clause, this Note advocates that the appropriate remedy is not that President unilaterally raise the debt ceiling but instead, that Congress—or if Congress fails—the President must direct the Treasury to pay debt owed to bondholders first to avoid a constitutional violation.

I. HISTORY OF THE PUBLIC DEBT CLAUSE

Although the Public Debt Clause is considered to be an obscure clause, it was of utmost importance when it was written and ratified.[12] Yet, since the Civil War/Reconstruction Era, Section Four has rarely been invoked. One scholar went so far as to call the clause "dead."[13] In 2011, the Public Debt Clause came to life in the media and political world.[14] An essentially unknown constitutional provision became hotly debated as to how it applied to the debt ceiling crisis.

In 1866, following the Civil War, Congress passed the Public Debt Clause as

---

11. The scope of this topic could lead to many more remedies and ideas than suggested in this Note, and the discussion of these issues could go in innumerable directions, but this Note is confined to some of the more publicly debated issues. For additional ideas, see Abramowicz, *supra* note 7, and Michael Abramowicz, *Train Wrecks, Budget Deficits, and the Entitlements Explosion: Exploring the Implications of the Fourteenth Amendment's Public Debt Clause* 41-43 (Geo. Wash. Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 575, 2011) [hereinafter Abramowicz, *Train Wrecks*], *available at* http://ssrn. com/abstract=1874746 (discussing "legislation forcing deficit reduction").

12. Joseph B. James, author of *The Ratification of the Fourteenth Amendment*, believed the Public Debt Clause "had more influence [in assuring the [Fourteenth] Amendment's passage] than many have assumed." The September 18, 1866 publication of the *New York Herald* described the Public Debt Clause as "the great secret of the strength of this constitutional amendment." *See* Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 AKRON L. REV. 289, 316-17 nn.143-44 (2006).

13. Abramowicz, *supra* note 7, at 566, 611.

14. *See generally* TATELMAN & THOMAS, *supra* note 7; Buchanan, *supra* note 7; Tribe *supra* note 7.

part of the Fourteenth Amendment.[15] With tensions still high, Northerners feared that Southerners would refuse to pay debts incurred during the Civil War, including money owed to soldiers and their families.[16] They also feared that if Southerners gained control of Congress in the future, they might repudiate those debts.[17] Thus, the Public Debt Clause was born. Three versions of the clause were introduced and the accompanying commentary from members of Congress revealed their fears.[18]

Limited judicial history provides another source of interpretation and history on the Public Debt Clause. The only Supreme Court case that interpreted the Public Debt Clause is *Perry v. United States*.[19] John Perry sought to redeem a bond purchased from the government, which he requested be redeemed in gold.[20] When he first purchased the bond, the terms of the bond provided he could redeem it in gold.[21] Between Perry's purchase and his effort to redeem the bond, Congress passed a Joint Resolution limiting bondholders' ability to choose gold as the medium of redemption, instead offering "10,000 dollars in legal tender currency."[22] Unhappy with this offer, Perry brought suit to receive his payment in gold.[23] The Court found that the Joint Resolution "went beyond the congressional power" but also found that Perry had failed to "show a cause of action for actual damages."[24] The Joint Resolution went beyond congressional power because

> [t]he Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the government . . . . The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations.[25]

In support of its finding that Congress exceeded its power, the Court said that the Public Debt Clause did not allow the action Congress had taken and that it

---

15. CONG. GLOBE, 39TH CONG., 1ST SESS. 3040 (1866) (Senator Doolittle describes the proposed Public Debt Clause as "having reference to the public debt and the rebel debt.").

16. *Id.* at 2768; *see also* TATELMAN & THOMAS, *supra* note 7, at 2-3; Aynes, *supra* note 12, at 316-18; Goldfarb, *supra* note 10.

17. Epps, *supra* note 10.

18. For the text of these versions, see *infra* text accompanying notes 43-45.

19. 294 U.S. 330 (1935); *see* Tribe, *supra* note 7 ("The Supreme Court has addressed the public debt clause only once, in 1935, in the case of [*Perry v. United States*].").

20. *Perry*, 294 U.S. at 347.

21. *Id*. at 346-47.

22. *Id*.

23. *Id*. at 347, 355.

24. *Id.* at 354, 358.

25. *Id.* at 353.

protected against repudiating debts owed to bondholders.[26] However, the Court's discussion of Section Four is merely dicta, and *Perry* was a plurality decision.[27] Although it is the only relevant judicial decision[28] that interprets this constitutional provision, *Perry* does not provide an in-depth analysis of that interpretation upon which the legal field can solely rely to understand the scope of the Public Debt Clause.

At most, the legislative history and judicial history of Section Four provide the following conclusions as to what this clause means: (1) Civil War debt could not be repudiated, and (2) Section Four is not limited to only Civil War debts, which likely means that the government cannot repudiate debt owed to bondholders. However, these conclusions are inadequate to answer all questions about what the Public Debt Clause means, particularly as applied to a situation in which Congress fails to raise the debt ceiling.

II. INTERPRETATION OF THE PUBLIC DEBT CLAUSE

To really understand what the Public Debt Clause can trigger if Congress ever fails to raise the debt ceiling, it is critical to understand the meaning and scope of the Public Debt Clause. Answering two questions, in particular, will aid in understanding its scope: (1) As used in this clause, what is public debt?; and (2) What actions does this clause protect, or in other words, what makes public debt invalid?

A. What Does "Public Debt" Mean Under the Constitution?

Initially, it is important to distinguish "public debt" under the debt limit statute from "public debt" under the Constitution. "Public debt" under the debt limit statute includes "all of the federal government's outstanding debt."[29] The

---

26. *Id.* at 354.

27. *Id.*

28. A few other judicial decisions have discussed the Public Debt Clause. *See* Gold Bondholders Protective Council, Inc. v. United States, 676 F.2d 643, 646 (Ct. Cl. 1982) (dealing with sovereign immunity); Branch v. Haas, 16 F. 53, 54 (M.D. Ala. 1883) (finding Confederate coupon bonds were "illegal and void" under the Public Debt Clause); Pietro Campanella, 73 F. Supp. 18, 29-30 (D. Md. 1947) (finding that an agreement for the United States to compensate ship-owners for the use of Italian ships was not considered a valid obligation under the Public Debt Clause); Great Lakes Higher Educ. Corp. v. Cavazos, 911 F.2d 10, 17-18 (7th Cir. 1990) (finding that amendments to the Higher Education Act had not "questioned" a public debt under the Public Debt Clause); Delaware v. Cavazos, 723 F. Supp. 234, 244-45 (D. Del. 1989) (finding that amendments to the Higher Education Act were not within the scope of the "public debt" contemplated by the Public Debt Clause).

29. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-485SP, FEDERAL DEBT: ANSWERS TO FREQUENTLY ASKED QUESTIONS 5 (2004), *available at* http://www.gao.gov/new.items/d04485sp.pdf. *See also id*. at 5-12 (defining debt subject to limit as the gross debt, debt held by the public, and debt held by government accounts).

meaning of "public debt" under the Constitution is subject to debate.[30] As used in the Public Debt Clause, there are two potential definitions of "public debt:" (1) it includes only payments owed to bondholders, whether through interest payments or through redeeming bonds;[31] or (2) it includes payments owed to bondholders and payments due through "all government obligations," including Social Security, Medicare and Medicaid, federal employees' salaries and benefits, and monies necessary to maintain government functions, such as the military.[32] Based on the legislative and judicial history discussed below, and perhaps more importantly, the United State's past experience, public debt within the Public Debt Clause should mean payment owed to bondholders.[33] The barriers that exist to extending public debt to all government obligations make such a definition highly unlikely and unrealistic.

1. "Public Debt" Could Include All Government Obligations.—Although this Note does not endorse defining public debt to include all governmental debt, it is still important to understand how some might accept this definition and why such acceptance is problematic. Proponents of this interpretation have pointed to various sources of support, including governmental and legal definitions of public debt, evolution of the language of the clause in legislative history, construction of the clause, judicial interpretation in *Perry*,[34] and use of the word "debt" found elsewhere in the Constitution.[35]

One legal definition of public debt is "a debt owed by a municipal, state, or national government."[36] Another legal definition from the U.S. Government Accountability Office ("GAO") defines federal gross debt as debt held by the public and debt held in government accounts; *this is debt that is subject to the debt limit*.[37] Under this definition, debt held by the public includes "the value of all federal securities sold to the public that are still outstanding,"[38] or in other words, debt held by bondholders. "Debt held by government accounts" includes debt "guaranteed for principal and interest by the full faith and credit of the U.S. government," which includes government obligations, such as entitlement

---

30. Goldfarb, *supra* note 10.

31. *See e.g.*, *Frequently Asked Questions About the Public Debt*, TREASURYDIRECT, treasurydirect.gov/govt/resources/faq/faq_publicdebt.htm (last updated May 16, 2011); *see generally infra* Part II.A.2 (*"Public Debt" Includes Only Payments Owed to Private Bondholders*).

32. *See* TATELMAN & THOMAS, *supra* note 7, at 8-10.

33. *See infra* Part II.A.2 (*"Public Debt" Includes Only Payments Owed to Private Bondholders*).

34. *See generally* Abramowicz, *supra* note 7 (discussing language of the clause, construction of the clause, and judicial interpretation).

35. *See infra* text accompanying notes 56-62.

36. BLACK'S LAW DICTIONARY 1058, 367 (abr. 9th ed. 2010).

37. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 29, at 5, 12 (emphasis added) (defining gross debt and then discussing that "*[g]ross debt* of the federal government is subject to a statutory ceiling—known at the debt limit.").

38. *Id.* at 6.

programs.[39] These definitions tend to support a broader definition of public debt. Modern definitions may not be conclusive as to what public debt meant at the time Section Four was passed, particularly because government programs such as Social Security had not yet been created.[40] Furthermore, the GAO defines these terms in context of the debt ceiling, which is different from how "public debt" is used in the Public Debt Clause.[41]

A scholar has argued that the evolution of the Public Debt Clause from its first proposed form to its adopted form suggests the definition of public debt deserves a broad interpretation.[42] The original language of Section Four was as follows: "Neither the United States nor any State shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for loss of involuntary service or labor."[43] The second proposal read:

> The public debt of the United States, including all debts or obligations which have been or may hereafter be incurred in suppressing insurrection or in carrying on war in defense of the Union, or for payment of bounties or pensions incident to such war and provided for by law, shall be inviolable. But debts or obligations which have been or may hereafter be incurred in aid of insurrection or of war against the United States, and claims of compensation for loss of involuntary service or labor, shall not be assumed or paid by any State nor by the United States.[44]

The adopted version of Section Four reads, "The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned."[45] It has been argued that this distinction indicates the intent of the drafters was for Section Four to apply to public debt more inclusively rather than exclusively.[46] Not only does the text of the versions of the clause indicate the drafters' original intent, but the commentary of members of Congress who introduced these proposals reveals intent as well. As will be discussed later in this Note, this congressional commentary is supportive of a narrower understanding of public debt.[47]

Additional linguistic analysis, particularly the construction of the clause, could support the argument that public debt includes all governmental obligations. In analyzing Section Four, "[t]he use of the word 'including' rather

---

39. *Id.* at 8-9.

40. Social Security was created through the Social Security Act of 1935. *See History*, SOC. SEC. ONLINE, http://www.ssa.gov/history/35actinx.html (last visited Aug. 24, 2012).

41. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 29, at 12-13.

42. Abramowicz, *supra* note 7, at 594; Epps, *supra* note 10.

43. CONG. GLOBE, 39TH CONG., 1ST SESS., 2768 (1866).

44. *Id.*

45. U.S. CONST. amend. XIV, § 4.

46. Abramowicz, *supra* note 7, at 583-84.

47. *See infra* notes 92-94 and accompanying text.

than 'in addition to' or 'and of' . . . delineate[s] the expanse of the phrase 'public debt' rather than annexing an additional category of 'debts' to it."[48] Further, the phrase "authorized by the law"[49] supports that public debt includes governmental obligations such as entitlement programs because something can only be "authorized by law" if passed by "a congressional statute."[50]

The Court in *Perry* also supported that Section Four's language "indicates a broader connotation."[51] Just past that statement in the opinion, though, the Court wrote, "We regard it as confirmatory of a fundamental principle which applies as well to the government bonds in question, and to others duly authorized by the Congress . . . ."[52] This interpretation appears to extend the scope of the Public Debt Clause beyond Civil War debts.[53] Further, this decision was limited to a bondholder's debt, which the Court, in the above language, explicitly said is included within the contemplation of the Public Debt Clause's language.[54] Despite the linguistic construction of the statute, other judicial interpretations of public debt would also make it legally difficult to accept that public debt includes all governmental obligations.[55]

Lastly, use of the word "debt" in other places of the Constitution may prove helpful for interpreting its meaning in this clause.[56] The word "debt" is used in three other locations in the Constitution, with only one of those uses providing relevant support in this context.[57] Article I, Section 8, Clause 1 of the U.S. Constitution states, "The Congress shall have Power . . . to pay the Debts . . . of the United States . . . ."[58] Two judicial interpretations of this clause support a broader definition of "Debts" as used in this clause, which could arguably provide

---

48. Abramowicz, *supra* note 7, at 587-88.

49. U.S. CONST. amend. XIV, § 4.

50. Abramowicz, *supra* note 7, at 588.

51. Perry v. United States, 294 U.S. 330, 354 (1935).

52. *Id.*

53. For the purpose of this Note, the Public Debt Clause is assumed to apply beyond the time it was passed (post-Civil War era). For an in-depth discussion of why it is more than merely transitional, see Abramowicz, *supra* note 7, at 582-587 ("*Was the Public Debt Clause Merely Transitional*?").

54. *Perry*, 294 U.S. at 354.

55. For discussion of these interpretations, see *infra* text accompanying notes 78-88.

56. To note, these uses of the word "debt" were included in the original Constitution, not in subsequent amendments. Further, the term at issue here is "public debt" rather than "debt."

57. U.S. CONST. art. VI, cl.1 states, "All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." Such use of the term "Debts" is not helpful to this discussion because there has been no judicial interpretation of this clause. "Debts" as used in U.S. CONST. art. I, § 10, cl. 1, which provides that "[n]o State shall . . . make any Thing but gold and silver Coin a Tender in Payment of Debts" is only applicable to the states, not to the federal government; thus, it is not dispositive in the context of federal government debt. *See* Juilliard v. Greenman (*The Legal-Tender Cases*), 110 U.S. 421, 446 (1884).

58. U.S. CONST. art. I, § 8, cl.1.

support for a broader definition of "public debt" in Section Four. In *Pope v. United States*,[59] the Court interpreted this clause and said the Government "is not restricted" to pay only "obligations which are legally binding on the Government" but can recognize and pay "claims which are merely moral or honorary."[60] Similarly, in *United States v. Realty Co*.[61] the Court wrote, "The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual;" Congress can pay these debts if it finds justice so requires.[62] The Court recognized the potential for an extremely broad definition of debt, including moral obligations, which one may presume is beyond, or includes, a government obligation, such as a Social Security payment. However, the Court was not requiring Congress to honor these moral obligations. Rather, the Court just gave Congress permission to do so if it wishes. This permissive language is not indicative of what "public debt" means in the Section Four.

Although the above discussion demonstrates some credible arguments for why public debt should include all government obligations, further analysis of more persuasive evidence clarifies that such a broad definition is legally unprecedented and practically unworkable.

2. "Public Debt" Includes Only Payments Owed to Bondholders.—Public debt includes debt owed to bondholders because both legal and practical factors support this interpretation. Similar to the above discussion, some relevant legal and governmental definitions support this interpretation.[63] Beyond *Perry*, judicial interpretation illustrates a narrower definition.[64] Legislative history, particularly comments made in conjunction with congressional proposals of drafts of Section Four, indicates the authors intended a narrower scope.[65] Lastly, and arguably

---

59. 323 U.S. 1 (1944).

60. *Id*. at 9. This case involved a contract that petitioner had with the government for excavation work. *Id.* at 5. In a previous case brought by petitioner in the Court of Claims, the petitioner was denied relief because the compensation he sought was for work outside the boundary lines dictated in the agreement. *Id.* Subsequently, Congress passed a Special Act that allowed for the petitioner's recovery of this additional work and instructed the Court of Claims to use a particular formula for determining the amount owed. *Id.* at 6-7. The Court found it was not beyond congressional constitutional power to turn a moral obligation into a legal one through this Special Act directive. *Id.* at 9-10.

61. 163 U.S. 427 (1896).

62. *Id*. at 440. The case involved sugar manufacturers whom the government owed a bounty under a congressional statute. *Id.* at 428-31. The bounty provision of this statute was later repealed. *Id.* at 431. These manufacturers had applied in compliance with that statute for the sugar bounties before anyone knew that the statute would be repealed. *Id.* at 433-35. Thus, Congress sought to pay these manufacturers due to a moral and equitable obligation. *Id.* at 437. The Court found that this act was an appropriate exercise of the congressional power to "pay the debts" of the United States under Article I, Section 8 of the U.S. Constitution. *Id*. at 440-41.

63. *See infra* text accompanying notes 67-68.

64. *See infra* text accompanying notes 78-88.

65. *See infra* text accompanying notes 92-96.

most important, the fact that the Public Debt Clause has not been a major subject of controversy in the courts seems to indicate that public debt does not extend beyond debt owed to bondholders. Similar crises in the past, including other debt limit crises and a government shutdown, did not result in entitlement program recipients or federal employees invoking Section Four in the courts.[66]

A different governmental definition of public debt supports a narrower reading. The Treasury defines "Public Debt Outstanding" as the "face amount or principal amount of marketable and non-marketable securities currently outstanding."[67] Here, the use of the word securities seems to limit the Treasury's understanding of the public debt to bonds because securities, including Treasury bills and savings bonds, are tools used to borrow money from the public to decrease the government's deficit.[68] Nowhere does this definition suggest that public debt outstanding applies to any Social Security payments. Further, this definition does not mention debt subject to a debt limit statute, which is different than "public debt" as used in the Public Debt Clause.[69]

In defending against the claim in *Perry,* the United States posited the following argument:

> The public debt is the money borrowed on the credit of the United States; indeed, the Constitutional authority to incur the public debt is "to borrow money on the credit of the United States." Legislation enacted in the exercise of another paramount Congressional power "to coin money and regulate the value thereof" may affect or even question the validity of collateral agreements without in any sense questioning the validity of the public debt itself.[70]

An analogy to the Court's statement in *Perry* is that public debt is money that is borrowed pursuant to Congress's borrowing power[71] but does not include governmental revenue that is accumulated pursuant to another congressional power, such as its power to tax.[72] Thus, public debt could not include all governmental obligations because not all governmental obligations are incurred through the borrowing power. Particularly, entitlement programs create revenue through the power to tax and spend money in aid of the general welfare.[73] Although the Government in *Perry* lost on the Public Debt Clause argument, the Court indirectly accepted this argument by recognizing bonds are borrowed

---

66. *See infra* text accompanying notes 97, 101, 105, 114, 117.

67. *Frequently Asked Questions About the Public Debt*, supra note 31.

68. *Id*.

69. *See* U.S. GOV'T ACCOUNTABILITY OFFICE*, supra* note 29, at 12-13; *supra* text accompanying notes 29-30.

70. Brief for the United States at 66-67, Perry v. United States, 294 U.S. 330 (1935) (No. 532), 1935 WL 32938 at *66 (citing U.S. CONST. art I, § 8, cl.2, cl. 5).

71. U.S. CONST. art I, § 8, cl. 2.

72. *Id*., § 8, cl. 1.

73. *Id.*; Helvering v. Davis, 301 U.S. 619, 634, 640-45 (1937) (discussing that Old Age Benefits created in the Social Security Act was spending "in aid of the general welfare").

pursuant to the borrowing power[74] and restricting its interpretation of the Public Debt Clause to bondholders.[75]

As mentioned, *Perry* explicitly said that the Public Debt Clause's "language indicates a broader connotation [than Civil War era debts]. [The Court] regard[s] it as confirmatory of a fundamental principle which applies as well to the government bonds in question, and to others duly authorized by the Congress . . . ."[76] Although the Court did say a broader interpretation was required, the broader interpretation is that public debt is not limited to Civil War era bonds but that the term extends to government bonds beyond that era. The implication is not that public debt applies to all governmental obligations.[77] Further, in *Delaware v. Cavazos*,[78] the court found that the wording of Section Four was "limited to bond debts" and "not so broad as to encompass within its coverage every debt of the United States."[79] In *Cavazos*, the debt in question was that owed by a Delaware guaranty agency to private lenders who insured student debt on higher education loans, which was, in turn, "reinsured by the Department of Education."[80] The guaranty agency would not be reimbursed for payments made to private lenders unless it complied with amendments that affected the Higher Education Act.[81] The court found the Public Debt Clause did not contemplate these debts.[82]

Other case law concurs with this restriction. For example, the Court in *Flemming v. Nestor*[83] held that future Social Security payments are not guaranteed.[84] Congress inserted a reservation power into the Social Security Act giving it "the right to alter, amend, or repeal any provision of the [Social Security] Act."[85] This reservation power extends to Congress's ability to reduce payments to current recipients.[86] As a result, Nestor, who had been cut off from

---

74. Perry v. United States, 294 U.S. 330, 350 (1935) (finding that bonds issued were "in the exercise of the power to borrow money on the credit of the United States"); *cf.* U.S. CONST. art. I, § 8, cl. 2 (providing, "To borrow Money on the credit of the United States.").

75. *Perry*, 294 U.S. at 354.

76. *Id.*

77. *See id.* (finding that Section Four's "language indicates a broader connotation . . . which applies . . . to the government bonds in question, and to others duly authorized by the Congress").

78. Delaware v. Cavazos, 723 F. Supp. 234 (D. Del. 1989).

79. *Id.* at 245.

80. *Id.* at 236.

81. *Id.* at 239-41.

82. *Id.* at 245.

83. 363 U.S. 603 (1960).

84. *Id.* at 610-11 (recognizing that Congress arbitrarily refusing to pay benefits is not without constitutional restraints but also recognizing that such a decision would likely have to be "utterly lacking in rational justification" to be barred constitutionally).

85. *Id.* at 611, 624 (internal citation omitted).

86. *See* Richardson v. Belcher, 404 U.S. 78, 78-80 (1971) (finding no constitutional violation in an amendment to the Social Security Act that decreased monthly Social Security disability benefits from $330 to $225 for recipients in order to recognize an individual receiving state

receiving Social Security payments when he was deported, had no constitutional claim.[87] "The same principle that current benefit amounts may be modified has been applied to other, similar programs involving pensions, such as Federal Civil Service Retirement."[88]

Recognition of the legal principle that the current Congress cannot bind a future Congress, except for payments owed to bondholders, is an implication of Congress's reservation power.[89] Thus, if public debt includes all government obligations, it follows that in order to avoid violating Section Four, Congress could not refuse to fulfill these government obligations. Implicitly, this would require it to bind a future Congress from refusing to make payments or making payments at a lower rate, a legal principle that has been rejected in *Flemming*. Further, it would strip Congress of its reservation power, a legal principle that the Supreme Court has accepted.[90] Finding public debt to fit within the broader definition requires repealing settled legal principles. "*Flemming* and its progeny would appear to stand for the proposition that because the benefit payments are subject to amendment by Congress, they can be distinguished from those obligations that are to be included as part of the 'public debt' covered by [Section Four] of the Fourteenth Amendment."[91]

As Section Four evolved into its adopted form, members of Congress commented on each proposal. Some of these comments affirm what is widely accepted: the purpose of the Public Debt Clause was to prevent the South, if it were to gain control of Congress in the future, from repudiating debt incurred during the Civil War.[92] The remarks from Ohio Senator Benjamin Wade, who made the second proposal, provided insight into what the members of Congress were thinking in terms of public debt. Senator Wade said, "[F]or I have no doubt that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a Congress to repudiate it and placed under the guardianship of the Constitution . . . ."[93] One could reasonably argue that an individual "who has property in the public funds"[94] is a

---

workmen's compensation benefits because the right to benefits it not so vested that reduction would amount to a Fifth Amendment taking); *see also* TATELMAN & THOMAS, *supra* note 7, at 9-10 (discussing the *Flemming* and *Richardson v. Belcher* decisions).

87. *Flemming*, 363 U.S. at 612.

88. TATELMAN & THOMAS, *supra* note 7, at 9.

89. *See* Perry v. United States, 294 U.S. 330, 353 (1935).

90. *See Flemming*, 363 U.S. at 611.

91. TATELMAN & THOMAS, *supra* note 7, at 9.

92. CONG. GLOBE, 39TH CONG., 1ST SESS. 2768 (1866) (Of his proposed version of Section Four, Senator Howard said, "The assumption of the rebel debt would be the last and final signal for the destruction of the nation known as the United States of America. Whatever party may succeed in so wicked a scheme, by whatever name it may be called and under whatever false guises or pretenses it may operate, if it succeed in assuming this indebtedness, puts an end first to the credit of the Government, and then, as an unavoidable consequence, to the Government itself.").

93. *Id.* at 2769.

94. *Id.*

bondholder. A bondholder has received a stake, in the form of a bond, in the public funds, which the bondholder believes will be profitable in the future. The first and second proposals were essentially combined to form the adopted version, which passed through the House of Representatives with no changes.[95] The legislative history does not clearly show that Congress would not have wanted all governmental obligations to be guaranteed constitutionally by Section Four, but the legislative history also does not show that it did contemplate those programs. The legislative history does indicate that through the Public Debt Clause, Congress sought that those who had a stake in the public's funds would be ensured their investments were secured.[96]

The United State's own experiences, specifically previous debt limit crises and the 1995-1996 government shutdown, are perhaps the most significant aspect of history for interpreting public debt.[97] The 2011 debt limit crisis is not the only time this country faced a potential default.[98] Even though some have said past debt ceilings were raised without controversy,[99] that statement is not completely accurate. Previous Congresses have reached impasses similar to 2011. The Treasury took extreme measures in the past to avoid default.[100]

In September 1985, the debt crisis reached a point that prompted the Treasury to announce it was going to be unable to make Social Security payments.[101] Yet, the lack of reported cases seems to indicate that the Public Debt Clause was not invoked to suggest constitutional rights had been violated. In fact, the Government found a temporary solution, something it seems it likely would do if a default occurred today. The Treasury divested various trust funds, including the Social Security Trust Fund, by redeeming some trust fund securities earlier than usual in order to "create[] room under the debt ceiling for [the] Treasury to

---

95. TATELMAN & THOMAS, *supra* note 7, at 3-4. For the text of these proposals, see *supra* text accompanying notes 43-45.

96. *See supra* notes 92-94 and accompanying text.

97. A government shutdown occurred because Congress and the President failed to reach an agreement on the budget for a particular fiscal year causing a funding gap in which money had not been appropriated. *See* CLINTON T. BRASS, CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 2 (2011), *available at* http://www.washingtonpost.com/wp-srv/politics/documents/RL34680.pdf.

98. Debt impasses were also reached in 1985 and 1995-1996, *see infra* text accompanying notes 101, 108.

99. *Obama Says Reagan Raised Debt Ceiling 18 Times; George W. Bush Seven Times*, TAMPA BAY TIMES (July 26, 2011, 12:42 PM), http://www.politifact.com/truth-o-meter/statements/2011/jul/26/barack-obama/obama-says-reagan-raised-debt-ceiling-18-times-geo/ (quoting President Barack Obama as saying, "In the past, raising the debt ceiling was routine. Since the 1950s, Congress has always passed it, and every President has signed it. President Reagan did it [eighteen] times. George W. Bush did it seven times.").

100. LEVIT ET AL., *supra* note 10, at 3-6 ("Past Treasury Secretaries, when faced with a nearly binding debt ceiling, have used special strategies to handle cash and debt management responsibilities.").

101. *Id.* at 4.

borrow sufficient cash from the public to pay other obligations, including . . . Social Security benefits."[102] Congress codified this option to allow federal officials to use Social Security Trust Funds for "the payment of benefits or administrative expenses" when necessary.[103] Thus, even if the Public Debt Clause included entitlement programs, that statute could be invoked to avoid violating the Public Debt Clause.[104]

When the Government shut down in 1995-1996,[105] several governmental obligations were "questioned"[106] because there was uncertainty as to whether they would be fulfilled.[107] A government shutdown occurs when Congress and the President fail to reach an agreement on the budget for a particular fiscal year.[108] Thus, money has not been appropriated for continued operations.[109] It is different than a debt limit crisis, which occurs when funds have already been appropriated, but the Government is unable to borrow money to fund those appropriations.[110] A government shutdown has harsher implications than a debt limit crisis.[111] As a result of the 1995-1996 government shutdown, federal employees received late or retroactive salary payments, federal contractors were not paid, and federal entities lost millions of dollars.[112] However, the Public Debt Clause was not invoked to suggest the shutdown was unconstitutional.[113]

---

102. *Id.* The Social Security Trust Fund is included within the Social Security program and is the mechanism that supposedly secures Social Security payments will be made in the long-term. *See* John McGuire, *The Public Debt Clause and the Social Security Trust Funds: Enforcement Mechanism or Historical Peculiarity?*, 7 LOY. J. PUB. INT. L. 203, 204, 209-10 (2006).

103. 42 U.S.C. § 1320b-15(a)(3) (2006).

104. *Id.* § 1320b-15(b) ("For purposes of this section, the term 'public debt obligation' means any obligation subject to the public debt limit established under section 3101 of Title 31.").

105. The government shutdown lasted twenty-one days, from December 15, 1995 to January 6, 1996. *See* Ed O'Keefe, *Government Shutdown: Facts and Figures*, WASH. POST (Feb. 24, 2011, 6:00 AM), http://voices.washingtonpost.com/federal-eye/2011/02/government_shutdown_facts_and.html.

106. U.S. CONST. amend. XIV, § 4.

107. BRASS, *supra* note 97, at 5-9 (discussing the multiple ways in which a federal government shutdown impacts public and private matters).

108. *Id*. at 2.

109. *Id*.

110. *See* LEVIT ET AL., *supra* note 10, at 11.

111. CONG. BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: AN UPDATE 49 (1995), *available at* https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/48xx/doc4805/entirereport.pdf. ("Failing to raise the debt ceiling would not bring the government to a screeching halt the way that not passing appropriations bill would. Employees would not be sent home, and checks would continue to be issued. If the Treasury was low on cash, however, there could be delays in honoring checks and disruptions in the normal flow of government services.").

112. BRASS, *supra* note 97, at 8 (citing Dan Morgan & Stephen Barr, *When Shutdown Hits Home Ports*, WASH. POST, Jan. 8, 1996, at A1; Peter Behr, *Contractors Face Mounting Costs from Government Shutdowns*, WASH. POST, Jan. 23, 1996, at C1).

113. This is evidenced by the fact that there are no reported or published judicial opinions

Federal employee salaries were paid late because the President and Congress could not agree on a budget to provide funding for the salaries. Thus, the Government had no ability to pay and was defaulting on these payments owed.[114] One may ask why, when the Government defaulted on a debt owed, the Public Debt Clause would not apply. The answer must be that federal employee salaries do not fall within the term "public debt" as contemplated in the Public Debt Clause. Furthermore, no consideration was given to that fact that the Government was defaulting on its obligations because other obligations, like mandatory entitlement programs, continued to be fulfilled on time.[115] If Congress fails to raise the debt ceiling, employees will likely be paid, albeit with a possibility of delay, and although agencies could still obligate funds, the Treasury might "not be able to liquidate all obligations."[116]

Similar to the panic that occurred during the 1985 debt limit crisis,[117] there was a Social Security panic during the 1995-1996 debt limit crisis. The Treasury announced it would not be able to make Social Security payments in March 1996.[118] In response, "Congress authorized [the] Treasury to issue securities to the public in the amount needed to make . . . benefit payments and specified that, on a temporary basis, those securities would not count against the debt limit."[119] Again, government officials did not question the potential for non-payment under the Public Debt Clause.[120]

Some statutes suggest "non-interest obligations," or obligations other than debt owed to bondholders, "are not sacrosanct."[121] For example, "the Prompt Payment Act dictates the interest penalties the federal government must pay for late payment to commercial vendors."[122] The Internal Revenue Code dictates interest penalties the federal government must pay "for late tax refunds."[123] These statutes suggest that late payment for these types of governmental obligations is

---

regarding government shutdowns and their ties to the Public Debt Clause.

114. BRASS, *supra* note 97, at 2, 5 (discussing the problems of a funding gap).

115. *Id*. at 9 (internal citation omitted) (discussing how the Social Security Administration retained 4,780 employees during the 1996 government shutdown to "ensure the continuance of benefits to currently enrolled Social Security, SSI and Black Lung beneficiaries").

116. LEVIT ET AL., *supra* note 10, at 10-11.

117. *See supra* text accompanying note 101.

118. LEVIT ET AL., *supra* note 10, at 4, 20.

119. *Id*. at 4-5. *See* Timely Payment of March 1996 Social Security Benefits Guaranteed, Pub. L. No. 104-103, 110 Stat. 55 (1996); Public Debt Limit: Temporary Extension, Pub. L. No. 104-115, 110 Stat. 825 (1996).

120. At least one editorial in 1995 suggested that default on the debt would be unconstitutional under Section Four. *See* George B. Tindall, Editorial, *Is This Train Wreck Constitutional?*, NEWS & OBSERVER (Chapel Hill), Nov. 15, 1995, at A25.

121. G.I., *America's Debt: The Debt Ceiling and Default*, ECONOMIST (Jan. 13, 2011, 5:48 PM), http://www.economist.com/blogs/freeexchange/2011/01/americas_debt.

122. *Id*.; *see* 31 U.S.C. § 3901 (2006) (effective Nov. 10, 1998); 31 U.S.C. § 3904 (2006) (amended 1988).

123. G.I., *supra* note 121; *see* 26 U.S.C. § 6511 (2006) (effective June 17, 2008).

legal and that they are more akin to entitlement programs or federal employee benefits, rather than debt owed bondholders. Bondholders voluntarily loan the government money in order to help fund programs and help the government function with the assumption that they will receive more money in return when they redeem their bonds. Obligations, including entitlement programs, are paid to individuals who are not always contributing to funding these programs.[124] Therefore, bond obligations are different than entitlement programs in that individuals invest in the government expecting to profit from that investment.

During the 2011 crisis, the Congressional Research Service suggested that the federal government must "eliminate roughly two-thirds of discretionary spending, cut nearly 40% of outlays for mandatory programs, increase revenue collection by nearly 27%, or take some combination of those actions" to avoid raising the debt ceiling.[125] Yet, proponents of the broader reading of public debt argue that actions such as cutting outlays of mandatory programs would violate the Public Debt Clause.[126] Such a reading is dangerous because if this interpretation is readily accepted, Congress may react by repealing these programs to avoid violating the Public Debt Clause. However, this overreaction is unlikely because public debt does not encompass all government obligations.[127] Past real-life experiences clearly have not led to dire circumstances in which Congress might repeal entitlement programs to avoid violating Section Four, as no one suggested during those times that a constitutional principle had been violated. Interpreting the meaning of "public debt" to include only debt owed to bondholders is most legally and practically accurate.

B. Does the Public Debt Clause Prohibit Repudiation, Default, and/or Actions that May Lead to Either?

Now that this Note has concluded that public debt contemplates only debt owed to bondholders, the next question that must be answered is what type of government action "question[s]"[128] that public debt. Three potential actions that question public debt include (1) repudiation, (2) default, or (3) any government act that may result in either repudiation or default. Repudiation means "to reject or renounce a (duty or obligation)"[129] and "to refuse to have anything to do with

---

124. *See e.g.*, Chris Edwards, *Food Subsidies*, CATO INST. (July 2009), http://www.downsizinggovernment.org/sites/default/files/agriculture-food-subsidies.pdf (stating that "[t]he food stamp program cost federal taxpayers $56 billion in 2009" and that "[t]he maximum monthly benefit in 2009 for a household of four [was] $668"). Thus, one can imply that individuals or households with $0 income are not paying taxes but could be receiving food stamps, which are funded by federal taxpayers, most of whom are not receiving food stamps.

125. LEVIT ET AL., *supra* note 10, at Summary.

126. Abramowicz, *supra* note 7, at 587-89.

127. *See supra* Part II.A.2.

128. U.S. CONST. amend. XIV, § 4.

129. BLACK'S LAW DICTIONARY, *supra* note 36, at 1111.

. . . to reject . . . as having no binding force."[130] As applied to the Public Debt Clause, repudiation is a refusal to recognize payments owed to bondholders. Default is "[t]he omission or failure to perform a legal or contractual duty; esp[ecially] the failure to pay a debt when due"[131]—or in other words, an inability to pay or not paying on time. As applied to the Public Debt Clause, failing to pay bondholders on time or not being able to pay bondholders is default. Defining the third act is difficult, but it would likely include a failure to raise the debt limit and arguably, any action that makes raising the debt ceiling unlikely or questionable.

The most widely accepted interpretation is that the Government cannot repudiate the public debt because of *Perry*.[132] Senator Wade's comments regarding his Section Four proposal,[133] as well as the Court in *Perry,* explicitly mention that the purpose of Section Four is to avoid repudiation.[134] Further, "the drafters of [Section Four] of the Fourteenth Amendment consistently spoke in terms of repudiating confederate debt and preventing repudiation of Union debts."[135] Thus, what is most debatable is whether the Public Debt Clause prohibits any actions beyond repudiation, and if so, what actions.[136] This Note endorses the interpretation that the Public Debt Clause prohibits the Government from repudiating and defaulting on payments owed to bondholders, but does not extend to any government action that questions whether payments owed to bondholders will be paid.

---

130. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1058 (11th ed. 2003).

131. BLACK'S LAW DICTIONARY, *supra* note 36, at 377.

132. Perry v. United States, 294 U.S. 330, 354 (1935).

133. CONG. GLOBE, 39TH CONG., 1ST SESS., 2769 (1866) ("[F]or I have no doubt that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a congress to repudiate it . . . .").

134. Perry, 294 U.S. at 354 (finding that Section Four supports that overriding a valid debt obligation "went beyond . . . congressional power").

135. TATELMAN & THOMAS, *supra* note 7, at 7.

136. In *Perry*, the parties disputed whether the Public Debt Clause prohibited only total repudiation or also partial repudiation. *See* Gerard N. Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 64 FLA. L. REV. 1243, 1254-56 (2012). The Government argued it prohibited only total repudiation of federal bonds for three reasons: (1) the word '"validity'" in Section Four should be read as '"to the essential existence of the obligation;'" (2) legislative history supported the theory that the purpose of Section Four was to ensure that the South would not refuse to honor debts incurred during the Civil War; and, (3) other judicial cases that dealt with the "changes to the value of legal tender" did not say "anything about Section Four." *Id.* at 1255 (quoting Brief for United States at 62-64, Perry v. United States, 294 U.S. 330 (1935) (No. 532), 1935 WL 32938, at *62-64). Perry argued that an 1869 Act of Congress that read '"the faith of the United States is solemnly pledged to the payment in coin or its equivalent . . . of all the interest bearing obligations of the United States . . . '" confirmed that Section Four's purpose '"was definitely to prevent any attempt either to repudiate or to scale down the principal of or interest on the public debt.'" *Id.* (quoting Brief of Claimant at 11, 18, 20, Perry v. United States, 294 U.S. 330 (1935) (No. 532), 1934 WL 31880, at *11, *18, *20).

1. The Public Debt Clause Prevents the Government from Taking Action that May Result in Repudiation or Default.—Legal scholars have suggested that any government action inhibiting the debt ceiling from being raised is a violation of the Public Debt Clause.[137] Support for this argument supposedly comes from the Section Four drafters' intent, the construction of Section Four, the evolution of the language of the clause from proposal to adoption, and *Perry*.[138] Although some of this support is arguably valid, the potential implications of adopting such an interpretation, in addition to the country's history, suggest this is not the appropriate interpretation of the Public Debt Clause.[139]

As mentioned, when Section Four drafters were discussing this clause on the Senate floor, they primarily spoke in terms of seeking to prevent the South from repudiating debt incurred during the Civil War.[140] As one legal scholar argued, the drafters likely did not consider the distinction between a ban on government failure to honor debts and actual government action that fails to honor debts.[141] Since the drafters likely did not consider this distinction, there is an implication that they saw no distinction and assumed that Congress repudiating the debt or the government doing something that leads to repudiating the debt would both violate the Public Debt Clause.[142] Considering the evidence only supports a desire to prohibit the former, arguing that the drafters also intended the latter seems like a stretch. Congress's intent in passing the Public Debt Clause can best be derived through what they said when they passed it; none of the Senators suggested that *any* government action that could lead to repudiation of debt or not raising the debt ceiling would violate the clause.[143]

Turning specifically at the linguistic construction of the clause, it has been argued that the phrase "to question"[144] is more analogous to the phrase "to jeopardize" rather than to the phrase "to repudiate" and that "to question" and "to jeopardize" are more inclusive.[145] In other words, the phrases "to question" and "to jeopardize" seem to include more government action than merely the actual act that repudiates debt. Further, it is argued that the use of the phrase "to question" is telling.[146] In an earlier version of the clause, "shall not be

---

137. *See* Abramowicz, *supra* note 7, at 591; Thomas Geoghegan, Op-Ed., *Dear GOP, Default Is Unconstitutional*, POLITICO (Mar. 31, 2011, 4:54 AM), http://www.politico.com/news/stories/0311/52235_Page3.html; Epps, *supra* note 10.

138. *See infra* Part II.B.1.

139. *See infra* Part II.B.2.

140. CONG. GLOBE, 39TH CONG., 1ST SESS., 2769 (1866).

141. *See* Abramowicz, *supra* note 7, at 591.

142. *Id.*

143. CONG. GLOBE, 39TH CONG., 1ST SESS., 2768-69, 3040 (1866).

144. U.S. CONST. amend. XIV, § 4 ("The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.").

145. Abramowicz, *supra* note 7, at 592.

146. *See id*. at 594.

questioned" was not included, but instead the word "inviolable" was used.[147] "Inviolable" is closer in meaning to "unrepudiable;" the drafters were shifting away from exclusively limiting "to question" to mean only repudiation.[148] This "shift suggests a preference for phraseology that protects the public debt so strongly as to put the government's commitment to it beyond question."[149]

A similar argument is based on the Court's interpretation of the clause in *Perry*.[150] After deciding that Section Four applied to government bonds, the Court said, "Nor can we perceive any reason for not considering the expression 'the validity of the public debt' as embracing whatever concerns the integrity of the public obligations."[151] As one legal scholar argued, the word "integrity" brings to mind the word "question" and seems to be more "inclusive."[152] In other words, the Public Debt Clause prevents more than just repudiation. Nonetheless, the drafters did not intend for the Public Debt Clause to prohibit any government action that could lead to or result in repudiation or not raising the debt ceiling.

To put this in context of the debt ceiling, those who endorse that the Public Debt Clause prohibits any act that may inhibit the debt ceiling from being raised argue that any speech by a member of Congress suggesting the debt ceiling not be raised is in violation of Section Four.[153] To expand, "any budget deficit, tax cut or spending increase could be attacked on constitutional grounds, because each of those actions slightly increases the probability of default."[154] Adopting this interpretation defies legal principles and common sense. First, finding congressional speech or debate between parties during a congressional session in an attempt to find a compromise to be unconstitutional seems to be itself unconstitutional, namely under the First Amendment's right to freedom of speech.[155] Second, taxing and borrowing are explicitly authorized by the Constitution as congressional powers.[156] Currently, the United States deficit is so enormous and constantly growing that a budget deficit seems perpetual.[157] The country would constantly violate the debt ceiling because the debt incessantly increases. Moreover, such an interpretation would be unenforceable, making the

---

147. CONG. GLOBE, 39TH CONG., 1ST SESS., 2768 (1866).

148. Abramowicz, *supra* note 7, at 594; CONG. GLOBE, 39TH CONG., 1ST SESS., 2768-69 (1866).

149. Abramowicz, *supra* note 7, at 594.

150. Perry v. United States, 294 U.S. 330, 354 (1935) (quoting U.S. CONST. amend XIV, § 4).

151. *Id.*

152. McGuire, *supra* note 102, at 215.

153. Geoghegan, *supra* note 137.

154. Tribe, *supra* note 7.

155. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

156. U.S. CONST. art. 1, § 8, cl. 2 ("Congress shall have the Power . . . [t]o borrow Money on the credit of the United States . . . ."); U.S. CONST. art. 1, § 8, cl. 1 ("The Congress shall have the Power To lay and collect Taxes . . . .").

157. For an up-to-date depiction of the United States' debt, see U.S. DEBT CLOCK.ORG, www.usdebtclock.org/index.html (lasted visited Aug. 25, 2012).

Public Debt Clause obsolete. It would be impossible to monitor all governmental action and identify every act that questions whether debts will be honored (e.g. knowing what a member of Congress says at all times to ensure nothing he or she says could lead to not raising the debt ceiling). To think that a court would entertain such claims is nonsensical.

All this evidence does is support the theory that the Public Debt Clause was intended to prohibit more than repudiation, but a boundary must be established for the clause to have any force. An appropriate boundary is that the Public Debt Clause not only prohibits repudiation of debts owed to bondholders but also protects against default on debts owed to bondholders.

2. Public Debt Clause Prohibits Repudiation and Default.—As discussed above, there is legislative history and legislative intent that suggest that the Public Debt Clause is meant to be more inclusive and to protect against more than just repudiation.[158] The optimal interpretation is that it also prohibits the Government from defaulting. Applying this interpretation in context, the Public Debt Clause prohibits the Government from both repudiating and defaulting on payments owed to bondholders.[159] In other words, the Government cannot constitutionally refuse to recognize or revoke debt owed to bondholders or fail to make payments to bondholders when they come due. "The bond in suit differs from an obligation of private parties, or of states or municipalities, whose contracts are necessarily made in subjection to the dominant power of the Congress . . . . The bond now before us is an obligation of the United States."[160] Thus, if not raising the debt ceiling causes either repudiation or default, the Government's inaction would violate the Public Debt Clause.

It is imperative to understand that the Public Debt Clause prevents both repudiation and default and that these are two different concepts. Saying, "'Your debt will not be honored'"[161] is different from saying that a debt *cannot* be honored. Therefore, defaulting on debt, or the inability to pay debt owed to bondholders because of a failure to raise the debt ceiling, is different than repudiating debt, or refusing to recognize debt owed to bondholders by not raising the debt ceiling.

---

158. *See supra* Part II.B.1.

159. With this interpretation, it is important to remember the distinction between an individual defaulting and the Government defaulting. It is logical to think that the Public Debt Clause does not extend to default because if an individual defaults on obligations he or she owes, creditors do not assert that he or she is violating the Fourteenth Amendment. This clause does not apply to individuals, though; it applies to the Government. *See e.g.*, Perry v. United States, 294 U.S. 330, 348 (1935) (citation omitted) ("The bond in suit differs from an obligation of private parties, or of states or municipalities, whose contracts are necessarily made in subjection to the dominant power of the Congress. . . . The bond now before us is an obligation of the United States.").

160. *Id.* (citation omitted).

161. Abramowicz, *supra* note 7, at 592 (Abramowicz used this argument to support his position that advocates for extending the Public Debt Clause to any action that jeopardizes the debt, and I'm using his similar analogy to show the difference between repudiation and default.).

"[V]alidity . . . shall not be questioned"[162] should be interpreted to mean "a debt cannot be called 'valid' if existing laws will cause default on it."[163] In 2011, 31 U.S.C. § 3101, which set the debt ceiling, would have caused default had Congress not reached an agreement. Currently, the Budget Control Act of 2011 could potentially cause a default if the debt ceiling is not raised again in 2013. A debt cannot be valid if Congress's inaction to change existing laws (passing a bill to raise the debt ceiling) will cause default on it. Therefore, if Congress fails to raise the debt ceiling, causing the Government to be unable to make payments owed to bondholders, it would violate the Public Debt Clause.

The change in the wording of earlier versions of the clause, and the clause in its adopted form support this connotation,[164] as does the *Perry* interpretation. "[A]lthough *Perry* concerns only direct repudiation of bonds, its holding would have lent credence [to a broad reading] of the Public Debt Clause."[165] The Court cited other reasons why Congress could not repudiate the debt owed to Perry, namely, its borrowing power.[166] Thus, if other constitutional provisions prevent repudiation of government bonds, it would be redundant for the Public Debt Clause to prevent the same thing. It follows that the Public Debt Clause prevents more[167] default.

Again, the most persuasive evidence that the Public Debt Clause applies to both repudiation and default, but not to all government action that could lead to a failure to pay debts, is the historical precedent created during the previous debt limit crises and the 1995-1996 government shutdown. The debt impasses in 1985 and 1995-1996 "jeopardized" monthly Social Security payments because the Treasury could not borrow against the debt ceiling.[168] Yet, the Public Debt Clause was not judicially invoked or spurred into public debate while this jeopardizing conduct was occurring.[169] Arguably, this lack of action proves two things: the Public Debt Clause does not contemplate obligations such as entitlement programs,[170] or even if it does include entitlement programs, jeopardizing conduct is not sufficient to trigger Section Four. The latter idea supports the theory that the Public Debt Clause applies to conduct that results in repudiation or default but not any "jeopardizing" conduct.

Practically, the Public Debt Clause must prevent more than just total repudiation. If not, "Section Four would impose no real limit on federal authority, as Congress could decide to meet .01% of bond payments and still be

---

162. U.S. CONST. amend. XIV, § 4.

163. Abramowicz, *supra* note 7, at 594.

164. *See supra* text accompanying notes 43-45.

165. Abramowicz, *supra* note 7, at 604.

166. *Id.*

167. *Id.*

168. LEVIT ET AL., *supra* note 10, at 4-5 n.15.

169. Neither politicians nor the Government brought up this argument, but at least one editorial in 1995 suggested that default on debt would be unconstitutional under the Public Debt Clause. *See* Tindall, *supra* note 120.

170. *See supra* Part II.A.2.

acting lawfully."[171] In order for this constitutional provision to have any real force, finding that Section Four prohibits defaulting on bonds is the best interpretation.[172] Thus, a delay in payments to bondholders or a failure to make "retroactive payments"[173] would result in a violation of Section Four.

Underlying this interpretation is the assumption that the Government would not be able to make the payments owed to bondholders should the debt ceiling not be raised. In fact, during the 2011 debt crisis, figures were published that demonstrated that the Government's incoming revenue was sufficient to pay principal and interest payments due to bondholders.[174] According to one member of Congress, only 10% of incoming revenue is necessary to pay bondholders.[175] However, this position assumes that the Government will only pay bondholders and a portion of other obligations.[176] In 2011, the Treasury said it would not '"prioritize' payments" and that Congress required all obligations to be paid in full, on time as each becomes due.[177] Using this argument, the Government could miss a payment to a bondholder,[178] thus violating the Public Debt Clause.

The key interpretation to this section is what actions or results the Public Debt Clause constitutionally prohibits. As legislative history, legislative intent, and judicial precedent demonstrate, the Public Debt Clause seems to be "bizarrely" broad.[179] What Section Four prohibits has never been determined. On one hand, the argument that it prohibits any actions that jeopardize a failure to honor debts seems to go too far as that suggestion has no historical, legal, and practical support.[180] On the other hand, the clause seems to suggest it prevents more than repudiation. The next logical step is that it prohibits the Government from defaulting on debt owed to bondholders. As the Treasury said, bondholders

---

171. Magliocca, *supra* note 136, at 1256.

172. Another plausible and slightly different interpretation that has a strong chance of "reconcil[ing]" the different positions on the interpretation of the Public Debt Clause is that it "bars the federal government from substantially defaulting on its bonds" so that "[a] short suspension of debt payments—as was threatened during the 2011 debt ceiling debate—would probably not meet this standard, especially if the bondholders were made whole when payments resumed." *Id.*

173. *Id.*

174. G.I., *supra* note 121.

175. *Georgia Republican Tom Price Says Paying Debtholders First Will Stave Off Default*, POLITIFACT & ATLANTA J. CONST. (July 24, 2011), http://www.politifact.com/georgia/statements/2011/jul/26/tom-price/georgia-republican-tom-price-says-paying-debtholde/.

176. *Id.* For example, this could mean a delay in obligations such as Pell grants, educational loans, federal employees' salaries and benefits, and welfare programs, among others. *Id.*

177. Neal Wolin, *Treasury: Proposals to 'Prioritize' Payments on U.S. Debt Not Workable; Would Not Prevent Default*, U.S. DEP'T OF THE TREASURY (Jan. 21, 2011), http://www.treasury.gov/connect/blog/Pages/Proposals-to-Prioritize-Payments-on-US-Debt-Not-Workable-Would-Not-Prevent-Default.aspx.

178. G.I., *supra* note 121.

179. McGuire, *supra* note 102, at 213.

180. *See supra* Part II.B.2.

must be paid in full and on time.[181] Thus, the Public Debt Clause is properly interpreted as prohibiting the Government from repudiating or defaulting on paying debts owed to bondholders.

III. REMEDIES

With a proper interpretation of the Public Debt Clause in mind, various remedies can be considered as to how the Government can avoid violating it. The following are some potential remedies: (1) allowing the courts to handle bondholders who bring suit claiming the Government has defaulted or repudiated; (2) permitting the President to unilaterally raise the debt ceiling; (3) Congress or the President directing the Treasury to use a prioritization system for paying off the debt, with payment to bondholders as the first priority; and (4) the Government doing nothing. The best choice is the third one. To understand why this is the best choice, it is important to weigh the positive and negative aspects of each option. Even the best option has negative implications, demonstrating why it is of utmost importance that Congress, in the future, reach a compromise in raising the debt ceiling.

A. Option 1: Let the Courts Handle It

The argument for letting the judiciary determine a remedy for a violation of the Public Debt Clause is that if Congress does not raise the debt ceiling, causing the Government to miss payments due to bondholders, then bondholders should file an action, claiming Congress violated the Public Debt Clause. The positives to this option are limited. First, the President need not unilaterally take action without the consent of Congress, which avoids implicating the separation of powers. Second, the courts might finally render a decision providing more guidance as to how to interpret Section Four. Other than these two benefits, it is difficult to imagine others.

The downside to this option includes both legal impediments and potentially dangerous financial consequences. The first legal barrier is that a bondholder must have standing.[182] To establish standing, one bringing an action must: (1) have an '"injury in fact,"' which is "concrete and particularized" and '"actual or imminent, not 'conjectural' or 'hypothetical,"' (2) show "a causal connection between the injury and the conduct complained of," and (3) demonstrate that a remedy must be '"likely"' to redress the injury.[183] As to the first requirement, "[r]epudiation of debts creates a direct and substantial injury."[184] Failure to raise the federal debt ceiling could establish a causal connection.[185] Further, bondholders must ensure the remedy they propose would be a solution to their

---

181. Wolin, *supra* note 177.

182. Tribe, *supra* note 7 ("Only someone who has suffered a 'particularized' harm—not one shared with the public at large—is entitled to sue.").

183. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

184. Abramowicz, *supra* note 7, at 607.

185. *Id.*

injury—that raising the debt ceiling would compensate them for payment owed. Bondholders may be able to establish standing, but their injuries may not be redressed for several years because litigation is typically a drawn out process.

Even if a bondholder could demonstrate standing, who would the bondholder sue? The most likely candidate is the Government. Yet, the Government could invoke sovereign immunity, a doctrine that prohibits the Government from being sued in its own court unless it has waived this immunity.[186] Some examples of claims that overcome or waive sovereign immunity, include a violation of the Takings Clause,[187] Contracts Clause,[188] or an unconstitutional taxation.[189] The federal government's default on its debt arguably would violate both the Takings and Contract Clause.[190] Further consideration demonstrates such claims would be unlikely to prevail.[191] "First, recovery for a debt default requires the payment of monies from the [T]reasury to compensate for previous violations. This is the area in which sovereign immunity is at its strongest."[192] This reason also supports why the Treasury officials likely would have sovereign immunity.[193] Second, the

---

186. *See, e.g.*, Chisholm v. Georgia, 2 U.S. 419, 478 (1793) *superseded on other grounds by* U.S. CONST. amend. XI, *as recognized in* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (choosing not to permit suit against the United States because "there is no power which the Courts can call to their aid"); United States v. Clarke, 33 U.S. 436, 444 (1834) (The United States is "not suable of common right;" thus, "the party who institutes such suit must bring his case within the authority of some act of [C]ongress, or the court cannot exercise jurisdiction over it.").

187. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

188. U.S. CONST., art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.").

189. *See* John Lobato & Jeffrey Theodore, *Federal Sovereign Immunity*, 4, 15 (Harvard Law Sch. Fed. Budget Policy Seminar, Briefing Paper No. 21 Draft 2006), *available at* http://www.law.harvard.edu/faculty/hjackson/FedSovereign_21.pdf.

190. *Id.*

191. *Id.* at 16-18.

192. *Id. Ex parte Young*, 209 U.S. 123 (1908) allowed claims against individual public officers but was later severely limited by *Edelman v. Jordan*, 415 U.S. 651 (1974), which found that *Young* applied only to "pre-collectment challenges" and not "post-collectment challenges . . . seek[ing] retroactive relief." Lobato & Theodore, *supra* note 189, at 18-19. *Papason v. Allain*, 478 U.S. 265, 281 (1986), further limited *Young* when "the Court refused to allow plaintiffs to recover for a continuing breach of trust on the grounds that the recovery would in effect be for an accrued monetary liability." Lobato & Theodore, *supra* note 189, at 20. Thus, bondholders who wait to sue the Government or officers until after they were supposed to be paid likely would be prohibited from seeking retroactive damages by sovereign immunity via *Edelman* and *Papason*, and those who attempt to sue before they are supposed to be paid likely would lack standing because they have yet to suffer a concrete and particularized injury. Lobato & Theodore, *supra* note 189, at 17-20.

193. *Id.* at 16-17, 20 (discussing Papason v. Allain, 478 U.S. 265 (1986)).

courts may decide that "market consequences" lend to this issue being solved politically, not judicially.[194] Third, nineteenth century judicial precedent illustrates that courts "reject[ed] various suits, nominally against state officials, to force state governments to honor their debts."[195] Further, a claim under the Contracts Clause would not be viable against the federal government because the Contracts Clause is only applicable to the states.[196] "Indeed, the Supreme Court has noted that contractual obligations between the nation and an individual are binding to the extent of the sovereign's 'conscience' and do not create an independent right of action."[197]

One may argue the Tucker Act is an avenue bondholders could pursue; this act can waive sovereign immunity in suits arising out of contracts to which the Government, or its agencies, are parties and provides jurisdiction for such suits.[198] However, this action provides jurisdiction for such claims when the Government *chooses* to waive its sovereign immunity.[199] Further, limits subsequently placed on this Act by judicial precedent make it unlikely for bondholders to avoid Congress invoking its sovereign immunity.[200] Additionally, *Gold Bondholders Protective Council, Inc. v. United States*[201] found a joint resolution that withdrew its consent to be sued for gold clause obligations properly invoked sovereign immunity.[202] Congress's Joint Resolution of August 27, 1935,[203] at issue in *Gold Bondholders*, was in response to Congress's Joint Resolution of June 5, 1933, the joint resolution that the *Perry*[204] Court found unconstitutional.[205] *Gold Bondholders* found this new joint resolution to be constitutional and a proper invocation of sovereign immunity.[206] Accordingly, Congress potentially could pass a similar joint resolution, which would withdraw the Government's consent to be sued by bondholders, without violating the Constitution. Such an act would make this remedy—to let the courts handle any dispute under the Public Debt

---

194. *Id.* at 16.

195. *Id.* (listing nineteenth century cases including *In re* Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); and Louisiana v. Jumel, 107 U.S. 711 (1883)).

196. *See* Lynch v. United States, 292 U.S. 571, 580-81 (1934).

197. Lobato & Theodore, *supra* note 189, at 12.

198. 28 U.S.C. § 1491 (2006).

199. Lobato & Theodore, *supra* note 189, at 13-14.

200. *Id.* at 15-16 (referring to Federal Housing Administration v. Burr, 309 U.S. 242 (1940), which allows Congress to limit its own liability in such cases so "in the absence of congressional waiver, there will be no basis for a claim against the federal government . . . . Even the Tucker Act does not create any cause of action against the government" but only provides for jurisdiction if the substantive claim, here contract law, creates a waiver of sovereign immunity).

201. 676 F.2d 643 (Ct. Cl. 1982).

202. *Id*. at 646.

203. *Id*. at 645 (stating the Joint Resolution was codified at 31 U.S.C. § 773).

204. Perry v. United States, 294 U.S. 330, 347 (1935) (stating the Joint Resolution was codified at 31 U.S.C. §§ 462-63, 48 Stat. 113).

205. *Gold Bondholders*, 676 F.2d at 646.

206. *Id.*

Clause—unavailable. If a bondholder cannot sue the Government, there are no other parties he could bring a claim against. Sovereign immunity stands in the way of this remedy as a viable option.

B. Option 2: President Unilaterally Raises the Debt Ceiling

In presenting an argument that the President should unilaterally raise the debt ceiling without congressional approval if Congress fails to raise it,[207] legal scholar Garrett Epps writes what he imagines, or desires, a president's speech to be on such occasion.[208] His support for this argument comes from both the Take Care Clause[209] and the Public Debt Clause.[210] The Take Care Clause requires the President to "take Care that the Laws be faithfully executed."[211] The advantages of this option are obvious. First and foremost, the Government would not default.[212] The Government would continue to make payments to bondholders, federal employees, and entitlement program beneficiaries.[213] Possibly, investor confidence in the United States would not suffer (at least not as much as if default were to occur); thus, interest rates on government issued bonds would not skyrocket.[214] The nation's credit[215] likely would remain intact.[216]

---

207. Under the Budget Control Act of 2011, Congress approved a mechanism through which the President can potentially raise the debt ceiling if Congress fails to do so: "The [Budget Control Act] stipulates that when U.S. debt obligations are within $100 billion of exceeding the debt limit, the President may submit a certification to Congress calling for a $900 billion increase. Automatically, the debt ceiling increases by $400 billion, and if Congress fails to respond in fifty days, the debt ceiling increases by an additional $500 billion. Subsequently, when debt obligations again reach the $100 billion danger zone, the President may file a second certification, this time calling for a default increase of $1.2 trillion. If Congress does not respond in fifteen days, the debt limit rises to the level commanded by the President. In both rounds, to prevent a debt-ceiling increase as large as the President requests, Congress may pass a 'joint resolution of disapproval,' like an ordinary bill, subject to a presidential veto and in turn, a veto override." *Constitutional Law—Separation of Powers—Congress Delegates Power to Raise the Debt Ceiling.*—Budget Control Act of 2011, Pub. L. No. 112-24, 125 Stat. 240 (to be Codified in Scattered Sections of the U.S. Code), 125 HARV. L. REV 867, 869-70 (2012) (citing the Budget Control Act of 2011, Pub. L. No. 112-25, § 301(a)(2), 125 Stat. 240, 251-52, 255).

208. Epps, *supra* note 10.

209. U.S. CONST. art. II, § 3 ("[T]he [President] shall take Care that the Laws be faithfully executed . . . ."). Epps also argues that these clauses require the President to raise the debt ceiling unilaterally and to pay all obligations, not just payments owed to bondholders. *See* Epps, *supra* note 10. However, because I have already rejected that interpretation, Epps' commentary regarding those issues is not relevant to this part of the Note.

210. Epps, *supra* note 10.

211. U.S. CONST. art. II, § 3.

212. Epps, *supra* note 10.

213. *Id.*

214. Some have suggested that if the Government were to default, it is not implausible that investors would lose confidence in the U.S.'s ability to make payments due; for investors to

Invoking the Public Debt Clause to unilaterally raise the debt ceiling has major legal ramifications. It may be difficult to argue that one constitutional principle is more important than another, but anyone who has studied this nation's history understands that a provision like the Thirteenth Amendment of the U.S. Constitution,[217] which abolished slavery, seems to have a more thunderous impact than some others. Similarly, some provisions in the Constitution have been so developed that they seem to exude more power than others.[218] Constitutional powers that have been explicitly and expressly granted to Congress seem to do just that.[219] In fact, Section Five of the Fourteenth Amendment gives Congress the power to enforce the Public Debt Clause, thus leaving the raising of the statutory debt ceiling in the hands of Congress.[220] Some of these powers could be negatively implicated if the President were to unilaterally raise the debt ceiling. The President likely would have to exploit one of these powers that are explicitly reserved for Congress, namely its borrowing[221] or taxing authority.[222] "An increase in the debt limit is, by definition, an

---

continue investing, interest rates on government borrowing instruments would increase substantially. *See* LEVIT ET AL., *supra* note 10, at 11.

215. The Credit Agency Rating Reform Act of 2006 requires the Securities and Exchange Commission to set guidelines for establishing nationally recognized statistical ratings organizations or "NRSROs." *See* 15 U.S.C. § 78o-7 (2006) amended by Pub. L. No. 111-203, §§ 932(a), 933(a), 934, 935, 124 Stat. 1872, 1883, 1884 (2010).

216. Two of the most widely reputed NRSROs, Fitch, Inc. and Moody's Investors Services, Inc., did not downgrade the U.S. credit rating upon passage of the Budget Control Act, but the NRSROs eventually changed their outlook to negative. *See* Matt Egan, *Fitch Keeps U.S. Credit Rating at 'AAA,' Cuts Outlook to Negative*, FOXBUSINESS (Nov. 28, 2011), http://www.foxbusiness.com/economy/2011/11/28/fitch-keeps-us-credit-rating-at-aaa-cuts-outlook-to-negative/; Annalyn Censky, *Moody's Keeps U.S. Credit Rating in Place*, CNNMONEY (Nov. 23, 2011, 11:10 AM), http://money.cnn.com/2011/11/23/news/economy/moodys_credit_rating/index.htm. It is possible that the nation's credit would suffer because at least one NRSRO downgraded the U.S. credit rating even after Congress passed a bill to raise the debt ceiling due to the extreme political dispositions and controversies. *See S&P Downgrades U.S. Debt*, CBSNEWS (Aug. 5, 2011, 8:37 PM), http://www.cbsnews.com/stories/2011/08/05/national/main20088944.shtml.

217. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

218. *E.g.*, U.S. CONST. amend. XIV (the Due Process Clause and the Equal Protection Clause).

219. *See* U.S. CONST. art. I, § 8.

220. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

221. U.S. CONST. art. 1, § 8, cl. 2 ("The Congress shall have the Power . . . [t]o borrow money on the credit of the United States . . . .").

222. U.S. CONST. art. 1, § 8, cl. 1 ("The Congress shall have the Power To lay and collect Taxes . . . ."); *see also* Erwin Chemerinsky, *The Constitution, Obama, and Raising the Debt Ceiling*, Op-Ed., L.A. TIMES (July 29, 2011, 11:41 AM), http://opinion.latimes.com/opinionla/2011/07/erwin-chemerinsky-on-why-obama-cant-raise-the-debt-ceiling.html ("The power of the

authorization to borrow money, a power given to the Congress to grant and not to the President to create in the absence of legislation authorizing it."[223] Thus, by unilaterally raising the debt ceiling, the President is violating well-settled and accepted constitutional principles. It is difficult "to see how the President can 'defend the Constitution' while usurping the powers of the Congress under it to engorge his own."[224]

Additionally, it is not clear that the Take Care clause would give the President the power to unilaterally raise the debt ceiling without congressional approval:

> It is a note-worthy fact in our history that whenever the exigencies of the country, from time to time, have required the exercise of executive . . . power for the enforcement of the supreme authority of the United States government for the protection of its agencies, etc., it was found, in every instance, necessary to invoke the interposition of the power of the national legislature.[225]

Even when President Lincoln suspended the writ of habeas corpus during the Civil War[226] without a legislative act, the legislature eventually passed legislation to approve of that action.[227] Several questions are left unanswered about the "Take Care" clause: Does "Take Care" mean the President is to "be careful" or "be certain" in executing the laws? What does "faithfully" mean? Does "faithfully" mean the President must enforce the letter of the law, the spirit of the law, or both? To what extent are they to be executed?

Unilaterally raising the debt ceiling potentially could lead to impeachment or congressional legal action.[228] If Congress believed the President taking such

---

purse—including the authority to tax, spend, and borrow—is quintessentially legislative."); Tribe, *supra* note 7.

223. Dan Miller, *The President Has No Authority to Increase the Debt Limit Unilaterally*, OP. FORUM (July 24, 2011), http://opinion-forum.com/index/2011/07/the-president-has-no-authority-to-increase-the-debt-limit-unilaterally/.

224. *Id.*

225. Cunningham v. Neagle, 135 U.S 1, 96 (1890).

226. The Constitution could be interpreted to allow such an act but this act was likely reserved to Congress as it fell in Article I. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

227. Congress subsequently authorized the suspension on March 3, 1863, almost two full years later. *See* James A. Dueholm, *Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29 J. ABRAHAM LINCOLN ASS'N 47, 50 (2008), http://quod.lib.umich.edu/cgi/p/pod/dod-idx/lincoln-s-suspension-of-the-writ-of-habeas-corpus.pdf?c=jala;idno=2629860.0029.205.

228. U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); *id*. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments . . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

unilateral action qualified as a "Treason, Bribery, or other high Crimes and Misdemeanors,"[229] the House of Representatives could attempt to impeach the President,[230] and the Senate could convict and remove him from office.[231] Because there is uncertainty as to what constitutes "high crimes and misdemeanors,"[232] impeachment and conviction is not likely.[233] Impeachment and conviction would be even more difficult under a Congress similar to the makeup of the current Congress in which there is an apparent unwillingness to compromise. Congress also could try to take action by suing the President. Yet, "case law is quite clear that a member of Congress, even if joined by a dozen or two colleagues, cannot get standing in court to contest a constitutional issue."[234]

This remedy puts the President in a catch-22: he may have to violate multiple constitutional principles to enforce another. The key here is that, under the proper interpretation of the Public Debt Clause, the Government must avoid defaulting or repudiating on payments owed to bondholders.[235] Thus, the President has another option by which he can avoid violating each of these constitutional principles discussed. That option is to direct the Treasury to make payments owed to bondholders first.

C. Option 3: Make Payments to Bondholders First

The only way to avoid violating the Public Debt Clause is to ensure that the Government does not repudiate or default on payments owed to bondholders. Thus, ensuring payment to bondholders if Congress fails to raise the debt ceiling

---

229. *Id*. art. II, § 4.

230. *See id*. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment.").

231. *See id*. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments . . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

232. *What Are "High Crimes and Misdemeanors"?*, SLATE (Feb. 4, 1999, 6:06 PM), http://www.slate.com/articles/news_and_politics/explainer/1999/02/what_are_high_crimes_and_misdemeanors.html.

233. *See History of Impeachment*, UNIV. OF ILL. AT CHIC. (Mar. 6, 2004, 3:10 PM), http://www.uic.edu/depts/lib/documents/resources/history.shtml. Nine Presidents have had impeachment charges filed against them. *Id.* The House only impeached two of them, President William Clinton and President Andrew Johnson. *Id.* The Senate convicted neither Clinton nor Johnson. *Id.* President Nixon resigned before he could be impeached. *Id.*

234. Matthew Zeitlin, *The Debt Ceiling: Why Obama Should Just Ignore It*, NEW REPUBLIC (June 24, 2011, 12:00 AM), http://www.tnr.com/article/politics/90659/debt-ceiling-obama-congress (quoting Louis Fisher, a former Congressional Research Service employee and an expert on the separation of powers); *see, e.g.,* Raines v. Byrd, 521 U.S. 811, 813-14, 819, 830 (1997) (holding that action brought by individual congressmen challenging the constitutionality of the Line Item Veto Act did not have "concrete and particularized injury," the first requirement for one to have standing in court).

235. *See supra* Part II.

is the remedy with the fewest negative consequences. That remedy would require Congress to pass legislation, or if Congress refuses, for the President to issue an Executive Order directing the Treasury to prioritize its legal obligations so bondholders are paid first.[236] This mechanism of priority would ensure that the President does not overstep constitutional barriers that leave the raising the debt ceiling to Congress[237] but also ensure the country does not default.

Throughout the 2011 debt crisis, many observed that payments to bondholders could be paid merely with incoming revenue; thus, a failure to raise the debt ceiling would not cause a default nor be a violation of Section Four.[238] This conclusion, though, assumes that the Government would not be paying other obligations as they become due. The Government may have sufficient incoming revenue to pay off debt owed to bondholders, but if the Treasury pays obligations as they become due it "could clearly mean missing an interest payment" owed to bondholders.[239] In fact, the Treasury explicitly said that it would not employ a prioritization system and would make payments on all legal obligations as they become due.[240] Further, Treasury officials asserted that they "lack[ed] legal authority to establish priorities . . . ."[241] Under the current regime, the Treasury would continue to make payment on each legal obligation as it becomes due, resulting in default to some bondholders.

These claims by the Treasury of an inability to prioritize are not without rebut. During the 1985 debt limit crisis, the GAO issued a letter "that it was aware of no requirement that [the] Treasury must pay outstanding obligations in the order in which they are received."[242] The "GAO concluded that [the] 'Treasury is free to liquidate obligations in any order it finds will best serve the interests of the United States.'"[243] Essentially, Congress is silent on this particular action. Two government agencies have interpreted this silence differently. The Treasury interprets it as a lack of authority, and the GAO interprets it as a lack of restriction. Because of this silence, the President should unilaterally direct the Treasury to establish payments owed to bondholders as priority number one.

Arguably, Congress has addressed this issue indirectly. According to 31 U.S.C. § 3102, "With the approval of the President, the Secretary of the Treasury

---

236. This mechanism is similar to the priority scheme used in the Bankruptcy Code. *See, e.g.*, 11 U.S.C. § 507 (2006), which sets forth the order for paying certain expenses, individuals, and creditors.

237. *See* U.S. CONST. amend. XIV, § 5.

238. *See Georgia Republican Tom Price Says Paying Debtholders First Will Stave Off Default*, *supra* note 175; G.I., *supra* note 121.

239. G.I., *supra* note 121.

240. Wolin, *supra* note 177; *see also* TATELMAN & THOMAS, *supra* note 7, at 12.

241. TATELMAN & THOMAS, *supra* note 7, at 12 (citing S. COMM. ON FIN. INCREASE OF PERMANENT PUBLIC DEBT LIMIT, S. REP. NO. 99-144, at 5 (1985)).

242. *Id*. (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO B-138524, LETTER FROM GAO TO THE HON. BOB PACKWOOD, CHAIRMAN OF S. FIN. COMM. (1985), *available at* http://redbook.gao.gov/14/fl0065142.php).

243. *Id.*

may borrow on the credit of the United States Government amounts necessary for expenditures authorized by law and may issue bonds of the Government for the amounts borrowed and may buy, redeem, and make refunds . . . ."[244] One scholar argues that this statute, "does not currently allow for such preferential treatment; the Treasury pays obligations on a rolling basis."[245] The statute is permissive, though. By using the word "may" the Treasury has an option to pay obligations on a rolling basis. If the statute used "shall," then Congress would be requiring the Treasury to pay obligations on a rolling basis. This statute is not dispositive that prioritization cannot be utilized.

Because Congress is essentially silent on prioritization, the President's executive power is not at its "lowest ebb" or its highest ebb, so he must rely on his independent powers to act.[246] The executive power here that gives him the ability unilaterally to give this order to the Treasury could be found in the Take Care Clause[247] or through invoking the Public Debt Clause. "[T]here is no dispute that the President has an Article II, [Section] [Three] duty to 'take Care that the Laws are faithfully executed,' which would entail compliance with [Section] [Four] of the Fourteenth Amendment . . . ."[248] Even if this may be out of the ordinary, it is not unprecedented for the President to act unilaterally.[249] Other past presidents have taken unilateral action.[250]

It is unknown at this time whether Congress would subsequently approve of the President directing the Treasury to make its first priority the payment of bondholders. Typically, actions taken pursuant to the Take Care power do require "interposition" of Congress.[251] Concededly, these acts or attempted acts

---

244. 31 U.S.C. § 3102 (2006).

245. Abramowicz, *Train Wrecks*, *supra* note 11, at 38.

246. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . . When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain . . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

247. U.S. CONST. art. II, § 3 (The President "shall take Care that the Laws be faithfully executed . . . .").

248. TATELMAN & THOMAS, *supra* note 7, at 11.

249. Through an Executive Order to the Secretary of Commerce, President Truman attempted to seize control of the steel industry during the Korean War, but Congress had forbidden the President from taking such action by rejecting an amendment to the Taft-Hartley Act that would have given the President this power, so his Order was found to be an unconstitutional exercise of executive power. *See Youngstown*, 343 U.S. at 586-89.

250. *See supra* text accompanying notes 226-27.

251. Cunningham v. Neagle, 135 U.S 1, 95-96 (1890).

were taken during times of war and as a more direct result of war.[252] It is unclear whether a financial crisis could be seen as an emergency.[253] Even if it would be considered an emergency, that reason alone is unlikely to endow the President with some inherent emergency powers unless Congress promulgates a statute that does so.[254] The President may also find some persuasive support for ordering this prioritization because such practice is similarly allowed on the state level, without legal action questioning it.[255] Even if the Take Care Clause is insufficient, the President will invoke the Public Debt Clause. This clause requires the Government to pay bondholders on time;[256] if Congress refuses to ensure compliance with this clause,[257] the President must take care that the Government complies with it. Prioritization would avert a violation of this constitutional principle.

From a legal perspective, the best benefit of this choice is that it would not violate the Constitution because bondholders would be paid, and the President would not be invoking any powers enumerated to Congress in Article I, Section 8 of the U.S. Constitution. As a result of making payments to these bondholders, investors would continue to have confidence in the United States; thus, they would continue to invest in the government, keeping interest rates on Treasury investment instruments low.[258] "Full investor confidence in the validity of the debt requires not just a constitutional nonpayment ban, [sic] but also a statutory regime that provides for payment."[259] Other benefits include maintaining a high credit rating.[260]

There are financial disadvantages if the President orders the Treasury to make payment to bondholders first. Other legal obligations under the debt ceiling (which are different than those under the Public Debt Clause)[261] may not be met.

---

252. *See supra* text accompanying notes 226-27.

253. I acknowledge that very detailed analysis could go into this consideration, but this level of detail is outside the scope of this Note.

254. *Youngstown*, 343 U.S. at 652-53 (Jackson, J., concurring); Congress authorized President Bush to suspend habeas corpus pursuant to the Military Commissions Act of 2006. *See* Pub. L. No. 109-366, § 7, 120 Stat. 2600 (2006).

255. G.I., *supra* note 121 ("[I]n California, for example, bond holders stand ahead of all creditors except schools. Illinois has remained current on its bond debt while racking up some $6 billion in unpaid bills to other creditors.").

256. *See supra* Part II.

257. *See* U.S. CONST. amend. XIV, § 5.

258. *See* LEVIT ET AL., *supra* note 10, at 11.

259. Abramowicz, *supra* note 7, at 595.

260. Two of the most widely reputed NRSROs, Fitch, Inc. and Moody's Investors Services, Inc., did not downgrade the U.S. credit rating upon passage of the Budget Control Act but eventually changed their outlook to negative. *See* Egan, *supra* note 216; Censky, *supra* note 216. It is possible that the nation's credit would still suffer because at least one NRSRO downgraded the U.S. credit rating even after a bill to raise the debt ceiling was passed due to the extreme political dispositions and controversies. *See S&P Downgrades U.S. Debt*, *supra* note 216.

261. *See supra* text accompanying notes 29-30.

These "perceptions . . . are difficult if not impossible to predict"; thus, "it is not clear what the effects of prioritization would be, in the event of an impasse."[262] However, some historical evidence demonstrates there may be some mechanisms to mitigate damages. For example, 42 U.S.C. § 1320b-15 provides, "No officer or employee of the United States shall . . . redeem prior to maturity amounts in any Federal fund which are invested in public debt obligations for any purpose *other than the payment of benefits or administrative expenses from such Federal fund*."[263] During the 1985 debt ceiling crisis (which was before this statute was promulgated), the Government took action similar to what this statute would eventually allow. It divested various trust funds, including the Social Security Trust Fund, by redeeming some trust fund securities earlier than usual in order to "[create] room under the debt ceiling for [the] Treasury to borrow sufficient cash from the public to pay other obligations, including . . . Social Security benefits."[264] The Treasury also warned that economic consequences could include "rises in mortgage interest rates and other borrowing costs . . . [and] reductions in the value of homes, 401(k)s and other retirement savings . . . ."[265]

From a different perspective, some experts in the financial world believe that even if the Government did default on these legal obligations under the debt ceiling, only a technical or short-term default would occur, so the actual backlash would be less than that expected.[266] This concept will be explored further later, but it is relevant to note that the disastrous predictions of what could occur if the Government defaults under the debt limit may be exaggerated.[267]

Although these disadvantages admittedly have significant negative consequences, an act or omission that would violate the Public Debt Clause, is unprecedented and potentially catastrophic.[268] *The Economist* raises some potential issues that could occur if the Government fails to make payment to bondholders:

> Would banks around the world have to classify Treasury holdings as non-performing? Would money-market mutual funds break the buck?

---

262. LEVIT ET AL., *supra* note 10, at 15.

263. 42 U.S.C. § 1320b-15(a)(3) (2006) (emphasis added). Under this statute, "'public debt obligation"' is defined as "any obligation subject to the public debt limit established under section 3101 of Title 31." *Id.* § 1320-15(b). "'Federal fund"' includes "the Federal Old-Age and Survivors Insurance Trust Fund; the Federal Disability Insurance Trust Fund; the Federal Hospital Insurance Trust Fund; and the Federal Supplementary Medical Insurance Trust Fund." *Id.* § 1320b-15(c).

264. LEVIT ET AL., *supra* note 10, at 4; the Social Security Trust Fund is included within the Social Security program and is the mechanism that supposedly secures long-term payment of Social Security benefits. *See* McGuire, *supra* note 102, at 209-10. For further discussion and explanation, see *id.*

265. Wolin, *supra* note 177.

266. *See* James Freeman, Op-Ed., *What if the U.S. Treasury Defaults?*, WALL ST. J., May 14, 2011, http://online.wsj.com/article/SB10001424052748703864204576317612323790964.html.

267. *See infra* text accompanying notes 271-74, 278.

268. *Id.*

> Would all federal entities lose their AAA-credit rating? Would the Federal Deposit Insurance Corporation's ability to backstop the nation's banks come into question? Would foreign central banks start to shift out of dollars?[269]

These potential implications arguably are more significant than the negatives discussed. Refusal to prioritize payments would violate Section Four of the Fourteenth Amendment. Not only could the negative financial consequences of not meeting all legal obligations occur, but additionally, all of the disadvantages if the Government defaults on payments owed to bondholders could also occur. Eliminating some bad consequences, while leaving another remaining, is better than not eliminating any of the bad consequences.

D. Option 4: Do Nothing

Some experts in the financial world believe that the best choice in response to a failure to raise the debt ceiling is to do nothing and let a technical default occur.[270] In this sense, a technical default is a short-term default.[271] The driving force behind this proposition is that allowing a technical default to occur would force the Government to solve the "real problem"—end the Government's "addiction" to spending and come to an agreement that ultimately puts the country on the right path to financial stability.[272] Advocates of this remedy admit that a technical default would be "horrible" in the short-term but reiterate that not solving the "real problem" would be "catastrophic" in the long-term.[273] This remedy is a method to stop the Government from acting as political extremists and do what is best for the long-term.[274] There may be some support for this dire financial outlook because Standard & Poor's (S&P) downgraded the United States' credit rating even though Congress passed a bill by the default deadline to avert the 2011 threatened default.[275] S&P's reasoning for this credit downgrade was that it had lost confidence in the Government and that the bill actually passed did not "go far enough" to provide stability.[276] S&P's further stated that if the United States Government continues to act how it has recently, the long-term outlook is negative and could lead to S&P further downgrading the credit rating.[277]

Financially, most experts do believe that doing nothing will have some

---

269. G.I., *supra* note 121.

270. Freeman, *supra* note 266. This is assuming that bondholders would be barred from suing by either lack of standing or sovereign immunity.

271. *Id.*

272. *Id.*

273. *Id.* (referring to statements made by Stanley Druckenmiller, a "legendary investor.").

274. *Id.*

275. *S&P Downgrades U.S. Debt*, *supra* note 216.

276. *Id.*

277. *Id.*

problems but that those problems can be minimized.[278] Interest payments due to bondholders may be delayed some time, but these economists believe that the bondholder still knows he or she will receive the interest payment.[279] This risk is worth it if, in exchange, there are massive cuts in entitlements that enables the Government to make payments. Accordingly, bondholders in the long-term "are much more assured."[280] Further, they predict that other markets, such as the Chinese government, understand that they would still be paid in a technical default, so these types of investors will not immediately sell their Treasury debt upon default.[281] Support for this claim comes from the fact that when the credit rating went down, the sales for Treasury bonds increased.[282] In the eyes of economists, this increase suggested increased confidence by consumers in that '"[i]nvestors have voted and are saying the U.S. is going to pay them."'[283] Similar investor confidence was portrayed in September 1995, during a debt ceiling crisis and a government shutdown, when '"the bond market rallied,"' and interest rates continued to decrease.[284]

Proponents of this remedy overlook legal and other financial implications. Legally, doing nothing would be a violation of the Public Debt Clause because it would result in a failure to pay bondholders.[285] It also could lead to more than a technical default if members of Congress do not feel as if the technical default is forcing their hand. Doing nothing results in all of the disadvantages previously discussed, which could result if neither bond payments nor other legal obligations are paid. These disadvantages include belated government payments on obligations, loss of interest of federal trust funds, the full faith and credit of the United States being threatened, increase in interest on government bonds,[286] "rises in mortgage interest rates and other borrowing costs . . . reductions in the value of homes, 401(k)s and other retirement savings."[287] If the default goes on long enough, the Government may eventually retire to its last resort—printing more money.[288] As a result, there would be inflation and potentially, "hyperinflation," a disaster from which it is difficult to efficiently recover.[289]

---

278. *See, e.g.*, *id.* (referring to financial investment expert, Stanley Druckenmiller).

279. Freeman, *supra* note 266.

280. *Id.*

281. *Id.*

282. *S&P Downgrades U.S. Debt*, *supra* note 216.

283. *Id.* (quoting Mark Zandi, chief economist of Moody's Analytics).

284. Freeman, *supra* note 266 (quoting Stanley Druckenmiller).

285. *See supra* Part II.

286. LEVIT ET AL, *supra* note 10, at 9-10.

287. Wolin, *supra* note 177.

288. Research Recap, *Federal Reserve May Be Forced to Print More Money to Avert Profound Recession*, FIN. CONTENT (Sept. 30, 2011, 10:00 AM), http://markets.financialcontent.com/stocks/news/read/19593132/Federal_Reserve_May_Be_Forced_to_Print_More_Money_to_Avert_Profound_Recession.

289. Omar Hossini, *Are We Really Printing Money to Finance Our Debts?*, HISTORY NEWS NETWORK (Feb. 14, 2009, 3:39 PM), http://hnn.us/articles/60041.html.

CONCLUSION

With another debt limit crisis looming in the future, the United States must have a plan in place in case the Government does not come to a last minute compromise like it did in 2011.[290] If the debt ceiling is not raised in the future, the Government would be violating the Public Debt Clause by defaulting or repudiating on debts owed to bondholders.[291] Legislative history, judicial precedent, and real-life historical precedent support this interpretation of Section Four.[292] To avoid this constitutional violation, the Government—either Congress or the President (if Congress is unwilling)—should direct the Treasury to ensure payments made to bondholders is its first priority, over all other obligations it has under the debt limit statute.[293] This is the best choice because it has fewest legal barriers and the fewest negative financial and legal consequences. Finally, this choice "reflect[s] the Framers' commitment to the sanctity of full faith and credit."[294]

---

290. The Treasury gave the Government an August 2, 2011 deadline to pass a bill. *See* LEVIT ET AL., *supra* note 10, at 3, 6. The Government passed the bill raising the debt ceiling on August 2, 2011. *See* Budget Control Act of 2011, Pub. L. No. 112-25, §§ 101, 301, 302, 401, 125 Stat. 240 (codified in scattered sections of the U.S. Code).

291. *See supra* Part II.

292. *See supra* Part II.

293. *See supra* Part III.C.

294. Abramowicz, *supra* note 7, at 595.

CHRISTIAN LOUBOUTIN'S "RED SOLE MARK" SAVED TO REMAIN LOUBOUTIN'S FOOTMARK IN HIGH FASHION, FOR NOW . . .

REANNA L. KUITSE*

INTRODUCTION

"A trademark is a word, phrase, symbol or design, or a combination thereof, that identifies and distinguishes the source of the goods of one party from those of others."[1] Under the Lanham Act, a party can protect a trademark by registering it with the federal government.[2] Section 1051 of the Lanham Act lays out the specific requirements that all trademarks must meet in order to be valid.[3] Continual interpretation of these requirements by the courts—in areas ranging from product design, to restaurant design, to high fashion—has led to additional and more specific requirements for a valid trademark.[4] In general, a trademark must be sufficiently distinct to identify a product, must be distinguishable from trademarks of other products,[5] and must not serve a functional purpose that would hinder competition by preventing other producers from using the same feature to create their goods or services.[6] However, even if the mark serves a functional purpose, its owner can still succeed in an action to protect the mark if the owner can show that the mark has acquired "secondary meaning," such that consumers associate the mark almost exclusively with the owner's good or service.[7] The United State Court of Appeals for the Second Circuit had the opportunity to consider these requirements in *Christian Louboutin S.A. v. Yves Saint Laurent America Holdings, Inc.* (*Louboutin II*).[8]

Christian Louboutin emerged in the high fashion industry in 1992 and became well-known for the lacquered red sole with which he marked all of his high-heeled fashion shoes.[9] In 2008, Louboutin was awarded a trademark that

---

* J.D. Candidate, May 2013, Indiana University Robert H. McKinney School of Law; B.A., Westmont College, Philosophy, Pre- Law Focus, Minor in Business, Dec. 2009.

1. *Frequently Asked Questions About Trademarks*, U.S. PATENT & TRADEMARK OFF. (last modified Mar. 9, 2012, 11:02 AM), http://www.uspto.gov/faq/trademarks.jsp#_Toc275426672.

2. 15 U.S.C. §§ 1051-1141n (2006 & Supp. V 2011), *amended by* Trademark Technical & Conforming Amendment Act of 2010, Pub. L. No. 111-146, 124 Stat. 66 (codified as amended at 15 U.S.C. §§ 1057-58, 1065, 1071, 1141k (Supp. V 2011)).

3. *Id.* § 1051.

4. *See, e.g.*, Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159 (1995); Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992); Louis Vuitton Malletier v. Dooney & Bourke, Inc., 454 F.3d 108 (2d Cir. 2006).

5. Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 210-11 (2000).

6. *See Qualitex,* 514 U.S. at 164-65.

7. Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc., 280 F.3d 619, 635-36 (6th Cir. 2002).

8. 696 F. 3d 206 (2d Cir. 2012).

9. Christian Louboutin S.A. v. Yves Saint Laurent Am. Inc. (*Louboutin I*), 778 F. Supp. 2d

became known as the Christian Louboutin "Red Sole Mark."[10] In 2011, Louboutin brought an action against Yves Saint Laurent, Inc. ("YSL"), alleging that the company was violating Louboutin's trademark registration by putting red soles on the shoes in its newest fashion line.[11] Louboutin filed a motion for a preliminary injunction in the United State District Court for the Southern District of New York, but the injunction was denied by the District Court on August 10, 2011.[12] However, Louboutin filed an appeal in the United States Court of Appeals for the Second Circuit, and the court found that the district court's reasoning for denying Louboutin's preliminary injunction action was inconsistent with current case law.[13]

The approaches taken by both the district court and Second Circuit addressed the question of whether a trademark could be based solely on color in the fashion industry.[14] In examining this issue and Louboutin's Red Sole Mark, and in denying Louboutin's motion for a preliminary injunction, the district court expressed its strong doubts that Louboutin's Red Sole Mark could be warranted protection as a valid mark.[15] Although the district court did not explicitly state that the Red Sole Mark was invalid, the denial of the injunction, along with the court's reasoning, indicated that any further action to protect the Red Sole Mark would likely result in the denial of the validity of the Red Sole Mark.[16] Also implicit in the district court's reasoning was the idea that a designer could not use simply color as a sole feature of his or her product logo.[17] However, the Second Circuit disagreed, holding:

> [T]he District Court's holding that a single color can never serve as a trademark in the fashion industry is inconsistent with the Supreme Court's decision in *Qualitex Co. v. Jacobson Products Co.,*. . . and that the District Court therefore erred by resting its denial of Louboutin's preliminary injunction motion on that ground.[18]

Also, the Second Circuit found that Louboutin's Red Sole Mark had achieved "limited secondary meaning," and only shoes that had a red sole with a

---

445, 447-48 (S.D.N.Y. 2011), *aff'd in part, rev'd in part*, *Louboutin II*, 696 F.3d 206.

10. RED SOLE MARK, Registration No. 3,361,597 [hereinafter Registration]; *see also* U.S. Trademark Application Serial No. 77,141,789 (filed Mar. 27, 2007) (Louboutin's application for trademark registration includes more in-depth analysis of the "Red Sole Mark," including an indication that the red lacquer is an additional step added to the design process that costs more money than the standard tan or black sole most commonly found on high fashion footwear).

11. *Louboutin I*, 778 F. Supp. 2d at 449.

12. *Id.* at 458.

13. *Louboutin II,* 696 F.3d at 212.

14. *Id*. at 211; *Louboutin I*, 778 F. Supp. 2d at 450-51.

15. *Louboutin I,* 778 F. Supp. 2d at 457.

16. *See id.*

17. *See id.* at 450-54.

18. *Louboutin II*, 696 F.3d at 212 (internal citation omitted).

contrasting upper color could be protected from infringement.[19] Accordingly, the monochromatic design created by YSL did not infringe on Louboutin's trademark, and there was no basis for the court to consider the validity of Louboutin's mark any further. [20] The question that arises out of these two decisions is what kind of protection can Louboutin expect for the Red Sole Mark in any future infringement actions?

Part I of this Note examines some of the history behind trademark law in the high fashion industry and discusses trademark protection for color specifically. Part II examines the decision in *Louboutin I* and why the court chose to deny Louboutin's motion for a preliminary injunction. Part III examines the decision by the circuit court in *Louboutin II*. Part IV examines the possible effects of the functionality doctrine on Louboutin's Red Sole Mark. Finally, Part V examines what Louboutin could do to alter his trademark and afford his well-recognized mark greater protection in the fashion design industry given the limited ruling by the circuit court.

I. TRADEMARK DEVELOPMENT

The main source of law governing trademarks is the Lanham Act, which was originally enacted as the Trademark Act of 1946.[21] The Lanham Act is comprised of four subchapters, which address various aspects of trademark law.[22] Subchapters I and II deal specifically with the basic aspects of a trademark and trademark registration, respectively.[23] The Act defines a trademark as follows:

> The term "trademark" includes any word, name, symbol, or device, or any combination thereof—
>
> (1) used by a person, or
>
> (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter,
>
> to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.[24]

If the applicant's desired mark meets the requirements under the Act, the applicant may choose to apply for registration of the mark with the U.S. Patent and Trademark Office.[25] When applying for registration of a trademark, the

---

19. *Id*. at 225.

20. *Id*.

21. 15 U.S.C. §§ 1051-1141n (2006 & Supp. V 2011), *amended by* Trademark Technical & Conforming Amendment Act of 2010, Pub. L. No. 111-146, 124 Stat. 66 (codified as amended at 15 U.S.C. §§ 1057-58, 1065, 1071, 1141k (Supp. V 2011)).

22. *Id.*

23. *Id.* §§ 1051-1096.

24. 15 U.S.C. § 1127 (2006).

25. *See Trademarks Home,* U.S. PATENT & TRADEMARK OFFICE (last modified Oct. 24,

applicant must include specific information about the mark in the application.[26] One important piece of information the applicant must include is a drawing of the specific "symbol" the applicant would like to protect, along with a description of the goods or services that are to be protected.[27] Once a trademark is registered, the "certificate of registration . . . is *prima facie* evidence of the validity of the registration . . . and of the registrant's exclusive right to use the mark . . . subject to whatever conditions or limitations may be contained in the certificate."[28] Although registration is a helpful tool for protecting a mark, the Lanham Act's protection against trademark infringement is not limited solely to registered marks.[29] The Lanham Act also provides protection for "unregistered trade dress."[30]

When a trademark applies to the overall image or design of goods and products rather than to a specific symbol or logo placed on the good or product, the trademark is commonly referred to as "trade dress."[31] *Black's Law Dictionary* defines trade dress as "[t]he overall appearance and image in the marketplace of a product or a commercial enterprise."[32] Trade dress can be protected under the Lanham Act so long as it is distinctive and serves a "primarily nonfunctional" purpose.[33] "A mark or dress can be inherently distinctive if its intrinsic nature serves to identify a particular source."[34] However, if a mark or dress is not inherently distinctive, the mark or dress can still be protected "through attachment of secondary meaning."[35] Secondary meaning "occurs when, 'in the minds of the public, the primary significance of a [mark or dress] is to identify the source of the product rather than the product itself.'"[36]

2012), http://www.uspto.gov/trademarks/index.jsp (providing trademark searches and online filing services).

26. U.S. PATENT & TRADEMARK OFFICE, PROTECTING YOUR TRADEMARK: ENHANCING YOUR RIGHTS THROUGH FEDERAL REGISTRATION 10-13 (2010), *available at* http://www.uspto.gov/trademarks/basics/BasicFacts_with_correct_links.pdf [hereinafter PROTECTING YOUR TRADEMARK].

27. *Id.* at 4-7.

28. 4A LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 26:5 (4th ed. 2011) (footnotes omitted).

29. 87 C.J.S. *Trademarks, Etc.* § 169 (2012) [hereinafter *Trademarks, Etc.*].

30. *Id.*

31. *See id.*; BLACK'S LAW DICTIONARY 1630 (9th ed. 2009).

32. BLACK'S LAW DICTIONARY, *supra* note 31, at 1630.

33. *Trademarks, Etc.*, *supra* note 29, § 169; *see* BLACK'S LAW DICTIONARY, *supra* note 31, at 1630; Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 764 n.1 (1992).

34. Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc., 280 F.3d 619, 635 (6th Cir. 2002) (internal quotation marks omitted) (quoting *Two Pesos*, 505 U.S. at 768).

35. *Id.*

36. *Id.* (alteration in original) (quoting Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 851 n.11 (1982)).

A. Trademarks in the Fashion Industry

Given the importance in the fashion industry of fostering creativity and allowing for the free flow of ideas by designers, courts have been reluctant to protect a designer's trademark that serves a functional purpose or restricts another designer's creativity in any way.[37] As such, a number of issues arise when a fashion designer attempts to protect his or her mark by registering it under the Lanham Act.

One case that addressed some of these issues is *Louis Vuitton Malletier v. Dooney & Bourke, Inc*.[38] In *Louis Vuitton*, the court applied a two-factor test to determine whether Louis Vuitton Malletier's design, which encompassed a symbol plus a color, was infringed upon by a competing design.[39] The first prong of the test asks whether the plaintiff's mark warrants protection, and the second prong asks whether the use of a similar mark by the defendant causes consumer confusion.[40] In considering the first prong, the court looked at two elements: whether the mark was distinctive, and whether it had acquired secondary meaning.[41] Based on the mark's unique color combination and unique symbol, along with its fame and recognition in the marketplace, the court concluded that Louis Vuitton's mark was inherently distinctive and had acquired secondary meaning.[42]

For the second prong, the *Louis Vuitton* court turned to the multi-factor test developed in *Polaroid Corp. v. Polarad Electronics Corp*.[43] In considering the question of consumer confusion, the court acknowledged that "no single [*Polaroid*] factor is dispositive"[44] but focused its analysis on the second factor—the similarity of the two marks.[45] "To apply this factor, courts must analyze the mark's overall impression on a consumer, considering the context in which the marks are displayed and the totality of factors that could cause confusion among prospective purchasers."[46] Ultimately, the court did not make a decision concerning this prong of the test; instead, the court remanded the case to the district court for consideration of the *Polaroid* factors.[47] However, the court's analysis of Louis Vuitton's mark is still helpful for assessing trademark infringement in the fashion industry.

---

37. *See, e.g.*, *Louboutin I,* 778 F. Supp. 2d 445, 452-53 (S.D.N.Y. 2011), *aff'd in part, rev'd in part*, *Louboutin II*, 696 F.3d 206 (2d Cir. 2012).

38. 454 F.3d 108 (2d Cir. 2006).

39. *Id.* at 112, 115.

40. *Id.* at 115.

41. *Id.* at 116.

42. *Id.*

43. 287 F.2d 492 (2d Cir. 1961).

44. *Louis Vuitton,* 454 F.3d at 118.

45. *Id.* at 117.

46. *Id.* (quoting Louis Vuitton Malletier v. Burlington Coat Factory Warehouse Corp., 426 F.3d 532,537 (2d Cir. 2005)) (internal quotation marks omitted).

47. *Id.* at 117-18.

In *Louis Vuitton*, the court considered whether a symbol and color combination warranted protection by considering the distinctiveness of the mark, along with its secondary meaning and the possibility of consumer confusion between the mark and a similar, competing mark.[48] Other courts have applied a functionality test to this analysis.[49] In general, the rule regarding functionality and trademarks is that a feature "is essential to the use or purpose of the article or . . . affects the cost or quality of the article" is functional and cannot be protected under the Lanham Act.[50]

The United States District Court for the Southern District of New York considered whether a product design was functional in *Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch, Co.*[51] Maharishi designed pants called "Snopants," which had elaborate designs and often had unusual fasteners, giving them a unique look.[52] Abercrombie later developed the "Shi Ding Roll Up Pant," which had many features similar to those used on Snopants.[53] In response to Abercrombie's design, Maharishi brought an action alleging trade dress infringement in the hopes of protecting its design; however, the court held the Snopants were "not entitled to trade dress protection . . . as a matter of law."[54] In reaching this decision, the court conducted the same two-prong analysis employed by the *Louis Vuitton* court, considering whether the mark claimed by Maharishi was distinctive and served a non-functional purpose, and considering the likelihood that consumers would confuse Maharishi's and Abercrombie's products.[55]

In its analysis, the court considered the "aesthetic functionality doctrine," stating: "Where an ornamental feature is claimed as a trademark and trademark protection would significantly hinder competition by limiting the range of adequate alternative designs, the aesthetic functionality doctrine denies such protection."[56] Additionally, the court stated that where the features "extend[ ] to the 'overall look' of the . . . product," distinctiveness and functionality must be considered "*together*, not in isolation."[57]

While acknowledging the Supreme Court's holding that a feature that "is

---

48. *Id.* at 115.

49. *See, e.g.,* Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc., 280 F.3d 619, 640-42 (6th Cir. 2002); Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch, Co., 292 F. Supp. 2d 535, 542-43 (S.D.N.Y. 2003).

50. Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 165 (1995) (quoting Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 850 n.10 (1982)) (internal quotation marks omitted).

51. *Maharishi*, 292 F. Supp. 2d. at 538.

52. *Id.* at 538-39.

53. *Id.* at 539.

54. *Id.* at 550.

55. *Id.* at 541; *see* Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 115-16 (2d Cir. 2001).

56. *Maharishi*, 292 F. Supp. 2d at 543 (quoting Wallace Int'l Silversmiths, Inc. v. Godinger Silver Art Co., 916 F.2d 76, 81 (2d Cir. 1990)).

57. *Id.*; *see* LeSportsac, Inc. v. K Mart Corp., 754 F.2d 71, 76 (2d Cir. 1985) (stating that trade dress can be a "particular combination and arrangement of design elements").

essential to the use or purpose of the article or . . . affects the cost or quality of the article" is traditionally considered functional,[58] the *Maharishi* court also considered the decision in *Stormy Clime Ltd. v. ProGroup, Inc.*,[59] which held that "distinctive and arbitrary arrangements of predominantly ornamental features that do not hinder potential competitors from entering the same market with differently dressed versions of the product are non-functional and hence eligible for trade dress protection."[60] *Stormy Clime* indicates that it is possible for trademark law to protect an ornamental design so long as other designs are able to use similar, yet differently arranged, ornamental designs to enter the same market.[61] Based on this analysis, the court in *Maharishi* found that Maharishi had made a sufficient showing that the Snopants design was not merely functional; however, because the action was to protect more than twenty-eight different designs that were not all similar, the court declined to grant Maharishi's trade dress infringement claim against Abercrombie.[62]

Another case that considered functionality and trade dress infringement under the *Lanham Act* is *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*[63] In this case, Abercrombie alleged that American Eagle copied various Abercrombie clothing designs and an Abercrombie catalog design in violation of the trade dress protection embodied in the Lanham Act.[64] The court affirmed the district court's award of summary judgment for American Eagle, deciding that allowing Abercrombie to monopolize the clothing design for which it was claiming trademark protection would allow Abercrombie to control something that is functional, which is not generally allowed under the trade dress doctrine.[65] In reaching this conclusion, the court considered the "effective competition" test:

> The "effective competition" test asks . . . whether trade dress protection for a product's feature would hinder the ability of another manufacturer to compete effectively in the market for the product. If such hindrance is probable, then the feature is functional and unsuitable for protection. If the feature is not a likely impediment to market competition, then the feature is nonfunctional and may receive trademark protection.[66]

The rationale for this test was explained by the Seventh Circuit in *W.T. Rogers Co. v. Keene*:[67] "[I]t would . . . be unreasonable to let a manufacturer use

---

58. Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 165 (1995) (quoting Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 850 n.10 (1982)) (internal quotation marks omitted).

59. 809 F.2d 971 (2d Cir. 1987).

60. *Id.* at 977.

61. *Maharishi*, 292 F. Supp. 2d at 548 (citing *Stormy Clime*, 809 F.2d at 977).

62. *Id.* at 544, 550.

63. 280 F.3d 619 (6th Cir. 2002).

64. *Id.* at 625.

65. *See id.* at 640, 645.

66. *Id.* at 642 (alteration in original) (quoting Mitchell M. Wong, *The Aesthetic Functionality Doctrine and the Law of Trade-Dress Protection*, 83 CORNELL L. REV. 1116, 1149 (1998)).

67. 778 F.2d 334 (7th Cir. 1985).

trademark law to prevent competitors from making pleasing substitutes for his own brand; yet that would be the effect of allowing him to appropriate the most pleasing way of configuring the product."[68] The court used this test to reason that allowing Abercrombie to protect the way it designed its clothing line would keep other designers from entering the same market and would inhibit competition.[69]

The court also drew a distinction between a product feature, such as the overall design of the clothing that Abercrombie was attempting to protect, and a merely incidental feature.[70] In this respect, the court considered:

> whether the feature . . . is something that other producers of the product in question would have to have as part of the product in order to be able to compete effectively in the market . . . or whether it is the kind of merely incidental feature which gives the brand some individual distinction but which producers of competing brands can readily do without.[71]

Applying this test, the court declined to grant Abercrombie's request to stop American Eagle from continuing to design its clothes with features similar to those found on the designs of Abercrombie.[72]

As evidenced by the decisions in *Maharishi* and *Abercrombie,* a mark's functional purpose becomes a very important inquiry for any court looking into trademark or trade dress infringement. Both of these cases examined functionality in the context of a feature that pertained to the overall appearance of the product. However, neither of these cases considered color as the sole distinguishing feature. Therefore, it is necessary to look to cases outside of the fashion industry to better understand trademark protection of a single color.

B. Color Trademarks

In *Qualitex Co. v. Jacobson Products Co.*,[73] Qualitex brought an action against Jacobson alleging trademark infringement.[74] Qualitex had been dying its dry cleaning pads a green-gold color since the 1950s, and in 1991, it registered a trademark to protect its green-gold mark.[75] Two years prior to the registration of Qualitex's mark, Jacobson had begun to market and sell dry cleaning pads with a similar green-gold color.[76] After registering its trademark, *Qualitex* added a trademark infringement claim under the Lanham Act to a claim it already had

---

68. *Id.* at 340.
69. *Abercrombie*, 280 F.3d at 644.
70. *Id.* at 643-44.
71. *Id.* at 642 n.18 (first alteration in original) (quoting *W.T. Rogers*, 778 F.2d at 346).
72. *Id.* at 643-44.
73. 514 U.S. 159 (1995).
74. *Id.* at 161.
75. *Id.*
76. *Id.*

against Jacobson for unfair competition.[77]

In considering Qualitex's trademark infringement claim, the Supreme Court looked at the history and language of the Lanham Act to conclude that color alone may be protected as a trademark.[78] The Court also looked at the rationale behind allowing a trademark for a color alone and considered the value of a trademark for a consumer.[79] Trademarks make it possible for consumers to identify a good by a particular feature and, based on that identification, easily ensure that they are purchasing a high-quality product.[80] Additionally, once a consumer associates a specific mark with a specific product, the mark acquires secondary meaning and can be considered inherently distinctive.[81]

The Court looked at the U.S. Department of Commerce Patent and Trademark Office's Trademark Manual of Examining Procedure, which "approv[es] trademark registration of color alone where it has become distinctive of the applicant's goods in commerce, provided that there is [no] competitive need for colors to remain available in the industry and the color is not functional."[82] With these considerations in mind, the Court found there was no reason that color should not be allowed as a source identifier and therefore allowed it as a valid trademark.[83]

The Supreme Court then considered the functionality doctrine, choosing to follow the general rule laid out in *Inwood Laboratories., Inc. v. Ives Laboratories, Inc.*:[84]

> [I]n general terms, a product feature is functional, and cannot serve as a trademark, if it is essential to the use or purpose of the article or if it affects the cost or quality of the article, that is, if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage."[85]

The Court also considered the aesthetic value of a good as it applies to functionality. In doing so, the Court cited the Restatement (Third) of Unfair Competition, which states that "[a] design is functional because of its aesthetic value only if it confers a significant benefit that cannot practically be duplicated by use of alternative designs."[86]

---

77. *Id.*

78. *Id.* at 162-63.

79. *Id.* at 163-64.

80. *Id.*

81. *Id.* at 163.

82. *Id.* at 166 (alterations in original) (quoting U.S. DEP'T OF COMMERCE, PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE §§ 1202.04(e), 1202-13 (2d ed. 1993)) (internal quotation marks omitted).

83. *Id.* at 164.

84. 456 U.S. 844 (1982).

85. *Qualitex*, 514 U.S. at 165 (alteration in original) (quoting Inwood, 456 U.S. at 850 n.10) (internal quotation marks omitted).

86. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 17 cmt. c (1993) (cited in *Qualitex*,

In applying these two rules to color as a property, the Court found that it is possible for a color to serve a non-functional purpose so long as it "is not essential to a product's use or purpose[,] . . . does not affect cost or quality[,]"[87] and does not inhibit the possibility for alternative designs.[88] Therefore, the Court held that the color of the dry cleaning pads at issue was protectable because the color acted as a symbol, had developed secondary meaning, and served no other functional purpose.[89] In assessing the color as nonfunctional, the Court noted that although the pads required some color to hide dirt and stains, there were other colors that could be used by competitors for that purpose.[90]

Other courts have afforded trademark protection for a color based on secondary meaning and non-functionality in the context of a particular product. In *In re Owens-Corning Fiberglas Corp.*,[91] Owens-Corning challenged the decision of the United States Patent and Trademark Office's Trademark Trial and Appeal Board, which had affirmed the denial of Owens-Corning's application for a trademark to protect its use of the color pink for its fibrous glass residential insulation.[92] The court focused on functionality and secondary meaning to reverse the Board's decision, finding Owens-Corning was entitled to register the pink color of its insulation as a mark under the Lanham Act.[93] In determining that Owens-Corning's use of the color had acquired secondary meaning, the court considered "evidence of the trademark owner's method of using the mark, supplemented by evidence of the effectiveness of such use to cause the purchasing public to identify the mark with the source of the product."[94] Specifically, the court focused on the extensive amount of advertising employed by the company to encourage consumers to associate the color pink almost exclusively with its brand of insulation.[95] Additionally, the court determined that the application of the color pink to insulation served "no utilitarian purpose," and it did "not deprive competitors of any reasonable right or competitive need."[96]

Conversely, in *Brunswick Corp. v. British Seagull Ltd.*,[97] the Federal Circuit Court of Appeals contemplated whether Brunswick was entitled to register a trademark protecting the color black on outboard engines for motorboats.[98] The Patent and Trademark Office's Trademark Trial and Appeal Board had rejected Brunswick's application to register the black color of its outboard engines; the

---

514 U.S. at 170).

87. *Qualitex*, 514 U.S. at 165.
88. *Id.* at 169.
89. *Id.* at 166.
90. *Id.*
91. 774 F.2d 1116 (Fed. Cir. 1985).
92. *Id.* at 1118.
93. *Id.* at 1128.
94. *Id.* at 1125.
95. *Id.* at 1124-28.
96. *Id.* at 1122.
97. 35 F.3d 1527 (Fed. Cir. 1994).
98. *Id.* at 1529.

Board noted that although the color did not make the engine function better, nor affect the cost or quality of the engine,[99] it did arguably make the engine appear smaller and blend in better with a wider variety of boat colors.[100] The *Brunswick* court applied an interesting analysis acknowledging two different types of functionality: de facto and de jure.[101] The court explained the difference: "[D]e facto functional means that the design of a product has a function, i.e., a bottle of any design holds fluid. De jure functionality, on the other hand, means that the product is in its particular shape because it works better in this shape."[102] Under this rule, de facto functional features may sometimes be protected; however, de jure functional features, which pertain to utility, may not be protected.[103] The rationale behind this distinction is that protection of de jure functional features poses a greater obstacle to competition in the marketplace by hindering the creation of new versions of existing goods in a superior functional form.[104] In the case of the color black used on a boat engine, the court found that it was possible to find that the color served a de jure functional purpose because of "competitive need."[105]

In addressing competitive need regarding color and functionality, the court quoted approvingly from the Trademark Trial and Appeal Board: "[W]hen we consider whether a color is functional we must consider whether alternative colors are available in order to avoid the fettering of competition. If competition will be hindered, the color in question is de jure functional."[106] The court upheld the Trademark Trial and Appeal Board's holding that the color black, applied to an outboard engine, made the engine appear smaller and made it blend in with a wide variety of other boat designs and colors, and that therefore, allowing Brunswick the sole use of the color black in the outboard motor market would hinder competition.[107]

The court drew a distinction between Brunswick's use of the color black in this case and Owens-Corning's use of the color pink in *Owens-Corning*. The court noted that the color pink in *Owens-Corning* served solely as a source identifier for Owens-Corning.[108] There was no competitive need for an insulation manufacturer to use pink rather than the normal yellow color that resulted from the manufacturing process of insulation; thus, allowing Owens-Corning a trademark for its use of the color pink would not hinder competition in the

---

99. *Id.*

100. *Id.*

101. *Id.* at 1531.

102. *Id.* (quoting *In re* R.M. Smith, Inc., 734 F.2d 1482, 1484 (Fed. Cir. 1984)).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1532 (alteration in original) (quoting British Seagull Ltd. v. Brunswick Corp., 28 U.S.P.Q.2d (BNA) 1197, 1199 (T.T.A.B. 1993)).

107. *Id.* at 1531-32.

108. *Id.*

insulation market.[109]

Qualitex, *Owens-Corning*, and *Brunswick* are all examples of how courts have addressed the issue of a trademark in a single color in relation to products outside of the fashion design industry. However, they do not address all aspects of trademark law that courts consider when deciding whether to extend protection against a competing mark.

C. Other Trademark Considerations

1. Functionality.—In *Wallace International Silversmiths, Inc. v. Godinger Silver Art Co.*,[110] the court denied Wallace's request for a preliminary injunction to stop Godinger from marketing silverware with a design similar to Wallace's Grande Baroque line under the trade dress doctrine of the Lanham Act.[111] In denying the injunction, the court held that the Baroque style of Wallace's silverware was "aesthetically" functional and could not be protected.[112] The court framed the concept of "aesthetic functionality" as the question of "whether the doctrine of functionality applies to features of a product that are purely ornamental but that are essential to effective competition."[113] In deciding whether the design that Wallace was asking the court to protect was "necessary to the use or efficient production of the product,"[114] the court considered the functionality test enunciated by the court in *Stormy Clime Ltd. v. ProGroup, Inc.*:

> [A court] should assess the degree of functionality of the similar features, the degree of similarity between the non-functional (ornamental) features of the competing products, and the feasibility of alternative arrangements of functional features that would not impair the utility of the product. These factors should be considered along a continuum. On one end, unique arrangements of purely functional features constitute a functional design. On the other end, distinctive and arbitrary arrangements of predominantly ornamental features that do not hinder potential competitors from entering the same market with differently dressed versions of the product are non-functional and hence eligible for trade dress protection. In between, the case for protection weakens the more clearly the arrangement of allegedly distinctive features serves the purpose of the product . . .[115]

In examining these factors, the court acknowledged that although the Baroque

---

109. *Id.*

110. 916 F.2d 76 (2d Cir. 1990), *abrogated by* Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996 (2d Cir. 1995).

111. *Id.* at 77-78.

112. *Id.* at 80-82.

113. *Id.* at 80.

114. *Id.*

115. 809 F.2d 971, 977 (2d Cir 1987) (internal citations omitted) (cited by *Wallace*, 916 F.2d at 79-80).

design did not serve a utilitarian function regarding the silverware, allowing Wallace to monopolize aesthetic features specific to the Baroque style would unduly hinder potential competition by limiting Godinger's ability to design Baroque style silverware.[116] Additionally, although the court acknowledged that Wallace's Baroque design may have acquired secondary meaning, the court held that this secondary meaning did not justify Wallace shutting out any competition in the market for baroque style silverware.[117]

Wallace is an important case for consideration of Louboutin's Red Sole Mark because it addresses the importance of examining the effect on competition of a trademark that serves solely an aesthetic function and has no utilitarian function. This concept is important for the fashion design industry because most trademarks that arise in the fashion design industry will arguably serve a primarily aesthetic function rather than a utilitarian function.

2. Aesthetic Functionality.—In *Eco Manufacturing LLC v. Honeywell International Inc.*,[118] the court stated, "Aesthetic appeal can be functional; often we value products for their looks."[119] However, the court added that recognition of purely aesthetic functionality should be limited because "it would always be possible to show that *some* consumers like the item's appearance."[120] Therefore, in evaluating whether the round shape of a thermostat dial could be protected as a mark, the court considered possible functional purposes for using a round dial as opposed to a differently shaped dial, such as safety and ease of use, along with the more pleasing appearance of a round dial.[121] Although the court declined to affirmatively state whether the round dial was functional, and therefore not entitled to trademark protection,[122] the court's acknowledgement of aesthetic functionality is helpful in effecting a broader understanding of functionality that encompasses the aesthetic advantages of a given design.

3. No Secondary Meaning.—In *Two Pesos, Inc. v. Taco Cabana, Inc.*, [123] the Supreme Court considered the extent to which a showing of secondary meaning is required to protect trade dress under the Lanham Act.[124] Taco Cabana operated a chain of Mexican restaurants whose buildings featured a very specific design.[125] Two Pesos was a competing Mexican food chain that adopted a façade for its buildings that was very similar to the one used by Taco Cabana.[126] In response, Taco Cabana brought an action against Two Pesos alleging trade dress

---

116. *Wallace*, 916 F.2d at 81.
117. *Id.*
118. 357 F.3d 649 (7th Cir. 2003).
119. *Id.* at 654 (citing Qualitex v. Jacobson Prods. Co., 514 U.S. 159, 169-70 (1995)).
120. *Id.*
121. *Id.* at 654-55.
122. *Id.*
123. 505 U.S. 763, 764-65 (1992).
124. *Id.*
125. *Id.* at 765.
126. *Id.*

infringement under the Lanham Act.[127] At trial in the United States District Court for the Southern District of Texas, a jury found that Taco Cabana's trade dress was nonfunctional and inherently distinctive but had not acquired secondary meaning.[128] Out of this decision "arose the question whether trade dress that is inherently distinctive is protectible under § 43(a) [of the Lanham Act] without a showing that it has acquired secondary meaning."[129]

The Supreme Court responded that when a trade dress or trademark is inherently distinctive, a showing of "secondary meaning is not required" to warrant protection for the trade dress or trademark.[130] The Court's rationale was that an inherently distinctive trade dress is, by its nature, one that identifies a specific product or service and is recognized in the market as a distinguishing feature of that product or service.[131] If, however, a mark is merely descriptive of a product, the Court stated that a court must ask whether the trademark is uniquely associated with the brand and "has acquired distinctiveness through secondary meaning."[132]

4. Consumer Confusion.—When considering whether a trademark has acquired secondary meaning, the likelihood of consumer confusion is also an important consideration. In evaluating whether the name "Polarad" was too similar to the "Polaroid" trademarked name, the court in *Polaroid Corp. v. Polarad Electronics Corp*[133] identified eight factors for evaluating the likelihood of consumer confusion that have come to be known as the *Polaroid* factors: (1) the strength of the plaintiff's mark; (2) "the degree of similarity between the" plaintiff's mark and the defendant's mark; (3) the proximity, or similarity, of the plaintiff's products or services and the defendant's products or services; (4) "the likelihood that the [defendant] will bridge the gap" and enter the defendant's market; (5) evidence of actual consumer confusion; (6) whether the defendant's mark was adopted in good faith or bad faith; (7) "the quality of the defendant's product[s]" or service; and (8) "the sophistication of the buyers" in the relevant market.[134] In considering these factors, the court focused on whether the companies produced goods of a similar nature and ultimately held that, although the names were confusingly similar, there was no infringement because the companies were producing for different markets.[135]

In cases such as *Qualitex* and *Owens-Corning*, the courts chose to afford a single color trademark protection based primarily on the mark's secondary

---

127. *Id.* at 765-66.

128. *Id.*

129. *Id.* at 767.

130. *Id.* at 767, 773.

131. *Id.* at 774.

132. *Id.* at 769 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 13 cmt. A (Tent. Draft No. 2, Mar. 23, 1990)).

133. 287 F.2d 492 (2d Cir. 1961).

134. *Id.* at 495; *see, e.g.*, Malletier v. Dooney & Bourke, Inc., 561 F. Supp. 2d 368, 378 (S.D.N.Y. 2008).

135. *Polaroid Corp.,* 287 F.2d at 498.

meaning and recognition of the mark in the market.[136] However, in *Brunswick*, the court declined the opportunity to extend trademark protection to a color that served a competitive need in the industry.[137] In *Wallace* and *Honeywell*, the courts acknowledged that aesthetic appeal may serve a functional purpose, though more is generally required than mere aesthetic functionality to establish that the trademark serves a functional purpose.[138] However, in other cases, such as *Abercrombie* and *Maharishi,* the courts denied trademark protection for a mark because they determined that allowing trademark protection for the mark would hinder competition.[139] The balance between functionality and secondary meaning is the exact balance that the court in *Louboutin* was asked to strike.

II. *LOUBOUTIN I* DECISION

On January 1, 2008, Christian Louboutin was awarded a trademark by the U.S. Patent and Trademark Office to protect the Red Sole Mark he used on all of his high fashion shoes.[140] The description provided on the certificate of registration indicates that the trademark is for the category of "women's high fashion designer footwear."[141] The description also indicates that "[t]he color(s) red is/are claimed as a feature of the mark. The mark consists of a lacquered red sole on footwear."[142] The registration also includes a picture depicting a high heel shoe with a red sole.[143] During litigation, Louboutin attempted to argue that the color of red depicted in the color drawing was the red he intended to protect rather than simply the color red as indicated on his registration certificate.[144] Also, in Louboutin's reply brief at trial, Louboutin designated that the color was Chinese Red of the Pantone color group.[145] Furthermore, he indicated that the type of high fashion footwear was more specifically "*high-heeled* [high-fashion] footwear."[146] These details, however, were not included on the final registration certificate.[147]

---

136. *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 166 (1995); *In re* Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1127-28 (Fed. Cir. 1985).

137. Brunswick Corp. v. British Seagull Ltd., 35 F.3d 1527, 1531-32 (Fed. Cir. 1994).

138. *See* Wallace Int'l Silversmiths, Inc. v. Godinger Silver Art Co., 916 F.2d 76, 81 (2d Cir. 1990); Eco Mfg. LLC v. Honeywell Int'l Inc., 357 F.3d 649, 654 (7th Cir. 2003).

139. Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc., 280 F.3d 619, 645 (6th Cir. 2002); Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch Co., 292 F. Supp. 2d 535, 544, 550 (S.D.N.Y. 2003).

140. *Louboutin I*, 778 F. Supp. 2d 445, 448 (S.D.N.Y. 2011), *aff'd in part, rev'd in part, Louboutin II*, 696 F.3d 206 (2d Cir. 2012).

141. Registration, *supra* note 10.

142. *Id.*

143. *Id.*

144. *Louboutin I*, 778 F. Supp. 2d at 455.

145. *Id.*

146. *Id.*

147. *Id.*

In 2011, YSL introduced its 2011 Cruise fashion line, which included four shoes that Louboutin believed infringed upon his mark.[148] All four of these shoes had a bright red sole to go along with the rest of the shoe, which was also entirely red. The line incorporated the monochromatic design on all of its shoes (*i.e.*, its yellow shoes had a yellow sole along with the rest of the shoe being all yellow).[149] In response, Louboutin brought an action to obtain an injunction to stop YSL from marketing the allegedly infringing shoes.[150]

In determining whether it would be appropriate to grant Louboutin an injunction, the court looked to the *Louis Vuitton* two-prong test and required Louboutin to show the following: "(1) its Red Sole Mark merits protection and (2) YSL's use of the same or a sufficiently similar mark is likely to cause consumer confusion as to the origin or sponsorship of YSL's shoes."[151] The court acknowledged that the certificate of registration provided the court with a presumption that the trademark was valid.[152] The court also acknowledged that courts, including the Supreme Court in *Qualitex,* have allowed trademark protection for a single color where the color had acquired secondary meaning, so long as the color was not a functional feature of the good and did not affect the cost or quality of the good.[153]

In the case of the Red Sole Mark, the court considered "the narrow question" of "whether the Lanham Act extends protection to a trademark composed of a single color used as an expressive and defining quality of an article of wear produced in the fashion industry."[154] The court decided that it did not.[155] The court noted that in the fashion industry, color "plays a unique role,"[156] and held that, given the nature of the fashion industry as a form of art and expression, allowing a designer to stake claim to a particular color "would unduly hinder not just commerce and competition, but art as well."[157] In reaching this conclusion, not only did the court consider Louboutin's use of color and the Red Sole Mark,[158] but the court also focused on the use of color in the fashion industry as a whole.[159]

---

148. *Id.* at 449.
149. *Id.*
150. *Id.*
151. *Id.* at 450.
152. *Id.*
153. *Id.* at 450-51.
154. *Id.* at 451.
155. *Id.* at 457.
156. *Id.* at 452.
157. *Id.* at 453.
158. *Id.* at 453-54.
159. *Id.* at 452-53; *see* Brief of Amicus Curiae Tiffany (NJ) LLC & Tiffany & Co. in Support of Appellants' Appeal Seeking Reversal of the District Court's Decision Denying Appellants' Motion of Preliminary Injunction, *Louboutin I*, 778 F. Supp. 2d 445 (S.D.N.Y. 2011) (No. 11-3303-cv), 2011 WL 5126167 at *14 [hereinafter Brief for Tiffany].

A. Functionality

The court not only acknowledged that color plays a unique role in the fashion industry but also found that it often serves a functional purpose in the fashion industry.[160] Looking at the reasons behind why Louboutin chose to use red and why YSL desired to use red, the court concluded that there can be a functional purpose for using the color red on the sole of a shoe.[161] Specifically, Louboutin claimed that he chose the color red because it gives the shoe "energy" and makes it "sexy";[162] whereas, YSL claimed that it used the red sole because it wanted to make an entirely red shoe to go along with its 2011 collection, which was composed of outfits embodying a single color theme.[163] These uses and meanings behind the use of the color red serve an aesthetic appeal, which courts have held may be a functional purpose.[164] In looking at the functional purpose behind the Red Sole Mark, the court focused on this aesthetic function of the red sole, rather than on whether or not the red sole served a utilitarian function.[165] The court made reference to the fact that the sole of a shoe is primarily for walking on, but then turned its focus to how use of color in the fashion industry adds a deeper meaning to the good.[166] The court did not consider whether a red sole on the bottom of a high heeled shoe affects the functionality of the shoe's sole as a part of the shoe and its use for aiding in walking.[167]

The court also found that the use of the color red affects the cost and quality of the good.[168] In *Qualitex*, the Court looked at the effects of the trademarked color on the cost and quality of the good in relation to whether protecting the trademarked color would hinder competition by making it more expensive for a competitor to produce a good of similar quality without the option of using the trademarked color.[169] However, the Southern District Court of New York considered the additional expense of adding the Red Sole Mark on high fashion footwear from the opposite perspective.[170] The court concluded that because the

---

160. *Louboutin I,* 778 F. Supp. 2d at 453-54.

161. *Id.*

162. *Id.* at 453; *see* Mourot Decl. Ex. C (Docket No. 22-7) ¶3; Mourot Decl. Ex. C (Docket No. 22-12), at 4.

163. *Louboutin I*, 778 F. Supp. 2d at 453-54.

164. *Id.* at 453; *see* Brunswick Corp. v. British Seagull Ltd., 35 F.3d 1527, 1533 (Fed. Cir. 1994).

165. *Louboutin I*, 778 F. Supp. 2d at 454; *see also* Brief for Tiffany, *supra* note 159, at **14-15.

166. *Louboutin I*, 778 F. Supp. 2d at 453-54.

167. *See* Brief for Tiffany, *supra* note 159, at **14-15 ("The District Court did not explain how the function of a shoe 'dictates' that the sole be covered entirely in red lacquer. And it is hard to imagine how such a conclusion could be reached—a shoe would seem to serve the same function regardless of the color of its sole.").

168. *Louboutin I*, 778 F. Supp. 2d at 454.

169. Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 165 (1995).

170. *Louboutin I*, 778 F. Supp. 2d at 454.

additional step of adding the Red Sole Mark makes the shoe more expensive, which is more desirable in the fashion industry, the Red Sole Mark "makes the final creation that much more exclusive."[171] Whereas in *Qualitex* the Court considered the additional expense of adding color to a product in the context of determining whether the trademark hindered competition,[172] the district court considered this additional expense in evaluating the functionality of the trademark.[173]

In looking at the meaning behind the color red in the fashion design industry as a whole and the added expense of adding a red sole to the bottom of a shoe, the court found that Louboutin's Red Sole Mark served a "nontrademark" purpose.[174]

B. Effect on Competition

Having decided that "the use of red outsoles serves nontrademark functions other than as a source identifier, and affects the cost and quality of the shoe,"[175] the court turned to the second prong of the *Louis Vuitton* test: whether allowing Louboutin exclusive use of the color red on high fashion footwear would hinder competition.[176] In considering whether the Red Sole Mark would hinder competition, the court used the test from *Qualitex* and asked whether allowing Louboutin the exclusive use of the color red "would permit one competitor (or a group) to interfere with legitimate (nontrademark-related) competition through actual or potential exclusive use of an important product ingredient."[177] Ultimately, the court decided that it would.[178]

To reach this conclusion, the court considered Louboutin's actual trademark registration description and determined that it was "without some limitation, overly broad and inconsistent with the scheme of trademark registration established by the Lanham Act."[179] The trademark registration certificate description merely indicated that the red sole was for use on women's high fashion designer footwear.[180] The registration did not specify the particular shade, the particular type of women's footwear, or the texture of the lacquer.[181] Instead, the trademark registration certificate indicated that the color for which protection was sought was simply the color red.[182] At trial, Louboutin submitted that the color was actually "Chinese Red," which is a part of the Pantone color

171. *Id.*
172. *Qualitex,* 514 U.S. at 165.
173. *Louboutin I*, 778 F. Supp. 2d at 454.
174. *Id.* at 453-54.
175. *Id.* at 454.
176. *Id.*
177. *Qualitex*, 514 U.S. at 170.
178. *Louboutin I*, 778 F. Supp. 2d at 455-56.
179. *Id.* at 454.
180. Registration, *supra* note 10.
181. *Louboutin I*, 778 F. Supp. 2d at 454-57.
182. Registration, *supra* note 10.

system,[183] based on his drawing for trademark registration.[184] However, the court pointed out that in considering the trademark color, it was constrained to the description and drawing provided on the actual trademark registration certification, which Louboutin could not "amend or augment . . . by representations [he] makes in . . . litigation."[185]

The court also pointed out that a description of Chinese Red would still render the trademark overbroad because, due to absorption and different lighting, Chinese Red could take on a broad range of different shades.[186] In *Qualitex*, the Court acknowledged that occasionally courts are required to make a determination on different shades of colors;[187] however, the court in *Louboutin* acknowledged that these determinations generally have not arisen in the context of the fashion industry, "where distinctions in designs and ideas conveyed by single colors represent not just matters of degree but much finer qualitative and aesthetic calls."[188]

Ultimately, the court found that allowing Louboutin the exclusive use of such a broad mark would keep other designers, such as YSL, from being able to effectively create different kinds of red shoes—including entirely red shoes, such as those in YSL's 2011 collection.[189] Therefore, allowing the trademark would hinder competition in violation of the second prong of the *Louis Vuitton* test.[190] Because the court found that Louboutin's Red Sole Mark served "nontrademark functions" in the fashion industry, and protecting the Red Sole Mark would likely unduly hinder competition, the court declined to grant Louboutin's injunction,[191] effectively denying protection for his trademark. In response to this denial, Louboutin filed an appeal in the United States Court of Appeals for the Second Circuit, which affirmed in part, reversed in part, and remanded the case.[192]

III. *LOUBOUTIN II* DECISION

The Second Circuit Court addressed the question of "whether a single color may serve as a legally protected trademark in the fashion industry and, in particular, as the mark for a particular style of high fashion women's footwear."[193] In looking at the decision by the district court, the Second Circuit held that the lower court's decision was inconsistent with the Supreme Court precedent

183. *Louboutin I*, 778 F. Supp. 2d at 455.
184. *Id.*
185. *Id.*
186. *Id.*
187. Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 167-68 (1995).
188. *Louboutin I*, 778 F. Supp. 2d at 456.
189. *Id.* at 457.
190. *Id.* at 454-57.
191. *Id.* at 454, 457-58.
192. *Louboutin II*, 696 F.3d 206 (2d Cir. 2012).
193. *Id*. at 211.

established in *Qualitex*.[194] Specifically, the court held that Louboutin's Red Sole Mark "ha[d] acquired limited 'secondary meaning'" in the context of high fashion footwear with a red outsole that contrasted with the shoe's upper.[195] Consequently, because the monochrome design by YSL did not fall within the parameters of this limited secondary meaning, the design by YSL did not infringe on Louboutin's trademark.[196]

Also, the Second Circuit held that the *per se* rule created by the district court against color marks in the fashion industry was inconsistent with the decision in *Qualitex* where the court "specifically forbade the implementation of a *per se* rule that would deny protection for the use of a single color as a trademark in a particular industrial context."[197] Accordingly, in looking at a trademark for a single color, the court must conduct "an individualized, fact-based inquiry into the nature of the trademark."[198] Turning to the Red Sole Mark, the court applied the same test used by the district court—the *Louis Vuitton* test.[199] However, the court stopped after considering the first prong of the test and did not discuss the functionality or likelihood of confusion in regards to the Red Sole Mark.[200] Because the court found "that the Red Sole Mark ha[d] acquired limited secondary meaning" that did not include the monochrome design by YSL being challenged in the action, the court left open the door for possible future challenges to the Red Sole Mark under the second prong of *Louis Vuitton*.[201] Specifically, because the court only addressed the distinctiveness of the Red Sole Mark under the first prong, it failed to consider the possibility that the Red Sole Mark could serve a functional purpose.[202]

IV. FUNCTIONALITY OF THE RED SOLE MARK

Both the district court and the Second Circuit addressed the functionality doctrine in regards to the fashion industry; however, only the district court specifically addressed the functionality doctrine in reference to the Red Sole Mark.[203] Because the Second Circuit stopped short of considering the functionality doctrine, it is possible that Louboutin could still face challenges to his Mark, even as altered by the court. For example, Louboutin could face a future action by a designer who wishes to use the color red on the outsole of a pair of shoes in a design collection where each pair of shoes has a different color outsole, such that all pairs in a line would make up the colors of the rainbow.

---

194. *Id*. at 212.
195. *Id*.
196. *Id*.
197. *Id*. at 223.
198. *Id*.
199. *Id*. at 224.
200. *Id*. at 225.
201. *Id.*
202. See *id*.
203. *See supra* Part II.A.

Under the reasoning of the district court, the rainbow design would likely be allowed, in violation of the Red Sole Mark, because the use of the color red on the outsole is serving a non-functional purpose.[204] However, because the Second Circuit slightly modified the Red Sole Mark registration and disposed of the *per se* functionality analysis adopted by the district court, it is necessary to consider the analysis of the aesthetic functionality doctrine as presented by the Second Circuit to determine whether the exemplified use will be allowed.

The Second Circuit set forth a test for aesthetic functionality, referencing both the two prong test from *Inwood*, and the competition inquiry set out in *Qualitex*.[205] In addressing the *Inwood* portion of the test, the court stated that a court must ask whether the design feature is "either essential to the use or purpose or affects the cost or quality of the product at issue."[206] If either of these prongs are met, then the inquiry ends and the design is considered functional.[207] However, if neither of these prongs are at issue, then the design must pass the competitive inquiry test of *Qualitex,* and the design must "be shown not to have a significant effect on competition in order to receive trademark protection."[208]

Based on this test and the rainbow shoe collection example, it would appear that the color red on the outsole of a shoe serves an aesthetic function and cannot be awarded protection in such instances. However, there is more to the story. The Second Circuit also stated:

> In short, a mark is aesthetically functional, and therefore ineligible for protection under the Lanham Act, where protection of the mark significantly undermines competitors' ability to compete in the relevant market. In making this determination, courts must carefully weigh "the competitive benefits of protecting the source-identifying aspects" of a mark against the "competitive costs of precluding competitors from using the feature."[209]

The question then becomes whether the limitation on the color red created by Louboutin's Mark is significant enough to cause him to lose his mark. Based on the decisions by the district court and the Second Circuit, Louboutin would be wise to be weary of how a future court will answer this question. Accordingly, in order to protect his Mark and the recognition that he has created through the use of his Mark, Louboutin should alter his trademark.

V. STRENGTHENING THE RED SOLE MARK

The main problem with Louboutin's trademark is that it lacks specificity. His

---

204. *Id*. at 222.

205. *Id.*

206. *Id*. at 220 (internal quotation marks omitted).

207. *Id*.

208. *Id.*

209. *Id*. at 222 (quoting Fabrication Enters., Inc. v. Hygenic Corp., 64 F.3d 53, 59 (2d Cir. 1995) (internal citations omitted)).

trademark registration certificate does not designate the type of shoe, the shade of red, or the finish of the color that the trademark is intended to protect.[210] However, under the Lanham Act, a designer can narrow the scope of his or her trademark registration.[211] In the case of the Red Sole Mark, Louboutin has a number of different options he should take to limit the Red Sole Mark such that it would greater warrant protection under the Lanham Act.

First, Louboutin should alter his trademark registration to cover a more limited range of shoes. For example, rather than claiming a trademark in the market of women's fashion footwear generally, he should designate that his trademark applies only in the market of women's high-fashion, *high-heeled* footwear. This limitation would protect his trademark from challenges made by designers who desire to place a red sole on ballet flats or flat boots, which Louboutin has indicated his trademark was not intended to encompass.[212]

Second, in regard to the color red, Louboutin should add that the color of his Mark is Chinese Red of the Pantone color group, and he should also list the range of colors around Chinese Red that he desires to protect. This clarification will address the court's concern regarding the specific shade of red, and the range of colors around the specific shade of red, that are encompassed by the Red Sole Mark. Limiting the protection of the Red Sole Mark to Chinese Red would allow other designers to use different reds, such as Bashful Red or Jubilee Red from the Pantone color group, on the soles of their shoes.[213] Additionally, these alternative colors could be used to convey the same sex appeal that Louboutin cites for choosing to put Chinese Red on the soles of his shoes.

Third, Louboutin could specify the finish of the red sole that he desires to protect. For example, Louboutin could indicate on his certificate of registration that the lacquer sole is a high gloss finish, a matte finish, or a flat finish.[214] Finally, although the Circuit Court stipulated that the Red Sole Mark only covers shoes with a contrasting upper, the court did not explicitly define the exact parameters of the exception.[215] For example, would a red sole shoe with a partially red upper be considered a contrast? Although the court defined the "upper" as "the visible portions of the shoe other than the outsole,"[216] it did not explicitly outline how much of the upper has to contrast with the remainder of the

---

210. Registration, *supra* note 10.

211. PROTECTING YOUR TRADEMARK, *supra* note 26, at 8.

212. *Louboutin I*, 778 F. Supp. 2d 445, 456 (S.D.N.Y. 2011), *aff'd in part, rev'd in part, Louboutin II*, 696 F.3d 206 (2d Cir. 2012).

213. These two colors in the Pantone color scale are considered red, yet they are very different from Chinese Red. Bashful Red is a very light red that normally gives off a pink hue, and Red Jubilee incorporates purple hues to make it appear very dark.

214. A high gloss finish would make the red sole appear shiny and glossy. A matte finish would provide the red with some sheen; however, it is not as shiny as a high gloss finish. A flat finish, on the other hand, would have no shine or sheen and would make the color appear dull and flat.

215. *Louboutin II*, 696 F.3d at 212, 228.

216. *Id*. at 227 n.25.

shoe. Accordingly, it would be beneficial for Louboutin to better articulate his registration to cover only shoes with a red sole that have an upper with a predominately different color. This limitation will allow for the creation of monochromatic designs without violating his Mark, while keeping his Mark enforceable against another designer who wishes to use a red sole with a small amount of red on the upper in the hopes of side-stepping Louboutin's Mark.

These limitations of Louboutin's Red Sole Mark would address the concerns of the district court and better support Louboutin's position that his Red Sole Mark warrants protection in possible future actions where a party wishes to challenge the functionality of his Mark.

CONCLUSION

Christian Louboutin was lucky to have a court that understood the importance of protecting fashion designs from being copied and sold for a fraction of the cost. However, given that the circuit court chose to cut its analysis short and not consider the functionality doctrine, it is possible that Louboutin could find himself in a similar position in the near future. In an industry where color is so highly regarded as a means of creativity, he would be wise to bolster the strength of his Mark by limiting it and better defining it.