



2005

Contestable Judicial Elections: Maintaining Respectability in the Post-White Era

Joseph E. Lambert
Kentucky Supreme Court

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Election Law Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Lambert, Joseph E. (2005) "Contestable Judicial Elections: Maintaining Respectability in the Post-White Era," *Kentucky Law Journal*: Vol. 94 : Iss. 1 , Article 2.

Available at: <https://uknowledge.uky.edu/klj/vol94/iss1/2>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Kentucky Law Journal

VOLUME 94

2005–2006

NUMBER I

ARTICLES

Contestable Judicial Elections: Maintaining Respectability in the Post-*White* Era

REMARKS PRESENTED AT THE HARRY LEE WATERFIELD LECTURE
AT MURRAY STATE UNIVERSITY, APRIL 14, 2005

Chief Justice Joseph E. Lambert¹

History teaches that democracy and an independent judiciary are inseparable. A country where judges are faithful to the popular will, to the executive or to the legislature, rather than to the rule of law, will not be a democratic country worthy of the name.

—*U.S. Supreme Court Justice Arthur J. Goldberg²*

THERE is no consensus among the states and the federal government as to the best method of judicial selection. Among the fifty states, five territorial possessions, and the District of Columbia, judges are selected and retained in almost as many ways as there are jurisdictions. In some states, judges are elected on a purely partisan ballot. They run as Republicans, Democrats, and Independents. States observing this method include Alabama, Illinois, North Carolina, Pennsylvania, and Texas.³ In other states, judges are appointed by the governor and seated with or without confirmation by the state senate. California, Maine, and New Jersey follow this method of judicial selection.⁴ New York and other states have a split

1 Chief Justice of the Supreme Court of Kentucky. B.S. 1970, Georgetown College; J.D. 1974, University of Louisville School of Law. Chief Justice Lambert lives in Mt. Vernon, Kentucky with his wife, Debra Hembree Lambert. The couple has two sons.

2 Arthur J. Goldberg, *Reflections on the Role of the Supreme Court in the Pursuit of Equal Justice*, 7 N. KY. L. REV. 1, 2 (1980).

3 Roy A. Schotland, *2002 Judicial Elections and State Court Reforms*, in 35 THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 233, 235 Table A (2003).

4 *Id.* at 247–48 Table 5.4.

system whereby some judges are appointed and confirmed, while others are elected on a partisan or nonpartisan ballot.⁵ In Virginia and South Carolina, judges are elected by a majority vote of the legislature.⁶ Other states utilize nominating commissions and greater or lesser input from the legislature in the process of judicial selection.⁷ A substantial number of states elect judges on a nonpartisan judicial ballot. Kentucky falls into this category.⁸ Still other states utilize a retention election system which is frequently referred to as the Missouri Plan.⁹ Within some states, judges at different levels are selected differently.¹⁰ Of course, federal judges are appointed by the President of the United States with confirmation by the U.S. Senate.¹¹

From the foregoing, it is obvious that there is a broad spectrum of thought on the best ways to select and retain judges. In this vein, it is worth noting that, in most states, judges have relatively long terms of office, six years or more,¹² and in some, such as New York, high court judges are ap-

5 For an in-depth analysis of the New York system, see Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791, 800-2 (2004).

6 Schotland, *supra* note 3, at 249 Table 5.4.

7 THE AMERICAN JUDICATURE SOCIETY, JUDICIAL MERIT SELECTION: CURRENT STATUS, Table 3 (2003).

8 KY. CONST. § 117 (“Justices of the Supreme Court and judges of the Court of Appeals, Circuit and District Court shall be elected from their respective districts or circuits on a nonpartisan basis as provided by law.”).

9 Schotland, *supra* note 3, at 233. Since 1940, approximately thirty-three states have adopted this system in whole or in part. The Missouri Plan allows the appointing authority, usually the governor, to pick judges from a list of qualified candidates proposed by a selection committee. The selection committees are commonly composed of non-attorney members, attorneys, and judges. The committee is usually appointed by the governor. Merit selection along with retention elections is applied to all judgeships in Alaska, Colorado, Iowa, Nebraska, Utah, and Wyoming. *Id.* In Arizona, Florida, Indiana, Kansas, Maryland, Missouri, New York, Oklahoma, South Dakota, and Tennessee, retention elections are applied to some judges’ tenures. PATRICK M. McFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 7-8 (1990).

10 Schotland, *supra* note 3, at 235 Table A. In Michigan, for example, the state Supreme Court is elected by a partisan ballot, while lower court judges are elected in a nonpartisan election.

11 U.S. CONST. art. II, § 2 (“[The president] shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

12 Schotland, *supra* note 3, at 237 Table C (noting that approximately sixty percent of state court judges serve terms of six years or more).

pointed for fourteen-year terms and may be reappointed.¹³

While means differ widely, it is generally believed that the best methods of judicial selection and retention are those that minimize political influence, favoritism, or obligation.¹⁴ In this regard, the federal system of presidential appointment for life with confirmation by the U.S. Senate is often regarded as superior.¹⁵ There is no doubt that federal judges, once appointed, do enjoy a great deal of independence as a result of life tenure and removal only for the most egregious conduct.¹⁶ But the initial selection of federal judges is, in many cases, heavily laden with politics. Presidents rarely appoint from other than their own political party,¹⁷ and in fact, appointments to the U.S. District Court, and to a lesser degree, appointments to the U.S. Circuit Court, are virtually controlled by U.S. senators who are of the same political party as the President.¹⁸ Even where there is no apparent political partisanship, favoritism is frequently a consideration. A federal judge with whom I have been acquainted for many years, formerly on the U.S. District Court and the U.S. Circuit Court, is fond of joking that a U.S. District judge is someone who went to school with a future U.S. senator, and a U.S. Circuit judge is someone whose college roommate became a U.S. senator. Undoubtedly, there is some truth in that observation. Thus, the question is not whether there will be a vote, rather it's who gets to vote.

The executive appointment of state court judges for a term of years,

13 N.Y. CONST. art. VI, § 2.

14 See, e.g., Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 *FORDHAM URB. L.J.* 1007, 1014 (2002) (observing that well-defined rules governing ex parte communications, receipt of gifts, regulation of political activities, and problematic relationships all reduce threats to judicial independence); see generally Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 *OHIO ST. L.J.* 13 (2003) (examining the relationship between electing judges and judicial independence).

15 Johnson, *supra* note 14, at 1007-09.

16 U.S. CONST. art II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

17 See ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 212-17 (4th ed. 1998) (reporting that ninety percent of federal judges appointed by the previous four presidents were of the same political party as the appointing president).

18 Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 *WM. & MARY BILL RTS. J.* 75, 76 n.3 (2001) ("Traditionally, the term senatorial courtesy has referred to the deference the president owes to the recommendations of senators from his own political party on the particular people whom he should nominate to federal offices in the senators' respective states. A second form of senatorial courtesy is the deference a member of Congress, particularly a senator, expects to get from his or her Senate colleagues (or, in the case of a representative, from his Senate counterparts) with respect to his or her own nomination to a confirmable post. Yet another form of senatorial courtesy is the expectation that senators (usually from the president's political party) will confer or consult with the president prior to his nominating people to fill confirmable posts in their fields of expertise ... or people from their respective states to fill national offices.") (citing MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 143-44 (2000)).

with or without legislative confirmation, has the same shortcomings as federal judicial appointments, but due to the absence of life tenure, lacks some of the positive aspects.¹⁹ A judge who must be reappointed or reconfirmed after a term of years cannot have the degree of independence of those holding life tenure.²⁰

When I became a lawyer about thirty years ago, and when I became a judge over eighteen years ago, it was quite popular to think of the so-called Missouri Plan, whereby judges are retained by means of a ballot question, which says in substance, "should Judge So and So be retained as judge?" as a panacea for everything wrong with judicial selection. It was believed that judges would be turned out of office only in the rarest of cases and for indisputable reasons. The view was that good, or even average, judges would routinely get a majority vote in favor of their retention and thereby be spared the expense and anxiety of a political campaign.

Perhaps that was so for a while. But in recent years, a new phenomenon has descended on retention election politics in the form of single-issue interest groups and their ability to spend substantial sums of money to attack a sitting judge on the basis of a single decision or line of decisions.²¹ Issues like crime, abortion, gun control, and the death penalty render judges vulnerable to a concerted attack by a small, well-financed minority who can mercilessly hammer the judge seeking retention.²²

In most cases, such attack campaigns do not surface until relatively late in the electoral season so that the judge seeking electoral retention may awaken one morning to a campaign for his removal without having had a clue it was coming. When such campaigns are begun late in the season, the judge is virtually powerless due to lack of time and resources to mount an effective campaign. Former Chief Justice Rose Bird and two of her colleagues were removed from office in California by this means,²³ and Justice

19 Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 16 (1995) ("Clearly, the appointive method does nothing to lessen the effect of partisan politics upon the selection of judges. On the contrary, it would appear that, at the very least, there is significant potential for partisan politics to play the determinative role in the selection of judges in states using an appointive method.")

20 Johnson, *supra* note 14, at 1008-10.

21 David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Election Campaigns: The Troublesome Interaction Between The Code of Judicial Conduct, Campaign Finance Laws, and The First Amendment*, 72 U. CIN. L. REV. 1, 13-14 (2003).

22 See Nathan Richard Wildermann, *Bought Elections: Republican Party of Minnesota v. White*, 11 GEO. MASON L. REV. 765, 784 (2003) (noting that the special-interest groups are increasingly interested in judicial elections, leading to more attack ads that could damage the appearance of impartiality of the judiciary).

23 John H. Culver & John T. Wold, *Judicial Reform in California*, in JUDICIAL REFORM IN THE STATES 139, 154-55 (Anthony Champagne & Judith Haydel eds., 1993); Webster, *supra* note 19, at 36.

Penny White of Tennessee was likewise removed by this method.²⁴ There are others.

As a result of these experiences, many people are rethinking the wisdom of retention judicial elections, and among judges seeking retention, there is a new sense of caution and far less of a “for-granted” attitude. One of my friends who is a justice of the Supreme Court of Indiana has expressed the view that thirty-five or so percent of voters will always vote “no” on a judge seeking retention. From that beginning percentage of “no” votes to a majority of “no” votes is not a long step.

What we have left of the methods of judicial selection are various forms of contestable elections between competing candidates. The flaws in any method of electing judges are obvious. First is the need for the candidate to raise campaign funds.²⁵ Any person who has ever sought public office knows that adequate funding is essential, and judicial campaigns are no different. Name recognition is essential to being elected, and, without adequate funding, the candidate’s name cannot be known.²⁶ Of course, with the solicitation of funds comes the fear of obligation and influence upon judicial decision making.²⁷ In addition to fundraising, it is also necessary for judicial candidates, including incumbents, to campaign, make speeches, shake hands, organize precincts or counties, and generally do all or most of the things candidates for partisan political office do. In states where judges are elected on a partisan political ballot, there is necessarily an appearance that the political parties exert an influence on the candidate or judge.²⁸

24 See John D. Fabian, *The Paradox of Elected Judges: Tension in the American Judicial System*, 15 GEO. J. LEGAL ETHICS 155, 156–57 (2001).

25 See Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21, 22 (2004).

26 See William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 Nw. U. L. REV. 335, 339 (2000) (“Challengers generally need greater funds in order to promote name recognition.”).

27 See Bonneau, *supra* note 25, at 22 (The main argument advanced by critics of judicial elections is that raising and spending campaign funds may give the appearance of impropriety. In that respect, winning candidates may feel indebted to campaign contributors and supporters, and provide rulings favorable to such persons from the bench. The integrity of courts and judges who sit in those courts is thereby questioned.); Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 213 (2004) (“Much as large donations create a reasonable fear that public officials will place private benefits over the public interest in making decisions, campaign pledges and promises create a reasonable fear that the judge will not make decisions based on the facts of the case, the evidence before her, and the rule of law. Like large contributions, judicial campaign promises undermine the legitimacy of government. Much as government can act to limit the undue influence and the appearance of undue influence of large contributions on elected representatives, so, too, government can act to protect public confidence that judges will properly discharge their judicial function.”).

28 See Gerald Stern, *The Changing Face of Judicial Elections*, 32 HOFSTRA L. REV. 1507, 1545 (2004) (“In some jurisdictions, designation as the nominee of a particular party assures victory.

Through the years, I have had many conversations with appellate judges from other states about their method of judicial selection. Almost without exception, those judges have asserted that their system is best; that only in their state has the perfect system of judicial selection been found. I must confess that I share the view of my colleagues across this nation. In Kentucky, we have the least flawed system of judicial selection. In Kentucky, judges are elected on a nonpartisan judicial ballot.²⁹ In addition, unlike many states, appellate judges in Kentucky are not elected statewide. Kentucky is divided into seven appellate court districts and each district has one Supreme Court justice and two judges of the Court of Appeals.³⁰ The fact of district rather than statewide election of judges diminishes the need for campaign funds and makes it possible for judicial candidates to campaign in person at civic clubs, factory gates, county fairs, and the like.

With respect to fundraising, judicial candidates in Kentucky raise funds through committees of responsible persons.³¹ That, of course, leads to the question of whether lawyers should be entitled to contribute to judicial campaigns. On that point, let me say that where judicial campaigns are a reality, there must be a means to fund those campaigns. In practice, about the only people who care enough about judicial campaigns to contribute are lawyers. If lawyers were prohibited from making such contributions, not only may their constitutional rights to political participation be infringed, but little by way of campaign funds would be raised. If contributions from lawyers or others were too greatly restricted, an enormous advantage would be available to wealthy judicial aspirants who were willing to self finance. In an extreme situation, the judiciary would be the province of the wealthy, and this would be unfortunate. Public financing of judicial campaigns has been widely suggested but only adopted in North Carolina. Proposals for public financing of campaigns make an easy target for opponents of the proposal. We have all heard the mantra of opposition: public financing of political campaigns is "welfare for politicians." I am confident that phrase

Where a political party or party chief decides who gets elected, the public's power to elect their judges is illusory. Moreover, too often, political leaders who wield enormous influence over who become judges do not choose candidates for the best of motives.").

²⁹ KY. CONST. § 117.

³⁰ KY. CONST. §§ 110, 111.

³¹ KY. SUP. CT. R. 4.300, § 5B(2) states that:

A judge or a candidate for judicial office shall not solicit campaign funds, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy. A candidate's committees may solicit funds for the campaign no earlier than 180 days before a primary election. A candidate's committees may not solicit funds after a general election (*See* KRS 121.150). A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or a member of the candidate's family.

would be changed to “welfare for judges.”

In view of the shortcomings in any method of selecting judges, much thought and attention has been given to nationwide reform of the judicial selection process and to the establishment of some form of “merit selection.”³² States have formed committees, editorial writers have espoused their support, law review writers have weighed in, and many have concluded that judicial elections should be discontinued.³³ But almost without exception, it hasn’t happened. Several states have endeavored to eliminate judicial elections in favor of some other method, but in every instance voters have defeated the effort. Recently, such efforts have again gone down to overwhelming defeat in South Dakota,³⁴ Ohio,³⁵ and Florida.³⁶ The trend in this country is decidedly against the discontinuance of judicial elections and no change in that trend is in the air. Citizens firmly refuse to give up their right to elect their judges.

One of this nation’s leading experts on the subject of judicial selection is Professor Roy Schotland of the Georgetown University Law Center in Washington. Recently, I participated in a symposium on this topic with Professor Schotland and numerous other Supreme Court Justices from across the country, and, in his keynote address, Professor Schotland administered a dose of reality:

[T]here are judicial elections of some type in 39 states. With 89 percent of the judges facing voters, that includes contestable [elections] for 53 percent of appellate[] [judges] and 77 percent of the trial judges, with *no changes* for the last generation.

We are *not getting rid* of contestable elections. It is understandable that when people call for it, we get endless bills and endless editorials, but it is not only a wheelspin, it is not only a waste of time, it is injurious because it deflects energy from what we can do.

32 See, e.g., Hon. Tim Dallas Tucker & Christina L. Fischer, *Merit Selection: A Better Method to Select South Dakota’s Circuit Judges*, 49 S.D. L. REV. 182 (2004).

33 See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003) (generally arguing to end judicial elections); J. David Rowe, *Limited Term Merit Appointments: A Proposal to Reform Judicial Selection*, 2 TEX. WESLEYAN L. REV. 335, 353 (1995) (“It is time to stop this madness; it is time to stop electing judges!”); THE AMERICAN JUDICATURE SOCIETY, *MERIT SELECTION: THE BEST WAY TO CHOOSE THE BEST JUDGES* (2003), http://www.ajs.org/js/ms_descrip.pdf.

34 Voters rejected, by a sixty-two-percent margin, amendments to the state constitution that provided for the discontinuance of the election of the state’s thirty-eight circuit judges. Dirk Lammers, *Ballot Measures, Food Tax Defeated*, ABERDEEN AM. NEWS, Nov. 3, 2004, at 3A.

35 In 1987, Ohio attempted to adopt merit selection for appellate judges. The proposed measure was defeated by voters by a two-to-one margin, and lost in eighty of Ohio’s eighty-eight counties. See AMERICAN JUDICATURE SOCIETY, *JUDICIAL SELECTION IN THE STATES*, http://www.ajs.org/js/OH_history.html.

36 Anita Kumar, *Floridians Keep Right to Elect Judges*, ST. PETERSBURG TIMES, Nov. 8, 2000, at 5B.

It's easy to say that what we can do is mere tinkering. In the first place, it is more than tinkering, and in the second place, it is what we can do, so let's please not be distracted in our little time together about whether there should or shouldn't be judicial election, or whether [they] should be partisan or nonpartisan.

Let's work together on what we can [do] to reduce inaction, reduce the problems, [and] change the judicial election *culture*.³⁷

Whatever views to the contrary policymakers and well-meaning citizens may have, judicial elections are here to stay, and we must make the best of the system we have.

I earlier detailed some of the disadvantages in the various systems of judicial elections. But until recently, the policy- and rule-making courts of this nation have had considerable authority to prevent abuse of the electoral process. Every state had in place an ethics canon that significantly limited the public statements of judges or candidates for judicial office.³⁸ Around the country, in one form or another, the canon embraced two concepts. First, it prohibited candidates from announcing their views on disputed legal or political issues, and second, it forbade candidates from making pledges or promises of conduct in office.³⁹ These provisions are commonly known as

37 Roy Schotland, Keynote Address at the National Symposium on Judicial Speech—post-*White* (Feb. 24, 2005) (emphasis added).

38 See Michael R. Dimino, *Pay No Attention to that Man Behind the Robe: Judicial Elections, The First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 315 (2003) ("Most states today restrict judicial candidate speech with regulations modeled on either the 1972 or the 1990 version of the ABA Canons.").

39

All Judges and Candidates ... shall not ... (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent

MODEL CODE OF JUDICIAL CONDUCT CANON 5 (1990);

A candidate ... for a judicial office ... (a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him; (b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon; (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

the “announce clause” and the “pledges or promises clause.” As these provisions were accompanied by the words “shall not,” candidates for judicial office were subject to sanctions for violations. This explains an experience some of you may have had, but not fully understood, where a judicial candidate would answer a question by saying, “I cannot answer your question on abortion, gun control, display of the Ten Commandments in public places, or other topic of interest because to do so would be a violation of either the announce clause or the pledges or promises clause.”

Some judicial candidates even went beyond what was strictly necessary and limited themselves to discussion of only the most banal topics. The result of this was that in the process of judicial campaigns, voters learned little about the personal views of the candidate, and the electoral decision was ultimately made on the basis of name recognition, political or family connections, financing, church attendance, good looks, or some other superficial basis. On the other hand, a candidate elected in an essentially non-controversial campaign was without baggage and entered office without having to apologize or explain away an unpopular decision that was based on settled law despite “announced” views to the contrary.

In 2002, the landscape changed dramatically. In *Republican Party of Minnesota v. White*,⁴⁰ the Supreme Court held that Minnesota’s announce clause violated the First Amendment to the Constitution of the United States.⁴¹ The majority opinion was by Justice Scalia, and he was joined fully by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas.⁴² Justice Stevens filed a dissenting opinion and he was joined by Justice Souter, Justice Ginsburg, and Justice Breyer.⁴³ In the middle, where she often is, was Justice O’Connor, who largely concurred with the majority but not entirely so.⁴⁴

The opinion by Justice Scalia, which is generally regarded as the majority opinion, held that the announce clause imposed an unconstitutional burden on political speech, a category of speech that is at the heart of First Amendment freedoms;⁴⁵ that the announce clause was not narrowly tailored to serve a compelling state interest;⁴⁶ and that it did not pass the

MODEL CODE OF JUDICIAL CONDUCT CANON 7 (1972).

40 *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

41 *Id.* at 788 (“The Minnesota Supreme Court’s canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment.”).

42 *Id.* at 766.

43 *Id.* at 797.

44 *Id.* at 788.

45 *Id.* at 774 (“[T]he announce clause both prohibits speech on the basis of its content and burdens a category of speech that is ‘at the core of our First Amendment freedoms’—speech about the qualifications of candidates for public office.”).

46 *Id.* at 776–77.

strict scrutiny test required of restrictions on political speech.⁴⁷ The Court held that “[d]ebate on the qualifications of candidates’ is ‘at the core of our electoral process and of the First Amendment freedoms’”;⁴⁸ that the role of elected officials is so essential to a free society that candidates must be allowed to freely express themselves on matters of current public importance;⁴⁹ and that as individual states have the power to discontinue the election of judges altogether, the state may not impose conditions that essentially institutionalize voter ignorance by speech restrictions.⁵⁰

In her concurring opinion, Justice O’Connor criticized the process of judicial elections, noting that in recent Supreme Court races in Alabama, Pennsylvania, and Texas, vast sums of money had been spent.⁵¹ She concluded with comments that have been widely repeated and deserve repetition here. Her views are all the more remarkable when one considers that Justice O’Connor was herself an elected judge of the Arizona Court of Appeals prior to her selection as a Justice of the Supreme Court of the United States. Justice O’Connor stated:

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State’s claim that it needs to significantly restrict judges’ speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.⁵²

While the Supreme Court did not strike the pledges or promises clause in the *White* case because it was not directly before the Court, there is widespread belief that when that issue presents itself, only a watered-down version will survive First Amendment scrutiny.⁵³ In fact, U.S. District Courts

⁴⁷ *Id.* at 788.

⁴⁸ *Id.* at 781 (quoting *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222–23 (1989)).

⁴⁹ *Id.* at 781–82 (“We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.”).

⁵⁰ *Id.* at 788 (“[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights to attach to their roles.”) (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

⁵¹ *Id.* at 789–90 (O’Connor, J., concurring).

⁵² *Id.* at 792.

⁵³ Joe Cutler, *Oops! I Said It Again: Judicial Codes of Conduct, The First Amendment and The Definition of Impartiality*, 17 *Geo. J. Legal Ethics* 733, 753 (2004) (recommending that the ABA review *White* carefully and draw out the principles that informed the court’s decision, specifically noting that revisions to the Model Code should attempt to enforce party-neutral-

have already invalidated pledges or promises clause provisions in several state judicial canons,⁵⁴ including Kentucky's.⁵⁵

Let me pause at this point for a brief review. I trust that by now I have adequately explained that the process of judicial selection differs widely among the states; that those states that employ popular election as their method of judicial selection are not likely to change to some so-called “merit selection” process; and, that by virtue of the *White* case, the ability of judicial conduct commissions and state Supreme Courts to prevent judicial election abuses has been greatly eroded.

Notwithstanding the enforceability of the code provisions until *White* in 2002, the last two decades have witnessed a steady decline in the tenor and character of judicial elections. I previously mentioned the 1986 retention election in California that resulted in the defeat of Chief Justice Rose Bird and two of her colleagues over the death penalty.⁵⁶ I also mentioned the defeat of Justice Penny White in Tennessee by means of a profound distortion of her death penalty views.⁵⁷ Many states have seen judicial elections, particularly at the Supreme Court level, where the candidates themselves or outside interest groups have castigated their opponents, often in a vicious, distasteful, and unfair manner. I recently saw an advertisement used in the State of Michigan to attack three incumbent Supreme Court justices. It showed an insurance executive leaned back behind his desk smoking a fat cigar and opening his coat and looking in the interior pocket. The screen then revealed three cartoonish looking characters wearing judicial robes and dancing a jig.⁵⁸ There was no subtlety in that ad.

A recent Florida ad had the candidate for judicial office saying, “[p]ut criminals behind bars.”⁵⁹ One California incumbent boasted that his “[p]rison [c]ommitment [r]ate is [m]ore [t]han [t]wice the [s]tate [a]verage.”⁶⁰ One judge who characterized himself as a crimefighter provoked the remark

ity and enable judges to express opinions on issues).

54 See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 208–10 (2004).

55 *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004), stay denied by *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n*, 388 F.3d 224 (6th Cir. 2004).

56 Culver & Wold, *supra* note 23, at 139, 160; Webster, *supra* note 19, at 36.

57 Fabian, *supra* note 24, at 156–57.

58 See Kent A. Gernander, *Judicial Elections II*, BENCH & BAR OF MINN., Apr. 2001, available at http://www2.mnbar.org/benchandbar/2001/apr01/presidents_page.htm (“In Michigan, incumbent justices were called lackeys ‘bought and paid for’ by special interests such as business groups, doctors, and hospital associations. In television ads they were depicted as comic figures dancing in the pocket of a lawyer.”).

59 Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 764–65 (1995).

60 Roy A. Schotland, Comment, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149, 150 (1998).

from one of his colleagues that he thought judges were supposed to be judging crime, not fighting crime.⁶¹ The fact is, judicial elections have been getting worse and worse. One ad even compared a judicial candidate's opponent to a skunk.⁶²

In the year 2000 and again in the year 2002, Ohio had some of the ugliest elections in this country. After the 2002 election, Chief Justice Tom Moyer made a speech in which he said this: "Candidates were outraged. Citizens were outraged. I am outraged. Anybody who places their trust and confidence in a constitutional democracy should be outraged . . . This is the dark side of democracy."⁶³

Soon, we will see whether Kentucky follows the same path or takes a higher road. In the year 2006, Kentucky will face an unprecedented number of judicial elections. Of the 274 judgeships in Kentucky, all but two will be on the general election ballot. Two Supreme Court seats, and mine is one of them, will not be on the ballot in 2006, but five Supreme Court seats, fourteen Court of Appeals seats, and all District and Circuit Court seats will be on the ballot. Therefore, the challenge for Kentucky judges, lawyers, journalists, and conscientious citizens is to do all in their power, consistent with the law, to prevent an onslaught of distasteful, misleading, and expensive judicial campaigns.

As this task is undertaken, we must never overlook fundamentals. The citizens of this nation who go into courts are entitled to have a judicial decision-maker who is free of bias, prejudice, or any interest in the outcome whatsoever. We often use the term "judicial independence," and I believe it is frequently misunderstood. When judges or lawyers speak of judicial independence they don't mean that judges should be free to decide as their personal views dictate. That is not judicial independence. Judges are bound by the Constitution and laws of our nation and state. Judicial independence is a right belonging to citizens to have cases decided by judges who are independent of outside improper influence.⁶⁴ How would

⁶¹ *Id.*

⁶² In a 1996 electoral contest for an Alabama Supreme Court seat, Justice Kenneth Ingram aired commercials labeling his opponent, Harold See, a "Slick Chicago Lawyer" and comparing him to a skunk. "Some things you can smell a mile away," said the ad announcer. Dale Russakoff, *Legal War Conquers State's Politics; In Tort Reform Fight, Alabama Court Race Cost \$5 Million*, WASH. POST, Dec. 1, 1996, at A01.

⁶³ Chief Justice Thomas J. Moyer, Speech to the Retail Merchants Association (Nov. 7, 2002), available at http://www.sconet.state.oh.us/Communications_Office/Speeches/2002/1107cjm.asp.

⁶⁴ See *McDonald v. Ethics Comm. of the Ky. Judiciary*, 3 S.W.3d 740, 744 (Ky. 1999) ("Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American and Kentucky concepts of justice and the rule of law.") (quoting Ky. SUP. CT. R. 4.300); see also *Ackerson v. Ky. Judicial Ret. & Removal Comm'n*, 776 F. Supp. 309, 313 (W.D. Ky. 1991) (holding that "[a]n even handed, unbiased and impartial judiciary is one of the pillars upon

you would feel if you went to court knowing that the judge had made a campaign speech supporting your opponent's position and attacking your position? What if you wanted probation for a son or daughter who had pled guilty to a crime and the judge had declared that he never gave probation? Would your confidence in the integrity of the process be lessened by those facts? I dare say that for most of us, the answer is "yes." That is the essence of judicial independence, the right of citizens to have an impartial, independent decision-maker. In a recent editorial, the *Courier-Journal* put it this way: "The cherished American right to a fair trial is colliding head-on with another basic liberty: free speech."⁶⁵ That same edition concluded with the following: "[T]he essence of liberty will be turned on its head if the state's courtrooms are filled by jurists who have pre-judged cases by pledging to follow popular opinion instead of the law."⁶⁶

But we are not entirely powerless to prevent such a dismal reality. A number of states have established independent non-judicial and non-state-sanctioned campaign-conduct committees.⁶⁷ These committees are comprised of private citizens who establish contacts with the legal community, the League of Women Voters, and news media outlets and establish their credibility as independent and objective. Whether an incumbent or a challenger, when candidates cross the line between the legitimate exercise of free speech into the realm of promises of conduct in office, distortion, and untruth, the committee speaks out and denounces the offending candidate. Such committees can also have an effect on outside interest groups that ostensibly act independently of the candidate. Such conduct committees have been used successfully in Florida, Alabama, and Ohio,⁶⁸ and such a committee is being formed in Kentucky. I am pleased to say that former Court of Appeals Chief Judge Tony Wilhoit has agreed to chair Kentucky's Judicial Campaign Conduct Committee. In a sense, the goal of the committee will be to preserve the dignified culture of judicial elections in Kentucky.

Another step being taken in some states, and one that we are thinking about in Kentucky, is a required judicial campaign education event shortly

which our system of government rests").

65 Editorial, *Judges, of All People, Must Balance Rights*, COURIER-JOURNAL (Louisville), Nov. 8, 2004, at 8A.

66 *Id.*

67 NATIONAL AD HOC ADVISORY COMMITTEE ON JUDICIAL CAMPAIGN CONDUCT, EFFECTIVE JUDICIAL CAMPAIGN CONDUCT COMMITTEES: A HOW-TO HANDBOOK (2004), available at <http://www.judicialcampaignconduct.org/handbook.pdf>. For a review of various campaign-conduct committees, see Richard A. Dove, Esq., *Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 LOY. L.A. L. REV. 1447 (2001); see also Barbara Reed & Roy A. Schotland, *Judicial Campaign Conduct Committees*, 35 IND. L. REV. 781 (2002).

68 Reed & Schotland, *supra* note 67, at 781–83, 786–87.

after the filing deadline.⁶⁹ Early in the election process most candidates for judicial office are filled with high ideals and the best of intentions. It isn't until the last few weeks that those high ideals evaporate, often at the urging of consultants, in favor of a win-at-all-costs notion. If candidates are educated as to acceptable campaign practices and make a commitment early in the process to an elevated, high-minded campaign, it will be more difficult for those same persons to compare their opponents to potential roadkill in the last three weeks before the election.

Another idea is judicial outreach. I have often said, and still believe, that of the three branches of government, the judicial branch is the least understood—despite the ubiquity of *Law and Order*, *Boston Legal*, *Judging Amy*, and like television programs. Judges and lawyers need to do more to educate their fellow citizens about the reality of the work of the judiciary and encourage an informed and active participation in the judicial election process.

Another possible step is recusal.⁷⁰ You will recall that I earlier said that the announce clause and the pledges or promises clause are virtually off-limits insofar as state regulations are concerned. But nothing in *White* or other federal constitutional authority would prevent states from making it mandatory for judges to recuse themselves where they had previously announced their views or made pledges or promises of conduct in office. In fact, in a concurring opinion in *White*, Justice Kennedy stated that states “may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.”⁷¹ Many states are taking Justice Kennedy's suggestion and enacting mandatory recusal provisions.⁷²

The possibility of mandatory recusal also provides candidates a legitimate basis for declining to answer questions by which the questioner seeks to obtain a commitment from the candidate. While citizens may still be skeptical of the legitimacy of the candidate's reason for declining to answer, the reality is that many of the questions a judicial candidate receives in the course of a judicial campaign, whether from individuals, small groups, or large groups, are not simply good faith efforts to learn the sincere views of the candidate. Many such questions are specifically intended by interest groups to commit the judicial candidate to a particular course of action after he or she is elected.⁷³ Some such groups want the judge's signature

69 See Dove, *supra* note 67, at 1456 (“Several jurisdictions have deemed it worthwhile to educate candidates and the public about the unique nature of judicial elections.”).

70 See KY. REV. STAT. ANN. § 26A.015 (West 2004).

71 Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002).

72 See, e.g., Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1109–10 (2004) (discussing Texas' post-*White* recusal canon).

73 See Angela Allen, Note, *The Judicial Election Gag is Removed—Now Texas Should Remove Its Gag and Respond*, 10 TEX. WESLEYAN L. REV. 201, 217 (2003) (“[T]o get elected, candi-

at the end of a questionnaire declaring himself to be pro-life or pro-choice, or pro-gun or pro-gun control, or for or against the death penalty. In an earlier era, the questions would have concerned mandatory racial segregation and whether women should have the right to vote. In fact, I recently had a state senator tell me that he believed every judge should have to run as a Republican or a Democrat and that every judicial candidate should have to declare his or her views on the leading controversial issues in this nation. In my view, such conduct by a judge would signal a social agenda and would be highly undesirable and harm public trust and confidence in the judiciary.

In fact, a phrase that has come into popular usage to describe a judge with an agenda is “activist judge.” Whenever I hear that term, I am annoyed because I know it is at once pejorative and meaningless. Until recently, I was unable to define “activist judge,” knowing as I do that judges do not seek out cases to decide; that we simply wait for citizens to bring their cases to us. I also knew that judges, like other citizens, have children in school; they have spouses, mortgages, and all the problems of other citizens. They attend the Catholic Church, the Baptist Church, or no church at all in numbers that probably do not differ greatly from the general population. I was perplexed, therefore, by how otherwise ordinary citizens who live in ordinary communities could become those dreadful activist judges. But I recently figured it out. An activist judge, so-described, is one whose decision in a particular case does not agree with the views expressed by the speaker or the writer. If the speaker is pro-choice, an activist judge is one who has made a pro-life ruling, and vice versa. If the writer favors allowing the Ten Commandments to be posted in public buildings, an activist judge is one who has ruled to prevent such posting.

Let me provide an example. The recent case of *In re Jane Doe* generated a heated debate among the Justices of the Texas Supreme Court.⁷⁴ At issue was the proper interpretation and construction of the Parental [Abortion] Notification Act. The Justices’ diverse perspectives, borne out in the majority, concurring, and dissenting opinions, were replete with accusatory references of “judicial activism.” What makes this illustrative is that there were deeply conservative jurists on both sides of the issue, but when they disagreed with one another, each branded the other as either pro-abortion activists or anti-abortion activists.⁷⁵

In other words, “activist judge” is nothing but a meaningless label.

dates will be pressured by special interest groups to indicate how they will rule on hot-button issues.”) (quoting Deborah Goldberg, deputy director of the Democracy Program at the Brennan Center for Justice).

⁷⁴ *In re Jane Doe*, 19 S.W.3d 346 (Tex. 2000). In this decision, the Texas court overturned the lower courts’ decisions and granted the appellant a court order allowing her to consent to an abortion without notifying a parent.

⁷⁵ *Id.*

Judges who decide the cases that are brought before them to the best of their ability based on the Constitution and laws of our nation and state, despite the outcome being contrary to popular will, are not activist judges. Such judges are simply acting in obedience to their oath of office to follow the Constitution and laws. A true "activist judge," if the term has any meaning, would be one who felt himself liberated from legal and constitutional constraint and decided according to popular or vocal opinion. In truth, many statutes enacted by legislatures or even constitutional provisions that look just fine on the surface may sometimes produce unappealing results in particular cases. But when that happens, judges must be able to fearlessly apply the written law rather than indulge personal preference.

As earlier stated, there are certain means available to the judiciary and private groups to encourage appropriate behavior by candidates in judicial campaigns. I have identified some of those means, and efforts toward their implementation are now underway. However, lawyers are the true guardians of our judicial system. All judges were lawyers first, and we come and go from the judiciary with regularity. While we welcome help from citizen groups and lay opinion-makers, we must not depend on others to preserve our judicial system and its centerpiece, judicial independence. No judicial candidate or incumbent judge would want to face the opprobrium of colleagues in the legal community. Thus, lawyers, individually and collectively, can do more than anyone else to demand of those seeking judicial office a high level of conduct in the course of a judicial campaign. It is imperative for lawyers to solemnly accept such a responsibility if we are to ensure that judicial elections remain a respectable method of judicial selection.

I want to thank you for your kind attention.