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## Had Enough in Ohio - Time to Reform Ohio's Judicial Selection Process

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HAD ENOUGH IN OHIO? TIME TO REFORM OHIO'S JUDICIAL  
SELECTION PROCESS

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## I. INTRODUCTION

I sauntered up to the election booth in the Parma Heights, Ohio municipal garage prepared to make some election history. With the 2000 election behind me, I knew that each vote I cast could prove to be the deciding vote.<sup>1</sup> As I slid the ballot card into the appropriate slot and lifted the stylus with which I would soon raise ordinary people to new political highs, I was confident. Governor, U.S. Representative, State Senator, and State Representative, my decisions were sure and swift. I turned the sheet and was confronted with the Supreme Court races, two this year. I recall seeing some rather acrimonious advertisements but was unable to recall what the judges actually stood for. Was this the Republican-business lover, or the Democrat who favors the trial bar? I was unsure how to best evaluate which was the better candidate for the Ohio Supreme Court. “Perhaps I’ll have better luck with the appellate judicial contests,” I thought to myself and calmly flipped the page leaving my votes un-cast. Long moments passed as I stared confusedly at the many names lining my ballot, secretly hoping I would be able to blame my indecision on my inability to read a butterfly ballot. After realizing that I was unable to make an intelligent and informed choice on any of the judicial races, I poked my head out of the booth to see if anyone else was having the type of trouble I was. Concluding my business in the booth, I humbly walked over to the drop box, praying the attendant would not notice that the majority of my ballot was not punched, not even a hanging chad. Confused and unhappy, I consoled myself with a grande double non-fat latte. Wouldn’t you?

Our legal system rests on the fundamental idea that judges will serve as independent and un-biased arbiters of the law.<sup>2</sup> Unfortunately, the current model for seating judges in Ohio through non-partisan elections<sup>3</sup> falls far short of the mark, as a poll of Ohio citizens found that ninety percent of Ohio citizens believed political contributions affected judicial decisions.<sup>4</sup> Ohio is not alone in its approach, as fully forty percent of the states utilize elections as the primary method for the selection of appellate level judges.<sup>5</sup> Indeed, the number of elected judges now exceeds the

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<sup>1</sup>It would be difficult not to recall the tragedy of the “chad” during the 2000 Presidential election. While America waited and watched, officials counted individual ballots in order to determine the voter’s intent. In the end Vice President Gore lost the election.

<sup>2</sup>*Justice for Hire: A Statement on National Policy by the Research and Policy Committee of the Committee for Economic Development*, at 1 (2002), at [http://www.ced.org/docs/report/report\\_judicial.pdf](http://www.ced.org/docs/report/report_judicial.pdf) [hereinafter *Justice for Hire*]. (Last visited Jan. 18, 2004).

<sup>3</sup>Ohio elections do not list party affiliations and are therefore non-partisan; however candidates must run in partisan primary elections and do so often with party endorsements.

<sup>4</sup>A.B.A. *Report and Recommendations of the Task Force on Lawyers’ Political Contributions, Part Two*, at 123 (1998), at <http://www.brennancenter.org>. (Last visited Feb. 2, 2003).

<sup>5</sup>*Justice for Hire*, *supra* note 2, app. at 43. See also information from the American Judicature Society, at [http://www.ajs.org/selection/sel\\_state-select-map.asp](http://www.ajs.org/selection/sel_state-select-map.asp) (last visited Jan. 18, 2004) (stating that there are currently thirty-nine states in the US that in some way elect their appellate level judges. Of these, twenty-three states have contested partisan or nonpartisan judicial elections for appellate judges).

number of elected state legislators and executive officers in this country.<sup>6</sup> While there is no absolute uniformity among the states as to the selection of judges, every state seats judges in one of a few ways. Those states that do not employ elections, as their primary means of selecting judges, utilize some manner of merit selection.<sup>7</sup> Most merit selection plans utilize some form of a nominating committee to evaluate candidates. Those names of the individuals the nominating committee feels are qualified are then forwarded to the individual, usually the governor, who will then appoint from the pool of individuals selected by the commission.<sup>8</sup> No state currently employs a pure appointive system modeled after the federal system.<sup>9</sup>

This note will examine the problems that the election of state judges creates, as well as the inadequacies of the current model of merit selection. I propose that Ohio should adopt an appointive method of selecting judges, which will utilize a judicial eligibility commission as outlined by the American Bar Association<sup>10</sup> similar to the nominating commissions commonly found in merit selection plans but which will do away with the commonly found retention election. As Chief Judge Moyer of the Ohio Supreme Court said in reference to the November 2002 judicial election in Ohio we “have been subjected to the dark side of democracy.”<sup>11</sup> Ohio needs to change the manner in which state judges are selected in order to bring confidence in the state judiciary, and to ensure that the most qualified individuals sit on the bench in Ohio.

## II. PITFALLS OF JUDICIAL ELECTIONS

Judicial elections are fundamentally contrary to the goal of an independent and impartial judiciary.<sup>12</sup> Former Pennsylvania Governor Tom Ridge recently said,

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<sup>6</sup>*Id.* at 1.

There are more than 30,000 judges in the fifty states, including more than 1,300 state appellate judges, 11,000 state trial judges, and almost 18,000 limited-jurisdiction judges. Over eight-seven percent of these judges must face the voters at regular intervals in some type of popular election. Thirty-nine states currently require elections for those seeking or holding judicial office at some level.

*Id.*

<sup>7</sup>*Id.* app. at 43-44.

<sup>8</sup>Mark Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 301 (2002).

<sup>9</sup>*See infra* Part III.B.

<sup>10</sup>*See infra* Part VII.

<sup>11</sup>Jack Torry, *Ohioans Endured the Most TV Ads*, COLUMBUS DISPATCH (Ohio), Nov. 21, 2002, at 1D.

<sup>12</sup>*Justice for Hire*, *supra* note 2, at 25.

Most of the litigation in this country—perhaps as large a share as 98 percent of the cases—is conducted in state courts. America is the only country that elects such a large proportion of its judges by popular vote. Such a system is inconsistent with our objective of credible, impartial, and effective dispensation of justice. The suggestion is that America has fallen behind in realizing that electing judges is not the most effective way to ensure an independent judiciary.

*Id.*

“[t]he restraint, temperament and detachment that we rightly demand from our judges is fundamentally incongruous with partisan statewide political campaigns. In my opinion, campaigning is precisely the wrong thing to ask our judges to do!”<sup>13</sup> ck D’Aurora noted that it makes little sense to ask our judicial candidates to announce their positions on current topics. Judges, unlike legislators and most state executives, are charged, not with carrying out the will of the people, but with the neutral dispassionate arbitration of the law.<sup>14</sup> Our system of electing judges has several negative effects: 1) election of judges gives the appearance that the judiciary will be unable to act with the independence and impartiality necessary for the proper; 2) election of judges undermines the public confidence in the judiciary; and 3) election of judges may discourage qualified candidates from seeking the bench.

*A. Our System of Electing State Judges Threatens Judicial Independence*

Forcing judicial candidates to run in contested elections threatens judicial independence, as candidates are forced to raise large sums of money in order to compete against their opponent.<sup>15</sup> Prior to the onset of heavy media use by judicial candidates, campaigns were run without a great deal of money spent and little fanfare;<sup>16</sup> the climate has shifted dramatically.<sup>17</sup> For example, in Alabama, total spending on two Supreme Court seats increased over \$1.8 million over a ten-year period.<sup>18</sup> In Montana, average spending on a race for Supreme Court more than

<sup>13</sup>Behrens & Silverman, *supra* note 8, at 277-278, (quoting Governor Tom Ridge).

<sup>14</sup>Jack D’Aurora, *Elections Are Poor Way To Choose Judges*, COLUMBUS DISPATCH (Ohio), Nov. 6, 2001, at 11A. “Electing judges makes little sense. Judges do not engage in the type of activity that requires them to espouse positions on current topics. Unlike legislators and most other elected officials, they are not charged with carrying out the will of the people.” *Id.*

<sup>15</sup>The following table details the money spent by the candidates in the 2002 Ohio Supreme Court election from January 1 until November 2, 2002, at <http://www.brennancenter.org>. (Last visited Feb. 10, 2003).

	Number of Ads	Number of Airings	Cost of Airtime
Black	2	1546	\$676,737
Burnside	4	1387	\$619,225
O’Connor	4	2425	\$912,601
Stratton	7	2794	\$1,172,844
O’Connor/ Stratton	4	802	\$389,895
Total	21	8954	\$3,771,302

<sup>16</sup>Scott D. Wiener, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 193 (1996).

<sup>17</sup>*Id.*

<sup>18</sup>The ten-year period was from 1986 to 1996. ABA COMM. ON JUDICIAL INDEPENDENCE, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS: REPORT OF THE COMM’N ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2002), at <http://www.abanet.org/judind/pdf/commissionreport4-03.pdf> (Last visited Jan. 25, 2004) [hereinafter REPORT].

doubled from 1984 to 1986.<sup>19</sup> Here in Ohio, the campaign for the Chief Justice seat increased over \$2.5 million from \$100 thousand in 1980, to \$2.7 million in 1986.<sup>20</sup>

Candidates must solicit campaign contributions from the very individuals who may be appearing before them in the courtroom as well as from those parties or persons who may have an interest in the outcome of cases that will come before the judge.<sup>21</sup> For example, more than forty percent of the money contributed to the winning candidates for the Texas Supreme Court between 1994 and 1997 was contributed by parties or attorneys with cases before the court or from individuals and organizations linked to parties with cases before the court.<sup>22</sup> Elected judges may feel it is necessary to reward campaign contributors by providing their supporters with favorable rulings, which may be contrary to the rule of law; likewise, the judge may feel compelled to rule against those individuals and businesses which did not support the judge.<sup>23</sup> Similarly, a judicial candidate may feel it is necessary to “adopt the political or social agenda that arrives tied to a stack of cash,”<sup>24</sup> and become beholden to special interest.<sup>25</sup> Indeed, T.C. Brown noted in a February, 2000,

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<sup>19</sup>*Id.* at 12. Average spending increased from \$63,647 to \$138,460. *Id.*

<sup>20</sup>*Id.*

<sup>21</sup>Mark Hansen, *A Run for the Bench*, 84 A.B.A. J. 68, 69-71 (1998). In the 1996 Ohio Supreme Court race, more than 50% of contributed funds came from lawyers. *Id.* at 71. *See also* Behrens & Silverman, *supra* note 8, at 279; REPORT, *supra* note 18, at 13.

As the cost of campaigning escalates, judicial candidates are required to raise more and more money from contributors who typically include lawyers, prospective litigants or organizations with an economic or political interest in the outcomes of cases to be decided by the courts to which the candidates are seeking election (or reelection) [sic]. It bears emphasis that unlike executive and legislative branch races, which are supported by a comparatively diverse funding base, judicial races attract the attention of a narrower band of interested contributors that have traditionally been limited to lawyers, and more recently been expanded to include a range of interested groups.

*Id.* at 13.

<sup>22</sup>Behrens & Silverman, *supra* note 8, at 279.

<sup>23</sup>*Id.* at 278.

<sup>24</sup>*Id.*

<sup>25</sup>The following table provided by the Brennan Center shows the amount of money spent by special interest groups in the 2002 Ohio Supreme Court election from January 1 until November 5, 2002, at <http://www.brennancenter.org> (Last visited Feb. 10, 2003).

	Number of Ads	Number of Airings	Cost of Airtime
Citizens for Independent Court	4	2222	\$760,706
Competition Ohio	1	140	\$115,690
Consumers for a Fair Court	1	550	\$220,416
Informed Citizens of Ohio	2	1235	\$738,181
Total	8	4147	\$1,834,993

*Id.*

*Cleveland Plain Dealer* article, that the Ohio Supreme Court ruled favorably two-thirds of the time in cases involving the twenty Cleveland-area attorneys who had contributed the most to the justices' political campaigns.<sup>26</sup>

Advocates of lawyer contributions to judicial campaigns suggest that the "informed opinions of attorneys should be brought to the public's attention, and that the bar should actively show support for or against judicial candidates."<sup>27</sup> Proponents also argue that contributions from lawyers may be small and therefore pose no threat to judicial independence.<sup>28</sup> A final, if weak, argument is that without lawyer contributions, a judicial candidate may not be able to adequately fund a campaign.<sup>29</sup> However, attorney contributions have not had the effect that the above arguments suggest<sup>30</sup> as David Barnhizer relates several instances in which lawyers have felt the effects of judicial fund-raising.<sup>31</sup>

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*See also generally* Kara Baker, Comment, *Is Justice for Sale in Ohio? An Examination of Ohio Judicial Elections and Suggestions for Reform Focusing on the 2000 Race for the Ohio Supreme Court*, 35 AKRON L. REV. 159 (2001); Behrens & Silverman, *supra* note 8, at 279-80.

There is at least some empirical evidence that the threat to judicial impartiality caused by campaign contributions is more than mere perception—lawyer contributions may in fact influence court decisions. A 2001 Texans for Public Justice study compared contributions by attorneys and law firms to Texas Supreme Court campaigns and the Texas Supreme Court's rate of accepting petitions for appeal between 1994 and 1998. . . . While the average overall petition—acceptance rate was 11%, this rate leapt to an astonishing 56% for petitioners who contributed more than \$250,000 to the justices. In contrast, non-contributing petitioners enjoyed an acceptance rate of just 5.5%.

*Id.*

<sup>26</sup>T. C. Brown, *Majority of Court Rulings Favor Campaign Donors*, PLAIN DEALER (Cleveland), Feb. 15, 2000, at 1A. (The justices denied any connection between the donations and the rulings.)

<sup>27</sup>Bradley Siciliano, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 HOFSTRA L. REV. 217, 222 (1991).

<sup>28</sup>*Id.* at 222.

<sup>29</sup>*Id.* Prior to the onslaught of media advertising in judicial campaigns, judicial candidates were able to fund their campaigns without the huge influx of money from donors, whether attorney or otherwise. *See also supra* notes 15-17 and accompanying text.

<sup>30</sup>*See generally* David Barnhizer, "On the Make:" *Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361 (2001).

<sup>31</sup>*Id.* at 378-80.

I asked a lawyer whether he had ever contributed to judicial campaigns. His answer was revealing and troubling. He told me he had done so only once and the experience showed him just how dangerous it was. This lawyer, who practices in Southern California, said that a local prosecutor's office decided to run several of their assistant district attorneys against judges whose rulings they did not like. Some of the lawyers in the area decided to create a committee to raise funds for the endangered judges and he contributed funds and his name to the committee. He related how in the midst of the heated election campaign, he was beginning a trial before a judge whose judicial friends and colleagues the lawyers' committee was supporting. At the beginning of the trial, the judge's bailiff entered the courtroom with a paper in his hand and then passed it to the judge. The judge looked down at the paper, looked up at the opposing lawyer (who was not on the lawyers' committee) without saying a word or changing expression and then looked back down at the paper. A few seconds later he looked up

Unfortunately, attorney contributions to judicial campaigns do not have the effects that the proponents of attorney contributions desire. Rather, the contributions create the potential for ethical dilemmas for both the attorneys and the judges. Bill Weisenberg, Ohio Bar Association Director of Governmental Affairs during the 1987 campaign to put merit selection on the Ohio ballot<sup>32</sup> stated, “people don’t contribute large sums of money and expect the other guy to be treated fairly.”<sup>33</sup> The act of providing funds to judicial candidates is inconsistent with the idea and goal of an independent judiciary in Ohio.

### B. Judicial Elections Undermine Public Confidence

The Justice at Stake Campaign<sup>34</sup> recently conducted a poll showing that: seventy-six percent of voters and twenty-six percent of state judges believe that campaign

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at my lawyer friend and smiled at him. From that point and throughout the trial the contributing lawyer “could do no wrong” and received an unbroken string of favorable rulings.

*Id.* at 378-79. Barnhizer provides a further example:

During a recent campaign for a seat on a local Ohio Domestic Relations Court, a lawyer from a small firm ran up against a political, ethical, and financial dilemma. His predicament began innocently enough when he was solicited for a campaign contribution by supporters of the Democratic incumbent. The lawyer, a longtime Democrat, willingly put his signature on a \$250 check to the judge’s campaign. Soon, however, he was contacted by the campaign of the judge’s Republican opponent. Would the lawyer be willing to contribute to their candidate’s campaign as well? The lawyer, who almost never gave to Republican candidates, nonetheless wrote out a matching check. His rationale was simple: His legal practice involved frequent appearances in family court, and he simply could not afford to risk offending whichever judge was eventually elected.

*Id.* at 379.

<sup>32</sup>See *infra* Section IV.

<sup>33</sup>John D. Felice & John C. Kilwein, *Strike One, Strike Two . . . : The History of and Prospect for Judicial Reform in Ohio*, 75 JUDICATURE 193, 196 (1992).

<sup>34</sup>A nationwide, nonpartisan group whose mission is to “educate the public and work for reforms to keep politics and special interests out of the courtroom—so judges can do their job protecting the Constitution, individual rights and the rule of law.” The Justice at Stake Campaign lists the following partners: Alabama Appleseed Center for Law and Justice; American Bar Association; American Judicature Society; Appleseed Foundation; Brennan Center for Justice at NYU School of Law; Campaigns for People; Chicago Appleseed Fund for Justice; Citizen Action/Illinois; Citizens for an Independent Judiciary; Committee for Economic Development; The Committee for Modern Courts; Common Cause; The Constitution Project; Democracy South/Georgia Project; The Greenlining Institute; The Illinois Campaign for Political Reform; Kansas Appleseed Center for Law and Justice; Lawyers’ Committee for Civil Rights Under Law; League of Women Voters Judicial Independence Project; Michigan Campaign Finance Network; Michigan League of Women Voters; National Center for State Courts; National Institute on Money in State Politics; North Carolina Center for Voter Education; Ohio Citizen Action; Ohio League of Women Voters; Oklahoma Appleseed Center for Law and Justice; Pennsylvanians for Modern Courts; Protestants for the Common Good; Public Campaign; The Reform Institute; Tallahassee League of Women Voters; Texans for Public Justice; Wisconsin Citizen Action; and Wisconsin Democracy Campaign, at <http://www.justiceatstake.org>. (Last visited Feb. 10, 2003).



contributions made to judges have at least some influence on their decisions; sixty-two percent of voters—including ninety percent of African-American voters—feel that America has two systems of justice, one for the wealthy and one for everyone else; and nine in ten voters, and eight in ten state judges say that they are quite concerned about special interest buying advertisements in order to influence the outcome of judicial elections.<sup>35</sup> The American Bar Association Standing Committee on Judicial Independence noted that “the old adage that ‘money talks’ is accepted wisdom when it comes to assessing whether judges are likely to be influenced by the campaign contributions they receive.”<sup>36</sup> For example, in Louisiana, a survey revealed that over half of voters thought that judicial decisions were influenced by the contributions a judicial candidate received.<sup>37</sup> Judge Dennis Duggan, a family court judge in New York, stated that the perception that judges can be influenced by contributions to their election “pervades not only the general public but the profession as well.”<sup>38</sup> Electing state judges poses a serious threat to the public confidence in the judiciary.<sup>39</sup>

The lack of public confidence in the judiciary is exacerbated by the increased use of “attack” ads during judicial campaigns.<sup>40</sup> An article in the *Cincinnati Post* quoted Mark Kozlowski, a staff attorney at the Brennan Center for Justice,<sup>41</sup> as saying: “The greater extent to which these races become TV ads and attack ads and all the things we associate with a race for Congress, the more cynical the people will become in respect to what judges do.”<sup>42</sup> During the 2002 election campaign for the Ohio

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<sup>35</sup>Justice at Stake Poll, at <http://www.justiceatstake.org/files/pollingsummaryFINAL.pdf> (last visited Jan. 25, 2004)..

<sup>36</sup>REPORT, *supra* note 18, at 20.

<sup>37</sup>*Id.* at 21.

<sup>38</sup>*Id.* at 22 (quoting Judge Dennis Duggan).

<sup>39</sup>Behrens & Silverman, *supra* note 8, at 283.

A 1998 study sponsored by the Texas Supreme Court found that 83% of Texas adults, 69% of court personnel, and 79% of Texas attorneys believed that campaign contributions influenced judicial decisions ‘very significantly’ or ‘fairly significantly.’ Even 48% of Texas judges confessed that they believed money had an impact on judicial decisions. That same year, a poll sponsored by a special commission appointed by the Pennsylvania Supreme Court found that nine out of ten voters believed that judicial decisions were influenced by large campaign contributions.

*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>The Brennan Center for Justice is located at New York University School of Law. The Center’s mission is to “develop and implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms.” The Brennan Center receives support from foundations, law firms, and individuals. See <http://www.brennancenter.org> (Last visited Jan. 18, 2004).

<sup>42</sup>Mark Kozlowski noted that public opinion already holds a cynical attitude towards the judiciary by stating, “Increasingly, people think that it is a quaint concept . . . that judges really do try to decide cases according to the law.” Randy Ludlow, *High-Stakes Race Draws National Scrutiny*, CINCINNATI POST, Sept. 9, 2000, at 1B.

Supreme Court, attack ads were plentiful. For example, one advertisement depicted a down on his luck working man who states: "Eve Stratton calls herself 'the velvet hammer.' Yeah, corporations get the velvet. Ohio families get the hammer."<sup>43</sup> Early in 2001, a group of Ohio judges, attorneys, and legal scholars met at the University of Toledo College of Law to discuss judicial elections. At the meeting, Chief Justice Thomas Moyer, in a call for judicial appointments, stated: "The primary fault I see with [electing judges] is the tremendous amount of money that flows into campaigns, large amounts of it from interests involved before the Supreme Court. Even if we assume it has no influence on the system, the perception of it couldn't be worse."<sup>44</sup> It is likely that the public confidence in an independent judiciary will continue to be low as the public continues to see judicial candidates engaged in invidious character assassinations.

### C. *Judicial Elections May Discourage Qualified Individuals*

Alexander Hamilton, co-author of *The Federalist Papers*,<sup>45</sup> related in Federalist No. 78:

there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.<sup>46</sup>

Hamilton envisioned a judiciary that was appointed rather than elected.<sup>47</sup> Ohio's system of electing judges, rather than appointing them, is likely shying qualified judges away from the bench.<sup>48</sup> Many potential jurists will choose not to seek election to the bench due to being uncomfortable with raising funds. As Justice

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<sup>43</sup>Catherine Candisky, *Supreme Court Candidates Upset by Groups' New TV Ads*, COLUMBUS DISPATCH (Ohio), Oct. 23, 2002, at 4E. Another ad shows a pregnant woman arriving for an appointment at her obstetrician's office only to find that the obstetrician has closed up shop due to high malpractice awards. The implication being that unless the voters elected a jurist who would effectively shut down the trial lawyers, doctors would be run out of business and the general public would be left without the ability to receive quality medical care.

<sup>44</sup>Joe Hallett, *Should Ohio Stop Electing Judges?*, COLUMBUS DISPATCH (Ohio), Apr. 8, 2001, at 1G.

<sup>45</sup>Alexander Hamilton, John Jay, and James Madison drafted the Federalist Papers. Hamilton, Jay, and Madison sought to influence those who were debating ratification of the Constitution, and specifically those who were to attend the New York state ratification convention. They wrote and published under the pseudonym "Publius," and the general public did not know their true identity for decades. *THE FEDERALIST PAPERS READER*, XIV (Frederick Quinn ed., 1993).

<sup>46</sup>*Id.* at 168.

<sup>47</sup>Judicial Appointments White Paper Task Force, *The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 357 (2002).

<sup>48</sup>Behrens & Silverman, *supra* note 8, at 286. "The mere requirement of participating in a contested judicial election and the necessity of raising large amounts of cash may cause qualified candidates to opt out of public service."

Joseph Grodin opined, “a judge asking lawyers for money is quite degrading and threatens their integrity.”<sup>49</sup> Those candidates who are unable or unwilling to raise significant funds may be unable to compete effectively for judicial office against those candidates who are either independently wealthy or who have connections to wealthy contributors.<sup>50</sup> By electing our judges, we are essentially narrowing down the field of potential candidates to those who can either afford to finance their own campaign or secure financing from outside sources.<sup>51</sup>

*D. Judicial Elections Are Incompatible With a Strong Judiciary*

While Canon 5 of the Model Code of Judicial Conduct specifically addresses the issue of judicial candidates,<sup>52</sup> Canon 2 is instructive on the issue of impropriety,<sup>53</sup>

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<sup>49</sup>REPORT, *supra* note 4, at 24 (quoting Justice Joseph Grodin).

<sup>50</sup>*Id.* at 24.

To the extent that money is a more reliable proxy for determining who will win an election than who is most qualified to hold judicial office, there is legitimate cause for concern that privately funded judicial campaigns may limit access to judicial office for all candidates, of color or otherwise, who derive their support from less affluent communities that are unlikely to make significant financial contributions to judicial races.

*Id.*

<sup>51</sup>*Id.* This problem will worsen as the cost of judicial campaigns continues to rise and candidates are forced to spend more of their own money on elections. Positions on the bench may become limited to those who can purchase them or are willing to take out personal loans to finance their campaigns.

<sup>52</sup>MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990).

All Judges and Candidates (1) Except as authorized in Sections 5B(2), 5C(1), and 5C(3), a judge or a candidate for election or appointment to judicial office shall not:

(a) act as a leader or hold an office in a political organization; (b) publicly endorse or publicly oppose another candidate for public office; (c) make speeches on behalf of a political organization; (d) attend political gatherings; or (e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions. (2) A judge shall resign from judicial office upon becoming a candidate for a non-judicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so. (3) A candidate for a judicial office: (a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate’s family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate. (b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate’s direction and control from doing on the candidate’s behalf what the candidate is prohibited from doing under the Sections of this Canon; (c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon; (d) 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

stating that a judge should conduct himself in a manner that promotes public confidence in the judiciary. The commentary to Canon 2 outlines a test that should be used in determining whether conduct will create the appearance of impropriety.<sup>54</sup> “The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”<sup>55</sup> Indeed, even though the Model Code of Judicial Conduct admits to the necessity of fundraising in judicial campaigns in those states utilizing popular election, it does so only grudgingly.<sup>56</sup> Judicial elections create the appearance of impropriety in the

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misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent; (e) may respond to personal attacks or attacks on the candidate’s record as long as the response does not violate Section 5A(3)(d).

B. Candidates seeking appointment to judicial or other governmental office. (1) A candidate for appointment to judicial office or a judge seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy. (2) A candidate for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that: (a) such persons may: (i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates; (ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required by those specified in Section 5B(2)(a); and (iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to his or her qualifications for the office; (b) a non-judge candidate for appointment to judicial office may, in addition, unless otherwise prohibited by law: (i) retain an office in a political organization, (ii) attend political gatherings, and (iii) continue to pay ordinary assessments and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other functions. C. Judges and candidates subject to public election. (1) A judge or a candidate subject to public election may, except as prohibited by law: (a) at any time: (i) purchase tickets for and attend political gatherings; (ii) identify himself or herself as a member of a political party; and (iii) contribute to a political organization; (b) when a candidate for election (i) speak to gatherings on his or her own behalf; (ii) appear in newspaper, television and other media advertisements supporting his or her candidacy; (iii) distribute pamphlets and other promotional campaign literature supporting his or her candidacy; and (iv) publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.

*Id.*

<sup>53</sup>MODEL CODE OF JUDICIAL CONDUCT Canon 2A (1990). “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” *Id.*

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>The commentary to Canon 5C(2) states:

[t]here is a legitimate concern about a judge’s impartiality when parties whose interests may come before a judge, or the lawyer who represents such parties, are known to have made contributions to the election campaigns of judicial candidates. This is among the reasons that merit selection of judges is a preferable manner in which to select the judiciary.

public's eyes by forcing judicial candidates to request money from the very individuals and businesses which will either be appearing before the judge or have an interest that will be before the judge. This appearance, whether real or simply perceived, will continue to erode public confidence in the judiciary. Further, judicial elections will likely keep qualified individuals from seeking the bench. Ohio needs to reform the method used to select judges.

### III. ALTERNATIVES TO JUDICIAL ELECTIONS

#### A. *Public Financing of Judicial Elections*

Although not a replacement for judicial elections, the American Bar Association<sup>57</sup> has called for the public financing of judicial elections in order to curtail the inflow of money from special interests and those who have business before the court.<sup>58</sup> In response to the inherent risk that campaign contributions would create a “quid pro quo benefits ... exchange,”<sup>59</sup> the Justice For Hire campaign has suggested public financing of judicial elections.<sup>60</sup> Similarly, North Carolina recently passed the Judicial Campaign Reform Act, which provides for the public financing of judicial elections.<sup>61</sup> Proponents of public financing suggest that it will protect judicial candidates from the “corruptive effects of political donations.”<sup>62</sup> However, public financing is completely ineffective in curtailing the spending of special interest groups.<sup>63</sup> It is likely that contributors who would normally have given the money directly to a candidate will instead fund independent campaigns either in support of their candidate or against the opponent.<sup>64</sup>

An example of the ineffectiveness of public financing of judicial elections is Wisconsin, where Supreme Court races are partially publicly funded by a \$1.00 state

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*Id.*

<sup>57</sup>REPORT, *supra* note 4, at 5. (The American Bar Association supports merit selection as being the best method to select judges and offers public financing of judicial elections merely as a method of making judicial elections better); *see also id.* at 8. “The Commission recommends that states consider financing contested judicial elections with public funds, but does so with its eyes open to the reality that public financing offers no panacea to the problems that pervade judicial campaign finance in many states.”

<sup>58</sup>*Id.*

The Commission recommends that states which select judges in contested elections finance judicial elections with public funds, as a means to address the perceived impropriety associated with judicial candidates accepting private contributions from individuals and organizations interested in the outcomes of cases those candidates may later decide as judges.

<sup>59</sup>*Justice for Hire, supra* note 2, at 26.

<sup>60</sup>*Id.*

<sup>61</sup>The National Pulse, *Footing the Bill for Judicial Campaigns*, 1 No. 40 A.B.A. J. E-REPORT 1 (Oct. 18, 2002).

<sup>62</sup>*Justice for Hire, supra* note 2, at 27.

<sup>63</sup>Behrens & Silverman, *supra* note 8, at 297.

<sup>64</sup>REPORT, *supra* note 4, at 36.

tax return check-off.<sup>65</sup> Public financing has not proved to be the boon for which proponents of public financing had hoped.<sup>66</sup> In order to receive funds from the state, Supreme Court candidates must have raised less than \$11,000 in \$100 increments or less; and the maximum public grant is \$97,031 out of a maximum allowable of \$215,625.<sup>67</sup> As a result, Supreme Court candidates may still raise up to fifty-five percent of the funds for their campaign.<sup>68</sup> Further, taxpayer participation in the state tax check-off system has declined from 19.9% in 1979 to 8.7% in 1998, with the result being that the fund has been unable to provide the \$97,031 in grants authorized to the candidates.<sup>69</sup> As a result, in 1999, a candidate for a Supreme Court seat declined to accept the public funding and the spending limits that go along with accepting the public funds.<sup>70</sup> This declination authorized the incumbent to exceed the spending limit as well, which resulted in combined spending of over \$1.2 million.<sup>71</sup> Opponents of public financing also argue that the money a judicial candidate would receive through public financing would be simply a “drop in the bucket.”<sup>72</sup>

### B. Appointive System

Originally, appointment was the preferred method of selecting judges in America.<sup>73</sup> The model of selecting judges most Americans are familiar with is the federal appointive model.<sup>74</sup> “Under the federal model, the President appoints a judge subject only to the advice and consent of the Senate.”<sup>75</sup> Federal judges are given a

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<sup>65</sup>A check-off system requires a taxpayer to check a box on his or her tax return in order to contribute some amount to the fund. Although check-off systems do not generally require the taxpayer to forgo any portion of his or her return for overpayment, many taxpayers do not understand this and choose not to check the box.

<sup>66</sup>REPORT, *supra* note 4, at 28.

<sup>67</sup>*Id.* at 28-29.

<sup>68</sup>*Id.* at 29.

<sup>69</sup>*Id.*

<sup>70</sup>REPORT, *supra* note 4, at 29-30.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* While the funding candidates may receive through public financing may not be simply a “drop in the bucket,” the candidates would not likely receive all of their funding through public financing and would therefore be forced to seek contributions from the community.

<sup>73</sup>Judicial Appointments White Paper Task Force, *supra* note 47, at 356 .

In the case of federal judges, of course, this meant the President with the advice and consent of the Senate. In eight of the original thirteen states, however, the appointment power was given directly to the legislature, the other five opting for a model similar to the federal system: appointment by the governor subject to confirmation by the legislature.

*Id.*

<sup>74</sup>Behrens & Silverman, *supra* note 8, at 300.

<sup>75</sup>*Id.*

lifetime appointment. Lifetime appointment was perceived by the framers and ratifying states as an important element in assuring a republican government.<sup>76</sup> As Alexander Hamilton in Federalist No. 78 stated:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovation in the government, and serious oppressions of the minor party in the community.<sup>77</sup>

Despite the success of the federal model, no state selects its judges in the exact manner as in the federal government.<sup>78</sup> Currently only four states utilize legislative appointment.<sup>79</sup> By the time Andrew Jackson became President, many states had begun to move toward an elected judiciary.<sup>80</sup> The Hamiltonian desire for an independent judiciary was giving way to a concern that appointed judges were not accountable to the general public, as evidenced by the fact that the first twenty-nine states that entered the Union opted for an appointed judiciary, but most of the states joining the Union after the Jackson presidency chose to implement an elected judiciary rather than an appointed one.<sup>81</sup> Opponents have suggested that legislative

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<sup>76</sup>Judicial Appointments White Paper Task Force, *supra* note 47, at 357.

<sup>77</sup>THE FEDERALIST PAPERS READER, *supra* note 45, at 160.

<sup>78</sup>Behrens & Silverman, *supra* note 8, at 300.

Several states, however, have adopted a method that resembles the federal system. In Maine, for example, the governor appoints judges subject to confirmation by a legislative committee whose decision is reviewable by the senate. At the conclusion of a seven-year term, the governor may reappoint the judge. In New Jersey, the governor appoints judges subject to senate confirmation. New Jersey judges serve an initial seven-year term and then may be granted life tenure by the governor. Virginia appoints its judges for 12-year terms through a majority vote of the members of each house of its General Assembly. Several state that elect their judges fill judicial vacancies by gubernatorial appointment until the next election. Only four states, Massachusetts, New Hampshire, New Jersey, and Rhode Island grant their judges lifetime tenure.

States employing some form of merit selection for initial terms include Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Mexico, New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Wyoming. California has a hybrid method of judicial selection featuring some characteristics of a pure appointive system and others of a merit system.

<sup>79</sup>Judicial Appointments White Paper Task Force, *supra* note 47, at 357. The four states are Rhode Island, South Carolina, Virginia and Connecticut.

<sup>80</sup>*Id.* at 359.

<sup>81</sup>*Id.* The first state to provide for direct election of appellate judges was Mississippi in 1832. *Id.*

appointment fosters “partisan politics, the possibility of cronyism, and the limitations imposed by the fact that it is likely that there will be only a narrow field of candidates known to the legislators.”<sup>82</sup> A majority of states now utilize some variation of merit selection.<sup>83</sup>

### C. Merit Selection

In 1940, Missouri became the first state in the nation to adopt a merit selection plan for the selection of state judges.<sup>84</sup> Since 1940, the issue of judicial selection has become a constant source of debate throughout the states.<sup>85</sup> Merit selection, a variant of the appointive system, is now one of the most prevalent methods for selecting judges in the United States.<sup>86</sup> Merit selection is now employed by at least thirty-three states.<sup>87</sup> Under the “Missouri Plan,” a commission<sup>88</sup> would nominate three candidates for every state judicial vacancy, and the governor would then appoint from the list.<sup>89</sup> The appointed judge would then have to face the voters in a retention election during the next general election.<sup>90</sup> Proponents of merit selection suggest that merit selection removes politics from the selection process, removes the need for campaign contributions, and allows for the selection of more qualified judges.<sup>91</sup>

While merit selection plans such as the Missouri Plan are a step in the correct direction, merit selection fails to address some of the primary concerns facing judicial selection. Despite not having to initially face voters in a general election, thus saving judicial candidates from being forced to take campaign contributions from individuals and businesses likely to have an agenda before the court, merit selection requires that the judge face the voters in a retention election. Even though the judge will run unopposed in a retention election, the same issues arise as a result of having to face the voters.<sup>92</sup> Marianna Brown Bettman, formerly an Ohio appellate judge now teaching at the University of Cincinnati College of Law, argues, “a real problem has emerged with retention elections. Some have become just as unseemly as the [2000 campaign between Justice Alice Robie Resnick and Judge Terrence

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<sup>82</sup>Behrens & Silverman, *supra* note 8, at 360.

<sup>83</sup>*Id.*

<sup>84</sup>Philip L. Dubois, *Voter Responses to Court Reform: Merit Judicial Selection on the Ballot*, 73 JUDICATURE 238, 239 (1990).

<sup>85</sup>Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 31-34 (May 1986).

<sup>86</sup>*See generally* Harry O. Lawson, *Methods of Judicial Selection*, 75 MICH. B.J. 20 (1996).

<sup>87</sup>Judicial Appointments White Paper Task Force, *supra* note 47, at 357.

<sup>88</sup>*Id.* at 362. Under the Missouri plan, the commission was composed of lawyers selected by the bar, laypersons selected by the governor, and a sitting judge. *Id.*

<sup>89</sup>*Id.*

<sup>90</sup>*Id.*

<sup>91</sup>Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom*, 41 S. TEX. L. REV. 1197, 1209 (2000).

<sup>92</sup>Judicial Appointments White Paper Task Force, *supra* note 47, at 363-364.



O'Donnell]—only the stealth attack groups don't even have to put forth their own candidate."<sup>93</sup> She suggests that the retention decision should be made by the same commission that made the initial recommendation, rather than by the voters in an election.<sup>94</sup> Bettman has hit on one of the key failings of traditional merit selection plans.

Retention elections under traditional merit selection plans are not the answer for Ohio as they subject the judge to rigors and expectations similar to partisan elections. Likewise, public financing of judicial elections does not provide the answer for the problem of judicial elections in Ohio. Ohio needs to adopt an appointive method for selecting judges. Judicial reform has been suggested in Ohio before without much success, however.

#### IV. OHIO'S REFORM EFFORTS

Ohio had the issue of judicial reform on the ballot in November 1987. Issue Three, as it was known, would have eliminated election of state appellate judges and established thirteen nominating commissions responsible for submitting candidates to the appointing authority for appointment to the twelve district courts of appeals and the Supreme Court.<sup>95</sup> Equal numbers of lawyers and laymen would have sat on the nominating commissions, with the lawyers being nominated for the commission by the district courts, and the governor nominating the laymen for the commission.<sup>96</sup> The commissions would be responsible for screening potential candidates and, when there was an opening, would forward three names to the governor who would then appoint one individual from the list submitted.<sup>97</sup> Under the Issue Three plan, the appointed judges would then be required to run unopposed in a retention election. To remain on the bench, the judge would then be required to have received at least a fifty-five percent approval vote.<sup>98</sup> The appointed judge would then be forced to face the voters in similar retention elections every six years.<sup>99</sup>

The principle proponents of Issue Three were the Ohio Bar Association (OBA) and the League of Women Voters (OLWV).<sup>100</sup> The OBA and the OLWV argued that an appointed judge would hold no electoral allegiance and thus would not be beholden to any one individual or group.<sup>101</sup> The OBA further advocated that moving

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<sup>93</sup>Marianna Brown Bettman, *A Better Way to Pick Judges: Ohioans Should Reconsider Merit Selection*, PLAIN DEALER (Cleveland), Nov. 30, 2000, at 11B.

<sup>94</sup>*Id.*

<sup>95</sup>Felice & Kilwein, *supra* note 33, at 194.

<sup>96</sup>*Id.*

<sup>97</sup>*Id.*

<sup>98</sup>*Id.*

<sup>99</sup>*Id.*

<sup>100</sup>Felice & Kilwein, *supra* note 33, at 194-95. The OBA and the League of Women Voters authored Issue Three. At least 40 other groups backed Issue Three including the Ohio Congress of Parents and Teachers, the Ohio Council of Churches. *Id.*

<sup>101</sup>*Id.* at 195. They argued that elected judges, "with an eye towards his or her next campaign, is more likely to allow his or her decisions to be affected by the interests of constituents."

to a merit selection plan would likely do away with Ohio's "name game."<sup>102</sup> The OBA also worried that the local political parties rather than the public as a whole held the key role in selecting judges.<sup>103</sup> The proponents used the media in order to get the message of merit selection across to the public,<sup>104</sup> focusing mainly on television ads, but also including newspaper advertisements.<sup>105</sup> They also created an information sheet called FACT, which attempted to list the problems inherent in the electoral system and offered merit selection as a means to fixing the judicial selection system.<sup>106</sup>

The major opponent to Issue Three was the Ohio chapter of the American Federation of Labor/Congress of Industrial Organizations (AFL/CIO).<sup>107</sup> The Ohio Republican Party as well as the Ohio Democratic Party also opposed Issue Three.<sup>108</sup> The opponents aired a series of advertisements that suggested that Issue Three would take away the public's right to vote.<sup>109</sup> The opponents emphasized the bipartisan opposition to Issue Three, and criticized the complicated structure of the proposal.<sup>110</sup> Once the opposition portrayed Issue Three as taking away the general public's right to vote, Issue Three was destined to fail.<sup>111</sup> Indeed, Issue Three failed by a two-to-

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<sup>102</sup>*Id.* at 196. This 'name game' is an interesting phenomenon that increases the electoral success of Ohio politicians who have particular last names, for example, Brown and Sweeney. Thus the ballots of many of Ohio's major elections are filled with these common names. Weisenberg argued that the potential exists that these 'name game' candidates have minimal qualifications for office their politically correct name, a problem he felt is exacerbated by the low level of information the average voter has for his or her choices in judicial elections.

<sup>103</sup>*Id.* (Explaining that the parties play the major role in determining who the judicial candidates would be with the public then merely choosing between those already selected by the parties).

<sup>104</sup>Felice & Kilwein, *supra* note 33, at 197-98.

<sup>105</sup>*Id.*

<sup>106</sup>*Id.*

The FACT pamphlet identified the following as examples of the problems with the current electoral method of selection of judges:

1. it virtually forces judicial candidates to conduct outrageously expensive political campaigns.
2. it discourages good candidates from seeking judgeships and encourages politicians to use judgeships as patronage plums.
3. it denies citizens the information they need to make sound judicial choices.
4. it turns judges into politicians and fundraisers.
5. in effect, the current method deprives Ohioans of their right to an impartial judicial system.

*Id.*

<sup>107</sup>*Id.* at 197.

<sup>108</sup>*Id.*

<sup>109</sup>Felice & Kilwein, *supra* note 33, at 198.

<sup>110</sup>*Id.*

<sup>111</sup>*Id.* at 199. The failure can be attributed to several factors. According to Weisenberg these were: the complexity of the issue, the effective job that the opponents did in framing this issue as one that solely involved 'the right to vote,' the difficulties that occurred in collecting the required petition signatures and the battles that took place in the courts to validate them, the weakness of the proponents' media ads, the nature of fund-raising capabilities of grass-

one count statewide and in eighty of Ohio's eighty-eight counties.<sup>112</sup> After the failure of Issue Three in 1987, the proponents of the issue expressed pessimism as to the future of merit selection in Ohio.<sup>113</sup>

## V. OHIO JUDICIAL ELECTIONS ON THE AIRWAVES

### A. *The 2000 Race for the Ohio Supreme Court*

"Lest you're worried...that Ohio might actually witness a statewide campaign that is not covered in muck, fret not. The race between O'Donnell and Resnick already is vying for the title of Ohio's ugliest in 2000."<sup>114</sup> A commercial run during the 2000 race between Alice Robie Resnick and Terrence O'Donnell asked the viewer: "Is justice for sale in Ohio?"<sup>115</sup> An independent activist group called Citizens for a Strong Ohio, in opposition to Justice Alice Robie Resnick's campaign for the Ohio Supreme Court, produced this ad.<sup>116</sup> Although the ad was labeled as issue advocacy rather than express advocacy, the emphasis was clearly on the candidate.<sup>117</sup> John Green, director of the Ray C. Bliss Institute of Applied Politics at the University of Akron, explained that while the advertisements sponsored by Citizens for a Strong Ohio may "technically abide by legal restrictions . . . very clearly, the intent of the ads is to influence people's choices of candidates."<sup>118</sup> Indeed, Justice Resnick remarked that she was "not a vindictive person, but they really did attack my honor and integrity."<sup>119</sup> Despite the ads that suggested that

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roots organizations like labor unions, and the fact that the major political parties and organized labor were opposed to the reform proposal.

<sup>112</sup>Felice & Kilwein, *supra* note 33, at 199.

<sup>113</sup>*Id.* at 200.

<sup>114</sup>Joe Hallett, *Ohio Supreme Court Race Features Outsider Mud*, COLUMBUS DISPATCH (Ohio), June 11, 2000, at 3B. The article concludes, "Maintaining judicial independence may be difficult after a campaign already noteworthy for its vitriol." *Id.*

<sup>115</sup>Darrel Rowland & James Bradshaw, *State Elections Panel Reaffirms Legality of Anti-Resnick TV Ad*, COLUMBUS DISPATCH (Ohio), Oct. 27, 2000, at 1D.

<sup>116</sup>Baker, *supra* note 25, at n.1.

<sup>117</sup>*Id.* Justice Resnick was confronted with negative ads in previous judicial races as well. Judge Harper ran an ad during their race which read:

On the Ohio Supreme Court, one Justice has a problem. It's money. Most of Resnick's money comes from just one place, the plaintiff lawyers who sue, sue, sue. Over \$300,000 just from them. This small group of using lawyers wants Resnick with her liberal rulings to make it easier for them to collect millions in fees. It's time for a change to Judge Sara Harper. Recommended, endorsed, highly rated, twenty years as a Judge, Marine Corps Lieutenant Colonel. Judge Sara Harper.

*Id.* at n.3.

<sup>118</sup>William Hershey & Mike Wagner, *Group Files Complaint About Anti-Resnick Ads*, DAYTON DAILY NEWS (Ohio), Oct. 18, 2000, at 1A. John Green added that he felt it was an embarrassment that Governor Taft had made fund-raising telephone calls on behalf of Citizens for a Strong Ohio.

<sup>119</sup>Mike Wagner, *Despite Negative Ads, Resnick Retains Seat*, DAYTON DAILY NEWS (Ohio), Nov. 8, 2000, at 1A.

Justice Resnick's vote could be bought, she soundly defeated Judge Terrence O'Donnell of the Eighth District Ohio Court of Appeals.<sup>120</sup> The attack ads during the 2000 campaign became so heinous that Chief Justice Thomas J. Moyer called for the legislature to require disclosure.<sup>121</sup> Despite Chief Justice Moyer's call to consider appointment of appellate level judges, the idea found stiff opposition in the Ohio legislature.<sup>122</sup>

Ohio Senate President Richard Finan announced that he was opposed to the idea of appointment.<sup>123</sup> The Ohio Democratic Party Chairman at the time, David Leland, announced that the re-election of Justice Resnick was among the great victories for his party during the 2000 election year.<sup>124</sup> Not surprisingly, Robert Bennett, Chairman of the Ohio Republican Party, backed a merit selection plan similar to that proposed by Chief Justice Moyer.<sup>125</sup> Reginald S. Jackson Jr., then president of the Ohio State Bar Association, stated that he felt the ads clearly conveyed the message that justice was for sale to the highest bidder.<sup>126</sup> The 2000 election was bad, but Ohio would see worse with the 2002 campaign.

### B. *The 2002 Race for the Ohio Supreme Court*

"If you liked the big-money, ideological free-for-all that was the 2000 Ohio Supreme Court race, you'll love the way things are shaping up this year."<sup>127</sup> Campaigning for the 2002 elections for the Ohio Supreme Court began early in January 2002 when the Ohio Democratic Party picked its two candidates for the fall race.<sup>128</sup> Judge Tim Black declared in response to being selected by the Ohio

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<sup>120</sup>T. C. Brown, *Top Judge Wants Ad Campaign Backers Identified*, PLAIN DEALER (Cleveland), Dec. 12, 2000, at 5B.

<sup>121</sup>*Id.* Those who contributed to "independent" efforts were able to remain anonymous. Moyer also called for Ohio to consider public financing and suggested that appellate level judges should be elected. Under Moyer's plan, judges would be appointed by a commission and would face retention elections.

<sup>122</sup>Julie Carr Smyth, *Legislators Uninterested in Appointed Judges: Chief Justice Seeking Allies to Push Idea*, PLAIN DEALER (Cleveland), Jan. 18, 2001, at 2B.

<sup>123</sup>*Id.* "Brett Buerck, chief of staff for House Speaker Larry Householder, said the issue wasn't even 'on the radar screen' of top legislative priorities."

<sup>124</sup>*Id.*

<sup>125</sup>*Id.* Bennett favored gubernatorial appointment rather than a commission based appointment.

<sup>126</sup>Joe Hallett, *Officials Ponder a Vaccine for Vicious Judicial Campaigns*, COLUMBUS DISPATCH (Ohio), Jan. 31, 2001, at 2B. Chief Justice Moyer stated:

Dissent is part of the American spirit, but to extract political revenge, to threaten the tenure of a judge over a decision with which some may disagree, places the judge in the same political position as a mayor or a legislator. It suggests that judges owe some members of their community something other than the impartial resolution of disputes.

*Id.*

<sup>127</sup>David Bennett, *Court in the Balance*, CRAIN'S CLEVELAND BUSINESS, Jan. 28, 2002.

<sup>128</sup>Editorial, *Court Seats Don't Belong to Groups*, DAYTON DAILY NEWS (Ohio), Jan. 16, 2002, at 6A.

Democratic Party: “This is labor’s seat.”<sup>129</sup> Judge Black admitted that he was attempting to motivate a particular set of supporters.<sup>130</sup> Similar to the 2000 election, issue advocacy groups made their mark.<sup>131</sup> A group called Informed Citizens of Ohio<sup>132</sup> ran “issue ads” aimed at supporting both Justice Evelyn Stratton in her re-election bid and Lt. Gov. Maureen O’Connor in her bid for the Ohio Supreme Court.<sup>133</sup> One ad run by Informed Citizens of Ohio depicts a young couple walking into their obstetrician’s office only to find it empty. The narrator states: “Little by little doctors are disappearing from the state of Ohio. Disappearing because frivolous lawsuits are forcing them to leave their practices. And when it’s your doctor, where do you go? Justice Evelyn Stratton’s record shows that she understands the need to stop lawsuit abuse and now so do you.”<sup>134</sup>

Consumers for a Fair Court ran another example of “issue advocacy.” This ad was against Justice Stratton. The ad said:

Their mothers took a drug called DES to prevent miscarriages. More than 400,000 women in Ohio, and when their daughters developed a form of cancer caused by DES, they asked Ohio’s Supreme Court for justice. But Eve Stratton said no. Eve Stratton said she had sympathy for the victims, but she gave sanctuary to the big drug companies. Their mothers took DES to prevent miscarriages, but Eve Stratton’s ruling is a miscarriage of justice.<sup>135</sup>

This ad suggested that Justice Stratton made her ruling based on a partiality toward big business rather than on any sound legal basis. An ad run by the citizens for an Independent Court advocated on behalf of Democrats Tim Black and Janet Burnside. The ad stated:

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<sup>129</sup>*Id.*

<sup>130</sup>*Id.* “Asked to expound about the remark, Judge Black says he’ll, of course, be ‘bound by the law,’ that he has no ‘preconceived’ notions, that his comments were meant to motivate Democrats and labor to support him. But the horse is out of the barn.” *Id.*

<sup>131</sup>Opinion, *Mocking the Voters Once Again, a Cynical Attempt to Influence Judicial Elections Threatens To Sink the Candidates It Seeks to Promote*, PLAIN DEALER (Cleveland), Sept. 9, 2002, at B6.

<sup>132</sup>*Id.* Informed Citizens of Ohio was formed by David Brennan, an Akron businessman and former Ohio Republican Party executive director. *Id.*

<sup>133</sup>*Id.*

<sup>134</sup>*At* [http://www.brennancenter.org/programs/buyingtime\\_2002/storyboard\\_2002\\_index.html](http://www.brennancenter.org/programs/buyingtime_2002/storyboard_2002_index.html). (Last visited Jan. 18, 2004) Another ad run by the Informed Citizens of Ohio shows two presumably plaintiff lawyers talking about their practice. They state: “At Brady and Lawrence we help you collect on your lawsuit. Say you’re stealing a hubcap and the car starts rolling over you hand. Well that could hurt and you could sue! Say you’re washing your poodle and you pop her in the microwave and she dies. That could hurt. And you could sue!” The announcer then says: “Frivolous lawsuits cost your family \$2500 a year. Justice Evelyn Stratton’s record shows that she protects your family by fighting lawsuit abuse.” *Id.*

<sup>135</sup>*Id.* Another ad by Citizens for an Independent Court stated, “We need Justices who protect people, not corporations.” *Id.*

Their side: Maureen O'Connor and Eve Stratton put large corporations ahead of working families. Our side: Judges Tim Black and Janet Burnside will hold large corporations accountable for wrongdoing. Their side: Eve Stratton sided with the big insurance companies ninety-four percent of the time. Our side: Judges Black and Burnside will put our courts back on the side of workers and families. Judges Tim Black and Janet Burnside. They're on our side.<sup>136</sup>

This ad clearly suggested that justices should take sides rather than upholding the law, regardless of their personal political bent. During the 2002 judicial elections, Ohio was subjected to more television ads than in any other state with a Supreme Court judicial race.<sup>137</sup> The amount and nature of the ads spurred many prominent individuals to call for change.<sup>138</sup> As Chief Justice Moyer said in reference to the large sums of money spent by independent organization: "We have been subjected to the dark side of democracy."<sup>139</sup> Advertisements during the 2000 and 2002 judicial campaigns evidenced the need for reform in Ohio.

#### VI. JUSTICE UN-GAGGED: TIME TO TAKE SIDES

In June 2002, the United States Supreme Court pushed open the door allowing room for even more judicial partiality in state elections.<sup>140</sup> In the case before the Court, *Republican Party of Minnesota v. Kelly*, Minnesota had adopted a canon of judicial conduct that prohibited a judicial candidate in a state election from announcing his or her personal views on a disputed legal or political issue.<sup>141</sup> A candidate for the Supreme Court of Minnesota, Gregory Wersal, challenged the announce clause, arguing that it violated his right to free speech.<sup>142</sup> Justice Scalia's majority opinion held that Minnesota could not keep a judicial candidate from "announcing his or her views on disputed legal or political issues."<sup>143</sup>

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<sup>136</sup>*Id.*

<sup>137</sup>Torry, *supra* note 11.

A study shows that candidates and special-interest organizations spent at least \$5.6 million on television ads in Ohio—far more than the combined total in the other eight states with TV ads for Supreme Court races. The report...reveals that Ohio residents were deluged with 29 commercials that aired more than 13,000 times, compared with eight ads that aired fewer than 3,600 times in Alabama, where the second-highest amount of money for ads was spent.

*Id.*

<sup>138</sup>*Id.* Geri Palast, executive director of Justice at Stake Campaign aid: "And when a state's judicial elections are targeted by special interests, courts find themselves caught in a 'perfect storm' of big money and partisan pressure." Alfred P. Carlton, president of the American Bar Association said: "This spending brings questions of a candidates allegiance, and with respect to judges, whether or not they can be impartial on the bench." *Id.*

<sup>139</sup>*Id.*

<sup>140</sup>*See generally*, *Republican Party of Minnesota v. Kelly*, 536 U.S. 765 (2002).

<sup>141</sup>*Id.*

<sup>142</sup>*Id.*

<sup>143</sup>*Id.* at 788.

The Court applied strict scrutiny, which requires that a statute have a compelling government interest that is narrowly tailored to meet that interest. The Court held that the statute was not sufficiently narrowly tailored to serve the government's interest in the impartiality of its judiciary.<sup>144</sup> The Court further held that the announce clause was not a compelling government interest.<sup>145</sup> The Court reasoned it was not a compelling government interest since it is extremely difficult, and perhaps impossible, to find a judge who does not have a pre-conception about the law.<sup>146</sup> However, in separate dissents, Justices Ruth Bader Ginsburg and John Paul Stevens argued that judicial elections are inherently different from other types of elections, and that the burden Minnesota placed on judicial campaign speech was permissible in order to meet the compelling interest of maintaining an independent judiciary.<sup>147</sup>

Despite the reasoning in the dissents, the Supreme Court effectively "endorsed an anything-goes, political-free-for-all system of electing judges."<sup>148</sup> Roy A. Schotland, a professor of law at Georgetown University Law Center said the decision "shows how unrealistic five justices can be about what happens in judicial election campaigns, and also—ironically—about how much judges differ from legislators and others who run for office."<sup>149</sup> Schotland believes, as a result of the decision in *Republican Party of Minnesota v. White*, that the quality of judicial candidate pools will diminish since potentially good judges will be less willing to seek election.<sup>150</sup>

After the ruling was announced, Judge Tim Black, candidate for the Ohio Supreme Court opined: "It makes judges much more susceptible to being politicians than we've ever been before. It will change the tenor and tone of judicial campaigns."<sup>151</sup> Lt. Gov. Maureen O' Connor, Black's Republican opponent, commented: "If my personal opinion on a topic is of interest to a voter or group, I certainly would express it."<sup>152</sup> The unfortunate result of the Supreme Court's ruling will be a further politicizing of the already mired judicial election process. While candidates for legislative and executive offices are representatives of the people, and thus may make promises and can be held accountable for them if they do not follow-through on their promises, judges are not representatives of the people.<sup>153</sup> Judges

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<sup>144</sup>*Id.* at 765.

<sup>145</sup>*Id.*

<sup>146</sup>*Id.*

<sup>147</sup>*Id.* at 797-808.

<sup>148</sup>Editorial, *High Court Invites Chaos in Judicial Races*, DAYTON DAILY NEWS (Ohio), July 5, 2002, at 10A. The editorial goes on to say: "It's as though the court turned loose a five-justice wrecking crew on judicial integrity and independence. As a result, Ohio needs judicial election reform more urgently than ever." *Id.*

<sup>149</sup>Roy A. Schotland, *Should Judges Be More Like Politicians?*, 39 AM. JUDGES ASS'N CT. REV. 8, at 8 (Spring, 2002).

<sup>150</sup>*Id.*

<sup>151</sup>Randy Ludlow, *Court Ruling Opens up Judge Races*, CINCINNATI POST (Ohio), July 15, 2002, at 1A.

<sup>152</sup>*Id.*

<sup>153</sup>Marianna Brown Bettman, *Judges' Free Speech*, CINCINNATI POST (Ohio), July 29, 2002, at 8A.

must make decisions based on the law and the facts of each specific case before them, not on campaign positions or their own personal views on controversial issues.<sup>154</sup>

#### VII. THE AMERICAN BAR ASSOCIATION STATES THE CASE

Recognizing the need for a more cohesive statement on the qualifications of judges and the ability to select judges with the proper qualifications, in 1999, the American Bar Association (ABA)<sup>155</sup> established a "Commission on State Judicial Selection Standards (Commission)."<sup>156</sup> The ABA charged the Commission to draft model standards for selecting state court judges.<sup>157</sup> The Commission took the stand that financial contributions to judicial elections are a major reason for "distrust in the integrity and independence of the judicial systems."<sup>158</sup> The Commission then made recommendations for improving judicial selection, which in turn will improve the public's perception of the judiciary.<sup>159</sup> The Commission started with a two-part thesis that suggested: 1) that there is an implied covenant with the public that those who are selected to be judges will have the qualifications necessary to administer justice; and 2) that there should be some deliberative body that screens judicial candidates to ensure that the standards are met.<sup>160</sup>

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<sup>154</sup>*Id.*

<sup>155</sup>ABA Comm. on State Judicial Selection Standards, *Standards on State Judicial Selection*, at vi. (July 2000) [hereinafter Commission].

How do we identify individuals with the requisite qualifications to assure us that they will perform the judicial task with distinction and, given the reality that no one becomes a judge without being touched by the political brush, how do we assure that only those with the requisite qualities become judges? That is our task.

*Id.*

<sup>156</sup>*Id.* The members of the Commission included Edward W. Madeira, Jr., Patricia G. Brady, Shelley A. Longmuir, Hon. Thomas J. Moyer, Hon. Cara Lee Neville, Andrea Sheridan Ordin, Joseph P. Tomain, Marna S. Tucker, Hon. James A. Wynn, Jr., James J. Alfini, Jarrett Gable, Luke Bierman, and Eileen C. Gallagher. *Id.*

<sup>157</sup>*Id.* at vi. The Commission was funded by a grant from the Open Society Institute.

<sup>158</sup>Commission, *supra* note 154, at x.

<sup>159</sup>*Id.*

<sup>160</sup>*Id.* at 1.

There is a two-part thesis for our recommended standards. First: whatever the system for selection of state trial and appellate judges, there is an implied covenant with the people that the judges selected will be persons who have demonstrated by well-defined and well recognized qualifications their fitness for judicial office. Second: there should be a credible, deliberative body that, pursuant to published criteria and procedures, finds that persons considered for judicial office are qualified, by learning, experience and temperament, to decide the cases that come before them impartially and in accordance with the law.

*Id.*



A. *The ABA Judicial Selection and Retention Criteria*

The Commission recommended that, at a minimum, a judicial candidate should be a member of the Bar of the highest court of a state for ten years and, further, that the candidate should have been actively practicing or teaching during those ten years.<sup>161</sup> In addition, the judicial candidate should be of high moral character including a reputation for honesty.<sup>162</sup> Further, the candidate must be professionally competent, and have a judicial temperament conducive to the administration of justice.<sup>163</sup> While the standards supplied by the Commission outline the type of individual we as a public should be looking for in a potential jurist, the standards by themselves do not ensure that potential candidates will volunteer any information about themselves or their background which would put them outside of the standards. Thus, enforcement of the standards becomes a key ingredient to the effectiveness of the standards.

B. *Primary Actors in Judicial Selection as Outlined by the Commission*

The Commission suggests that primary actors in the judicial selection process should be a judicial eligibility commission, a judicial nominating commission, and the appointing authority.<sup>164</sup> The Commission sets out what the role of each primary actor should be in the selection process, with the first actor being the judicial eligibility commission.<sup>165</sup>

1. *Judicial Eligibility Commission*

The role of the Judicial Eligibility Commission would be to review the qualifications of judicial candidates and forward its findings to the appointing authority, endorsing authority, or the electorate. The Judicial Eligibility Commission would be required to remain independent from appointing and endorsing authorities, as well as from any inappropriate influence in order to express the commission's opinions about the judicial candidates based only on the commission's independent findings.<sup>166</sup> Establishing the independence of the eligibility commission begins with the selection of the individual members of the commission.

While the Commission states that there is no rigid model, the Commission suggests that the judicial eligibility commission should be composed of both lawyers

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<sup>161</sup>*Id.* at 7

<sup>162</sup>Commission, *supra* note 154, at 7.

<sup>163</sup>*Id.* Under the ABA standards, professional competence includes: "intellectual capacity, professional and persona judgment, writing and analytical ability, knowledge of the law and breadth of professional experience, including courtroom and trial experience." Judicial temperament includes: "a commitment to equal justice under law, freedom from bias, ability to decide issues according to law, courtesy and civility, open-mindedness and compassion." The Commission further states that a judge should provide service to the law and contribute to the effective administration of justice. *Id.*

<sup>164</sup>*Id.* at 9-20 The Commission also puts emphasis on an endorsing authority and a retention evaluation body.

<sup>165</sup>*Id.* at 9.

<sup>166</sup>Commission, *supra* note 154, at 9-10.

and non-lawyers.<sup>167</sup> The Commission gives an example of what a typical method of selecting the individual members might be by suggesting that the Governor select two non-lawyer members, the Legislature select two non-lawyer members, the Supreme Court select two lawyer members and the State Bar Association select three lawyer members.<sup>168</sup> After the judicial eligibility commission's members have been selected, a chair would be appointed by the governor and only vote to break a tie.<sup>169</sup> Individuals seeking judicial office would be required to submit their names, and all information they have available, consistent with the selection standards to the judicial eligibility commission.<sup>170</sup> This disclosure by the judicial candidates would be extremely important to the overall effectiveness of the judicial eligibility commission as well as to the judicial selection process as a whole, including the public's perception that the method of selecting judges is both non-partisan and free from any bias.<sup>171</sup> Upon receipt of a judicial candidate's information, either from the candidate or through an endorsing or appointing authority, the judicial eligibility commission should then carefully and fairly examine the information, and then determine whether the candidate is qualified based on the selection criteria; no candidate should be deemed qualified unless at a minimum the candidate meets the selection criteria.<sup>172</sup> In order to further insulate the judicial eligibility commission from any bias or perception of bias, the commission should be funded and run at the state level with state funds.<sup>173</sup>

## 2. Judicial Nominating Commission

Similar to the judicial eligibility commission, a judicial nominating commission's role is also to screen judicial candidates and forward a list to an appointing authority. The Commission even states that if there is a judicial nominating commission that is effective and "operating satisfactorily as [a] credible, deliberative [body], there is no need for a Judicial Eligibility Commission."<sup>174</sup> The nominating commission should be: 1) independent, 2) have a member selection plan, which minimizes bias, and 3) have an open process, which also ensures the confidentiality of the judicial candidates.<sup>175</sup> Just like the judicial eligibility commissioners, the nominating commissioners should actively recruit individuals for screening in order to expand the potential pool of good applicants since many qualified individuals will not seek a judgeship on their own.<sup>176</sup> Like the judicial eligibility commission, after screening

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<sup>167</sup>*Id.*

<sup>168</sup>*Id.* at 10.

<sup>169</sup>*Id.* The Commission further suggests that no commissioner serve for more than two three-year terms and that the terms of the commissioners should be staggered.

<sup>170</sup>*Id.*

<sup>171</sup>Commission, *supra* note 154, at 8.

<sup>172</sup>*Id.* at 10-11.

<sup>173</sup>*Id.* at 11.

<sup>174</sup>*Id.* at 9-10.

<sup>175</sup>*Id.* at 12.

<sup>176</sup>Commission, *supra* note 154, at 13.

the applicants to ensure they meet the established criteria, the judicial nominating commission should forward a list of names to the appointing authority.<sup>177</sup>

### 3. Appointing Authority

The Appointing Authority's primary goal is to ensure a qualified and independent judiciary. The Appointing Authority is typically going to be the governor of the state, but could also be the legislature or the state supreme court.<sup>178</sup> "The appointing authority should only appoint from [a] list [] of qualified candidates submitted to the appointing authority by either a judicial eligibility commission or a judicial nominating commission."<sup>179</sup> Similar to the recommendations of the Commission as to the eligibility and nominating commissions, the Commission suggests that the Appointing Authority utilize an open and regularized process.<sup>180</sup> An open and regularized process "promotes objectivity by reducing the influence of inappropriate political pressures, and thereby adds legitimacy to the outcome."<sup>181</sup> The use of either a judicial eligibility or judicial nominating commission will lessen the effects of outside influences on the appointing authority since the appointing authority will only be able to appoint off of the list provided by one of the commissions.<sup>182</sup>

### 4. Retention Evaluation Bodies

The Commission also discusses the use of retention evaluation bodies for the purpose of retention elections.<sup>183</sup> In addition to the criteria for initial selection, the criteria to be used in evaluating judicial performance for the purposes of retention would be preparation, attentiveness and control of judicial proceedings, judicial

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<sup>177</sup>*Id.* at 14.

<sup>178</sup>*Id.* at 5.

<sup>179</sup>*Id.* at 15.

<sup>180</sup>*Id.* at 15.

<sup>181</sup>Commission, *supra* note 154, at 16. Further, an open and regularized process "heightens the likelihood of achieving the goals of a qualified, inclusive, and independent judiciary. An open selection process will assist in the recruitment of a diverse candidate pool, thereby promoting the goal of achieving a judiciary that is representative of our society particularly in terms of race, ethnicity, gender, and age or other indicia of diversity."

<sup>182</sup>*Id.* at 16.

<sup>183</sup>*Id.* at 17-18. The Commission also discusses Endorsing Authorities.

B.4: Endorsing Authority. The primary goal of individuals or official bodies who are responsible for endorsing judicial candidates for election should be to facilitate the selection of qualified, inclusive, and independent judiciary. (a) Open, Regularized Process. In endorsing judicial candidates, the endorsing authority should use an open, regularized process to review the qualifications of judicial candidates. The endorsing authority should endorse only those candidates who appear on lists of qualified candidates submitted by the Judicial Eligibility Commission. (b) Selection. In reviewing the qualifications of candidates submitted by a Judicial Eligibility Commission, the endorsing authority should consider a broad range of publicly disclosed criteria. (c) Use of a Judicial Eligibility Commission. The endorsing authority should encourage the use of a Judicial Eligibility Commission.

*Id.*

management skills, courtesy to litigants, counsel and court personnel, public disciplinary sanctions, and the quality of judicial opinions.<sup>184</sup> The Commission suggests that the retention body use surveys with questions that would elicit critical and specific responses, directed at those persons who had direct contact with the sitting judge.<sup>185</sup> After the retention body has conducted the survey and evaluated the judges, the information should be disseminated to as much of the voting public as feasible.<sup>186</sup>

The Commission on State Judicial Selection Standards delivered a set of standards that, if enforced, would improve the independence and quality of the state judiciary. The key to the Commission's suggestions is the use of either a judicial eligibility commission or a judicial nominating commission operating under a mandate to screen potential judicial candidates to ensure they meet the criteria set out as the minimum for judicial selection. Under the Commission's plan, the Appointing Authority would have a list of candidates who meet the qualifications, and the Appointing Authority may then make a selection without the appearance of any direct bias towards any one individual.

#### VIII. TOWARDS REFORM IN OHIO—A CALL BY CHIEF JUSTICE MOYER

Speaking at the 2002 annual meeting of the Ohio State Bar Association, Chief Justice Moyer called for reform in the manner Ohio selects judges.<sup>187</sup> Chief Justice Moyer expressed his hope that the citizens of Ohio will at some point become convinced that Ohio should change the method of selecting judges.<sup>188</sup> However, he stated that the day had not yet come, and proceeded to outline eight actions<sup>189</sup> he believed would move Ohio in the right direction.<sup>190</sup> The first action Moyer suggested was to increase the length of term in office to at least eight years, which he felt would help achieve an appropriate balance between independence in the judge's decision making and accountability to the voters as well as reducing the frequency that judges must engage in fundraising.<sup>191</sup> The second action would be to increase the current six-year practice requirement to at least a ten-year practice requirement.<sup>192</sup> The third action Moyer suggested was to adopt the American Bar Association's Standards on Judicial Qualifications<sup>193</sup> stating, "[s]ome voters

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<sup>184</sup>*Id.* at 7.

<sup>185</sup>Commission, *supra* note 154, at 19.

<sup>186</sup>*Id.* at 20.

<sup>187</sup>Chief Justice Thomas J. Moyer, Address at the Annual Meeting of the Ohio Bar Association (May 16, 2002), at [http://www.sconet.state.oh.us/Communications\\_Office/Speeches/2002/0516cjm.asp](http://www.sconet.state.oh.us/Communications_Office/Speeches/2002/0516cjm.asp) [hereinafter Speech]. (Last visited Feb. 9, 2003).

<sup>188</sup>*Id.*

<sup>189</sup>*Id.*

<sup>190</sup>*Id.*

<sup>191</sup>Speech, *supra* note 186.

<sup>192</sup>*Id.* He suggested that the ten year requirement be for trial courts and that appellate courts and the Supreme Court should have a requirement in excess of ten years. *See id.*

<sup>193</sup>*Id.*

acknowledge that in deciding between two judicial candidates, they flip a coin. With the creation of qualification committees, the voters win—heads or tails.”<sup>194</sup> He also suggested that more should be done to inform the voters about the candidates and that the General Assembly should adopt legislation requiring individuals and organizations to report their contributions.<sup>195</sup> Moyer suggested that the Ohio Assembly should adopt H.B. 201, and work at utilizing campaign conduct committees.<sup>196</sup> As a last action item, Chief Justice Moyer suggested that, if Ohio continues using the elective process to select justices for the Supreme Court, public funding of those elections should be considered.<sup>197</sup>

Chief Justice Moyer’s plan, which utilizes the American Bar Standards for selection standards, is a step in the correct direction. However, the Moyer plan is only a bridge between Ohio’s current electoral process of selecting judges and a more appointive method, which Moyer hopes will be implemented in Ohio’s future.<sup>198</sup> According to Moyer, “[t]he election of judges in 2002 no longer ensures the independence and the perceived impartiality of the judiciary. Campaign fundraising has created the misperception that fairness comes at a price.”<sup>199</sup> We need to go further than the Moyer plan suggests by rejecting the popular election of judges and instituting an appointive method for the selection of judges in Ohio.

#### IX. CONCLUSION—FULL REFORM IN OHIO

Ohio needs reform, as public confidence in the judiciary is low.<sup>200</sup> Campaign contributions in judicial campaigns give the appearance of impropriety.<sup>201</sup> Judicial elections may discourage qualified candidates from running.<sup>202</sup> Ohio needs to adopt the criteria for judicial selection as outlined by the American Bar Association’s Standing Committee on Judicial Independence.<sup>203</sup> Specifically, Ohio should require any judicial candidate to have been actively practicing for at least the previous ten years.<sup>204</sup> The judicial candidate should be of strong moral character and enjoy a good reputation in the community.<sup>205</sup> In order to evaluate a potential jurist’s

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<sup>194</sup>*Id.*

<sup>195</sup>Speech, *supra* note 186. “I propose that the legislation provide that if an organization expends an aggregate of \$10,000 on a judicial campaign, the names of individuals who contribute \$500 or more to the organization, and the names of groups which contribute at least \$2,000 to the organization, should be publicly reported.” *Id.*

<sup>196</sup>*Id.*

<sup>197</sup>*Id.*

<sup>198</sup>*Id.*

<sup>199</sup>*Id.*

<sup>200</sup>*See supra* Part II.B.

<sup>201</sup>*See supra* Part II.A.

<sup>202</sup>*See supra* Part II.C.

<sup>203</sup>*See supra* Part VII.

<sup>204</sup>Commission, *supra* note 154, at 7.

<sup>205</sup>*Id.*

qualifications, a Judicial Eligibility Commission should be established at the state level and funded with Ohio state revenue. The members of the Judicial Eligibility Commission should be selected in the manner suggested by the American Bar Association Commission on State Judicial Selection Standards.<sup>206</sup> All judicial candidates should be required to submit all pertinent information to the Judicial Eligibility Commission for review. The Judicial Eligibility Commission should then conduct a full review of the candidate and make an objective determination as to whether the candidate meets the selection criteria. Once the Judicial Eligibility Commission has made its review, the commission should forward an alphabetized list of all potential judges to the Governor. Unlike the typical judicial nominating commission, which would only forward three names for every open position, the judicial eligibility commission should forward all the names of qualified candidates to the appointing authority. The Governor, as the appointing authority must select a candidate from the list provided by the Judicial Eligibility Commission and then forward that name to the state Senate. The fact that the appointing authority may only select a candidate off of the list submitted by the Judicial Eligibility Commission will help ensure that there is no real or apparent cronyism. The Senate would then have approval authority over the Governor's selection similar to the role of the United States Senate in federal judicial appointments. The Senate should be required to approve a candidate by majority vote, and any candidate not receiving a majority vote should not receive the appointment.

After a judicial candidate has been approved by a majority of the Senate, the judge should sit for a period of two to four years at which point the judge should be re-evaluated by a retention evaluation body.<sup>207</sup> The retention evaluation body should be at least a three-person panel composed of members of the Judicial Eligibility Commission serving on a rotating basis. The retention evaluation body should review the judge's judicial record and compare the judge's record against the standards set by the eligibility commission and forward a report to the Senate. The report should include not only the same evaluative data used by the Judicial Eligibility Commission, but also information relating to the judge's preparation, judicial management skills, quality of judicial opinions, and any other information the retention body believes to be appropriate. This information can be collected from court records, evaluation surveys filled out by attorneys who have appeared before the judge, and from any means the retention body deems appropriate. I propose that Ohio should not adopt the practice of retention elections as typically found in merit selection plans.<sup>208</sup> Retention elections subject the judge to similar pressures as initial elections. Instead of subjecting the sitting judge to a retention election, the state Senate, after receiving the findings of the retention evaluation body, should vote to either retain the judge or dismiss the judge. Provided the Senate by majority vote chooses to retain the judge, the judge should receive a term in office not less than ten years.

The method of judicial selection in Ohio is in dire need of reform. The rhetoric in judicial campaigns is tumbling out of control and with the recent Supreme Court

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<sup>206</sup>*See supra* Part VII.B.

<sup>207</sup>*See supra* Part VII.B.4-VIII.

<sup>208</sup>*See supra* Part III.C.

decision in *Republican Party of Minnesota v. Kelly*, the situation will likely only get worse.<sup>209</sup> Ohio needs to look to the example of the founding fathers when they set up the federal judiciary providing for a fully appointed judiciary. Despite the difficulty in moving to an appointive method of selecting judges in Ohio, as evidenced by the previous attempts,<sup>210</sup> Ohio needs to make the radical change to an appointive method of selecting judges as outlined above in order to shore up public confidence in the judiciary and ensure the integrity and impartiality of the courts.

BRADLEY LINK

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<sup>209</sup>See generally Schotland, *supra* note 148.

<sup>210</sup>See *supra* Part IV.