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The Essentials and Expendables of the Missouri Plan

The 2009 Earl F. Nelson Lecture

*Sandra Day O'Connor*¹

This speech was presented by Sandra Day O'Connor at the University of Missouri School of Law on February 27, 2009. It is the 2009 Earl F. Nelson Lecture and was part of the symposium titled "Mulling over the Missouri Plan: A Review of State Judicial Selection and Retention Systems." The author has modified the speech and added citations for publication purposes.

It is an honor to have been asked to give this year's Earl F. Nelson Lecture, and I want to thank the University of Missouri School of Law, the *Missouri Law Review*, and Dean Lawrence Dessen for the invitation. I am conscious of the history of this lecture series, which started in 1955 and can claim a number of Supreme Court Justices, accomplished jurists, academics, politicians, and public figures as speakers.² I am happy to join their ranks. And having seen the list of past speakers, I noticed that there were a couple of years where two speakers shared the podium, so I appreciate you trusting me to give this year's lecture by myself.

We are here to discuss a matter of importance to me. The question of how we choose our judges, whom we entrust to uphold and interpret our laws, speaks to foundational principles of our judiciary and, indeed, our nation. But it is a question that our states have been unable to answer with a unified voice. While our federal judges are selected through presidential appointment, by and with the advice and consent of the Senate, the states of our nation have reached no consensus regarding how to select judges. Some states elect their judges through partisan elections, while others use non-partisan elections; some states use legislative or gubernatorial appointment, and some of those states use judicial nominating commissions to help the appointment process. Most states are not of one mind and use some combination of these selection methods.³

I do not doubt that the various methods of judicial selection are all guided by the same goal: an impartial administration of the law through

1. Associate Justice, Retired, Supreme Court of the United States.

2. The pamphlet distributed in conjunction with the 2007 Earl F. Nelson Lecture provides a list of past speakers (and the 2008 speaker was Judith Resnik). It is available at <http://www.law.missouri.edu/faculty/symposium/pdf/2007earlfnelson.pdf>.

3. The American Judicature Society offers a state-by-state list of judicial-selection methods. AM. JUDICATURE SOC'Y, METHODS OF JUDICIAL SELECTION, available at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm.

judges who follow the law. Most of our disagreements focus not on whether we share these goals but on how best to achieve them. These disagreements are not likely to be resolved today, so I will be modest in my ambitions for this speech. I will focus on Missouri's special role in this debate, both as a leader of judicial independence and as a target for those who would marginalize it.

The first part of my speech will focus on the shared history of our nation and of Missouri. Both this nation's and this state's careful guarding of judicial independence can be traced back to the grave abuses each experienced in the past. These histories provide cautionary tales and provide a backdrop for understanding the values that we sought to protect in implementing our current methods of judicial selection.

My second objective is to stress that, as instructive as this past is, we are at a new and critical point in history. While the debate about judicial selection has persisted for centuries, the climate has changed dramatically. In states that elect their judges, the expense and volatility of judicial campaigns have risen to obscene levels. Money is pouring into our courtrooms by way of increasingly expensive judicial campaigns. Litigants are attempting to buy judges along with their verdicts, and the public's trust in our courts is rapidly deteriorating as a result.⁴ I believe these new circumstances should reorient and reinvigorate the debate over judicial selection.

My third and final goal is to discuss, in light of these histories and expanding threats, what we can do better to protect the independence and reputation of our judiciary, across the nation as well as here in Missouri. While I favor a merit-selection system, which has become synonymous with Missouri,⁵ it is important to remember that the plan's value relies entirely on its premise of removing, or at least diminishing,⁶ the politics in judicial selec-

4. See Kathleen Hall Jamieson & Bruce W. Hardy, *Will Ignorance and Partisan Election of Judges Undermine Public Trust in the Judiciary?*, DAEDALUS, Fall 2008, at 11 (linking ignorance and judicial elections to decreasing trust in American judiciary); see also ANNENBERG PUBLIC POLICY CENTER, PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS: 2007 ANNENBERG PUBLIC POLICY CENTER JUDICIAL SURVEY RESULTS (2007), <http://www.law.georgetown.edu/Judiciary/documents/finalversionjudicialfindingsoct1707.pdf> [hereinafter 2007 Annenberg Survey].

5. I have previously detailed my reasons for this preference in articles and columns, perhaps most thoroughly in a piece for the *Arizona Law Review* last year. Sandra Day O'Connor & Ronnell Andersen Jones, *Reflections on Arizona's Judicial Selection Process*, 50 ARIZ. L. REV. 15 (2008); see also Sandra Day O'Connor, *Justice For Sale: How Special-Interest Money Threatens the Integrity of Our Courts*, WALL ST. J., Nov. 15, 2007, at A25.

6. It might be better to speak of reducing the politics to a tolerable level, rather than eliminating them altogether. As one observer noted, "You can't remove politics from the process. You might as well ask dogs not to chase cats, and cats not to chase birds, and birds not to eat worms. There will always be a degree of politics in the selection of judges." See Bill McClellan, *Nonpartisan Court Plan May Not Be So Nonpartisan*, ST. LOUIS POST-DISPATCH, July 27, 2007, at C1.

tion. If it fails to do that, it fails on its first principles. Thus, even states that use a merit-selection system to select judges should scrutinize their plans to preserve what is essential to judicial independence and reform those aspects of the plan that are expendable and might otherwise endanger the whole.

As you already know, in the 1760s there were extraordinary tensions over whether the colonists could be taxed by a British Parliament in which they had no representation. The colonial sentiment of that time is still emblazoned on our license plates in Washington D.C., which read, with a sense of derision, "taxation without representation."⁷

But colonists found some refuge in the colonial courts. While the courts were generally unwilling to defy Royal Acts or Acts of Parliament openly, they would sometimes obstruct them by refusing to assist those charged with executing them.⁸ The British government responded in 1772 by funding colonial judges' salaries through revenues collected under the authority of the Townshend Revenue Act of 1767,⁹ which might be most familiar to you as enacting a duty of three pence for every pound of imported tea. This gave colonial judges a monetary interest in enforcing the Townshend Acts that many colonists believed were beyond the authority of Parliament.¹⁰ It also removed one of the colonists' only means of controlling public officials, namely, by controlling their salaries.

Responding to the British attempt to control judges' salaries, along with the fact that judges would only serve during the King's pleasure, the Boston Committee of Correspondence had this to say in a 1772 letter titled "A List of Infringements and Violations of Rights":¹¹

This will if accomplished compleat our slavery. For if taxes are raised from us by the Parliament of Great Britain without our consent, and the men on whose opinions and decisions our properties liberties and lives, in a great measure depend, receive their support from the Revenues arising from these taxes, we cannot, when we think on the depravity of mankind, avoid looking with horror on

7. The District of Columbia also attempted to place this slogan on its 2009 commemorative quarter, but the U.S. Mint rejected the design. Associated Press, *Ellington Quarter Released*, N.Y. TIMES, Feb. 25, 2009, available at <http://query.nytimes.com/gst/fullpage.html?res=9B03E7D7133BF936A15751C0A96F9C8B63> ("Last year, the Mint rejected a proposed design for the District of Columbia quarter that included the slogan 'Taxation Without Representation,' a phrase borrowed by residents to voice objections that they pay federal taxes without voting representation in Congress.").

8. See Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 683 & n.70 (1980) (providing examples).

9. 7 Geo. 3, ch. 46 (1767).

10. See Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1142-45 (1976).

11. Boston Town Records, 1770-1777, in 18 BOSTON RECORD COMMISSIONERS 99 (1887).

the danger to which we are exposed. . . . [O]ur Judges hold their Commissions only during pleasure; the granting them [sic] salaries out of this Revenue is rendering them dependent on the Crown for their support.¹²

The Committee's outcry contributed to rebellions, such as the Boston Tea Party the following year, which in turn helped spark the Revolution.¹³ The Declaration of Independence later echoed the same sentiments when it listed as one of the primary grievances against King George III that he had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."¹⁴

This history is somewhat ambiguous with regard to the importance of an independent judiciary, because one could fairly conclude that the colonists' complaint was not that judges were being controlled by politicians but that they were being controlled by politicians an ocean away rather than those at home. But when it came time to draft a Constitution, it became evident that our Founding Fathers sought to protect judicial independence from the whims and impulses of a majority here at home as well. The Constitution, of course, protects our federal judges with life tenure, at least during good behavior, and a salary which cannot be diminished.¹⁵ And when, at the Constitutional Convention, John Dickinson of Delaware proposed that federal judges might be removed by a more expedient means than impeachment – "that they may be removed by the Executive on the application by the Senate and the House of Representatives" – the other delegates decried it as "fundamentally wrong to subject judges to so arbitrary an authority" and "weakening too much the independence of the Judges."¹⁶ His proposal received only one vote.¹⁷

I mention this history to draw a simple point that is often drowned out in debates over how we select our judges. The Founders of our Nation, having narrowly escaped the grasp of a tyrannical government, saw fit to render federal judges independent of the political departments with respect to their tenure and salary as a way of ensuring they would not be beholden to the political branches in their interpretation of laws and constitutional rights. This revolutionary promise – that our government would be restrained internally from the tyrannical and impulsive abuses of power that it might otherwise levy against its constituents¹⁸ – can only be fulfilled if the judicial power

12. *Id.* at 102.

13. Smith, *supra* note 10, at 1147-53.

14. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

15. U.S. CONST. art. III, § 1.

16. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 428-29 (Max Farrand ed., 1966).

17. *Id.* at 429.

18. While this promise's historical pedigree is strong, its justifications are still debated today. Alexander Bickel famously referred to this promise in terms of "the counter-majoritarian difficulty," posing the question of how a nonelective judiciary

is kept distinct from the political branches. Otherwise the promise can be broken with impunity. This idea set America apart, allowed it to endure, and has been emulated around the globe.

I do not think that I can make a stronger argument than history has already made on behalf of an independent judiciary. Those clamoring for a judiciary that acts merely as a reflex of popular will and those who would offer you the false choice between an independent and an accountable judiciary shoulder the burden of rebutting this history and the long-held ideal that a judge's sole concern must be the law. As we discuss methods of judicial selection, our first question should be to ask how closely each method follows these constitutional principles that have allowed our judiciary to flourish for centuries.

Missouri, like every state that entered the Union before it, appointed its judges when it was first admitted as a state in 1821.¹⁹ But this condition was short lived. In the following decades a wave of populism, ushered in with the help of President Andrew Jackson, gripped the nation, and judicial elections gained prominence.²⁰ Many people felt that appointive systems had allowed governors and legislators to award judgeships based on party loyalty rather than on legal ability, judicial temperament, or fair mindedness. So, President Jackson and many Americans became enamored with electing judges, a practice that still sets us apart from the rest of the world. We continue to be the *only* nation that elects judges.²¹

In 1832 Mississippi became the first state to adopt an entirely elected judiciary. New York followed suit in 1846,²² as did Missouri two years later in 1848.²³ By 1860 more than two-thirds of our states elected at least part of

with the power to strike down majoritarian policies could be justified in a democracy. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986). However, it is the opposite question – how elective judiciaries can be consistent with our commitment to constitutionalism – that is more difficult to reconcile with our history and the principles of our constitutional democracy. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

19. Though Indiana did provide for the election of a limited class of judges when it was admitted to the union in 1816. See LARRY C. BERKSON, *JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 1* (1980) (updated by Rachel Caufield in 2004), available at <http://www.ajs.org/selection/docs/Berkson.pdf>.

20. John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 840-42 (1990).

21. Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1232-33 (2008) (“Elections for judges occur *only* in America except for a few small cantons in Switzerland and retention elections [for] high-court judges in Japan.”).

22. BERKSON, *supra* note 19, at 1.

23. Charles B. Blackmar, *Missouri's Nonpartisan Court Plan from 1942 to 2005*, 72 MO. L. REV. 199, 199-200 (2007) (“In 1848, Missouri amended its constitution to

their judiciary.²⁴ Predictably, problems arose. The promise of a more able judiciary rang hollow as political party bosses controlled the ballot box and handpicked political lackeys as judges.²⁵ Worse yet, the political bosses maintained control of the judges once on the bench through fear of removal. If they were not corrupt before they got to the bench, chances are they were corrupted while on it. This was the state of affairs that gripped New York in the 1860s and early 70s, as Boss Tweed's Tammany Hall famously handpicked judges who would later face numerous criminal charges for corruption.²⁶

This type of corruption gripped many states with elected judiciaries, causing Roscoe Pound to famously lament more than one hundred years ago that "putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."²⁷ These ills were felt in Missouri, particularly toward the beginning of the twentieth century, when political machines and party bosses controlled judicial elections without apology and would often oust competent jurists to replace them with incompetent but politically responsive judges.²⁸

The most famous example is Tom Pendergast's political machine, whose followers were referred to as "goats." Pendergast ran up against Joe Shannon, whose followers were called "rabbits."²⁹ These nicknames were apparently coined some years earlier at a political rally, when one of Shannon's followers derogatorily referred to Pendergast's followers as goats, because many of them lived in the lower-class section of Kansas City where goats were popular pets, whereas Shannon's followers lived in a more prosperous part of town, over a hill that was replete with rabbits and other small

provide for popular election of all judges, including judges of the Supreme Court, on partisan tickets at the regular biennial elections.").

24. Roll, *supra* note 20, at 841.

25. Glenn R. Winters, *Selection of Judges – An Historical Introduction*, 44 TEX. L. REV. 1081, 1083 (1966) ("Dissatisfaction began to develop almost immediately after election of the judiciary came into vogue in the mid-1800's. In the 1860's, the Tammany Hall organization in New York City seized control of the elected judiciary and aroused public indignation by ousting able judges and putting in incompetent ones.").

26. See Renee Lettow Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed's New York*, 15 GEO. MASON L. REV. 109, 116-30 (2007); see also *The Judiciary of New York City*, 58 N. AM. REV. 149 (1867). This latter piece became a classic condemnation of corruption in New York's judiciary. While no author was attributed, it is generally accepted that Thomas G. Shearman, best known for founding the law firm of Shearman & Sterling, wrote this piece. Lerner, *supra*, at 117.

27. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 748 (1906).

28. See RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND BAR* 10, 81-83 (1969); see also Blackmar, *supra* note 23, at 200-01.

29. WATSON & DOWNING, *supra* note 28, at 82.

game. Upon hearing his followers called goats, Jim Pendergast, Tom's older brother, embraced the handle and responded, "When we come over the hill like goats; they'll run like rabbits."³⁰ I think that passed for heated campaign rhetoric back in those days. Our political campaigns have greatly improved their mud-slinging abilities in the past century.

But the problems with an overly politicized judiciary became readily apparent. Judges found their tenure dependent on their ability to please party bosses. Between 1918 and 1941, during the last decades that Missouri elected its supreme court justices, a Missouri Supreme Court judge was re-elected on only two occasions.³¹ No doubt that was because some of them were incompetent, given that the climate was better suited to put politicians rather than competent judges on the bench. Moreover, those judges who were faithful to the law were bound to run afoul of party leaders when the law dictated an unpopular result.

It was with this backdrop, and in large part because of it, that Missouri became the first state to adopt a merit-selection plan in 1940, when voters approved a constitutional amendment creating a "Nonpartisan Court Plan."³² The plan was devised about three decades earlier in the wake of Roscoe Pound's 1906 speech, *The Causes of Popular Dissatisfaction with the Administration of Justice*.³³ One of the plan's goals was to pre-screen judicial candidates in a way that better tests their qualifications for a judgeship than elections, given the general indifference most voters feel toward any particular judge's legal qualifications.³⁴ A former Missouri Supreme Court judge, Fred L. Williams, put it this way: "I was elected in 1916 because Woodrow Wilson kept us out of war – I was defeated in 1920 because Woodrow Wilson hadn't kept us out of war. I do not believe five percent of the voters of Missouri ever knew I was on either ticket."³⁵

30. *Id.* at 82 n.6 (citing WILLIAM M. REDDIG, *TOM'S TOWN: KANSAS CITY AND THE PENDERGAST LEGEND* 34 (Lippincott ed., 1947)).

31. Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 318 (1997) ("A judge's position in Missouri under 'machine politics' was so tenuous that between 1918 and 1941 only twice was a state supreme court judge re-elected.").

32. See Glenn Winters, *The Merit Plan for Judicial Selection and Tenure-Its Historical Development*, in *SELECTED READINGS: JUDICIAL SELECTION AND TENURE* 29, 36 (Glenn Winters ed., 1973).

33. Pound, *supra* note 27. For a detailed account of the speech's role in the origins of a merit-selection plan, see Roll, *supra* note 20, at 842-44.

34. See generally ALBERT M. KALES, *UNPOPULAR GOVERNMENT IN THE UNITED STATES* 225-51 (1914). Kales is typically credited with developing what is now commonly referred to as the "Missouri Plan" for the selection of judges. Roll, *supra* note 20, at 843.

35. Jack W. Peltason, *Merits and Demerits of the Missouri Court Plan*, in *SELECTED READINGS: JUDICIAL SELECTION AND TENURE* 95, 97 (Glenn Winters ed., rev. ed. 1973).

Other goals of Missouri's change to a merit-selection plan were to eradicate the party politics that infested the bench and to restore a judiciary that would uphold the laws without threat of reprisal. To that end, the basic elements of the merit-selection plan, which has come to be known as the "Missouri Plan," are these: an independent commission of citizens, lawyers and non-lawyers alike, recommends several candidates who would be suitable judges; from this pool, the governor appoints a judge; after some period of time, a retention election is held in which the voters get the ultimate up-or-down vote as to whether the judge should stay on the bench.³⁶

This blueprint has been very successful. More than thirty states have followed in Missouri's footsteps and adopted some version of this non-partisan court plan to select at least some of their judges.³⁷ It has helped restore some trust in our judiciary across the country.³⁸ Also, while the plan originally only applied to judges of the Missouri Supreme Court, the three regional courts of appeal, and the circuit courts in the City of St. Louis and Jackson County, in later years St. Louis County, Clay County, Platte County, and – just a few months ago after a pretty heated campaign – Greene County adopted a merit-selection plan.³⁹ Greene County, by the way, was the first jurisdiction in the United States to move from contested elections to a merit-selection system in more than twenty years, so Missouri is still leading the way. But it would be hyperbole to call merit selection an unbounded success. It has its own failings, and some argue that it does not live up to its title of being non-partisan.

Perhaps some of the criticisms are valid, but they are best cured within a merit-selection system. To the extent that merit-selection plans are imperfect, they remain on the side of virtue. They just might need some tweaking. I have some ideas about how to diminish the amount of politics that might seep into merit-selection plans, and I will discuss those ideas in a moment. But even if politics have crept into the initial selection of judges in merit-selection states, at the very least they have done a great deal to eliminate politics from the decision about whether or not to *retain* judges. That alone is a pretty strong advantage over the open-election system, as it frees judges who are already on the bench to focus on the law rather than on re-election.

While I recognize that the merit-selection plan could still use some improvement, it is far better than the alternative. No amount of reform will remove the politics inherent in partisan judicial elections because they specifically aim to infuse politics into the law. They are designed to make our courts responsive to electoral politics, and that is the flaw in their conception. If judges are subject to regular and competitive elections, they cannot help being aware that if the public is not satisfied with the outcome of a particular

36. O'Connor & Jones, *supra* note 5, at 17.

37. Brandenburg & Schotland, *supra* note 21, at 1246.

38. See generally Jamieson & Hardy, *supra* note 4.

39. See Am. Judicature Soc'y, *Voters in Four Jurisdictions Opt for Merit Selection on November 4*, Nov. 4, 2008, http://www.ajs.org/selection/sel_voters.asp.

case, it could hurt their re-election prospects. As the late California Supreme Court Justice Otto Kaus described it, ignoring the electoral pressure would be “like ignoring a crocodile in your bathtub.”⁴⁰ In short, judicial elections are inconsistent with our commitment to a constitutional democracy where even the majority is bound by the law’s restraints; they conflict with the promise that a judge’s only constituency is the law.⁴¹

We are at a dangerous moment in history to be braving such waters. The amount of money poured into judicial campaigns has skyrocketed in the past few decades.⁴² In 1980, Texas became the first state where the cost of a judicial race exceeded \$1 million.⁴³ The entire race cost \$1 million, which at the time was considered an obscene amount for a judicial race, but today it seems fairly pedestrian. During this past election cycle more than \$5 million was spent on a race for a single seat on the Alabama Supreme Court.⁴⁴ Five years ago there was a race for the Illinois Supreme Court that cost just over \$9 million. I am sure some of you who live in the eastern part of Missouri saw some advertisements for that race on television. After the \$9 million race in Illinois, Justice Lloyd Karmeier wondered “how can people have faith in the system” when such obscene amounts of money are used to influence the outcome of judicial elections.⁴⁵ And he was the one who won the race! You can only imagine what the losing candidate must have said afterward – probably nothing you could repeat in public.

That is not the worst of it. This term, the United States Supreme Court heard arguments in *Caperton v. A.T. Massey Coal Company*,⁴⁶ where a single donor contributed more than \$3 million to replace a sitting justice on the West Virginia Supreme Court of Appeals with his preferred candidate.⁴⁷ The donor was the CEO of a company that was appealing a \$50 million verdict

40. See Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994) (quoting former California Supreme Court Justice Otto Kaus).

41. See generally Croley, *supra* note 18 (developing this point thoroughly).

42. Brandenburg & Schotland, *supra* note 21, at 1237-41.

43. Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907, 924 (2002).

44. Eric Velasco, *State High Court Race Most Costly in Nation: Ads Help Raise Total to \$5.3 Million*, BIRMINGHAM NEWS, Jan. 31, 2009, at 1A.

45. Ryan Keith, *Republican Lloyd Karmeier Wins Supreme Court Seat*, ASSOCIATED PRESS, Nov. 3, 2004.

46. The case was decided after I delivered the Nelson Lecture and before publication of this piece. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). In a 5-4 decision, the Court held that the justice was required to recuse himself under the Fourteenth Amendment’s Due Process Clause given the unique facts of the case. The Court found that the probability of judicial bias rose to an unconstitutional level.

47. For a thorough telling of the facts of the case, see Brief for Petitioners at 1-15, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), and Brief for Respondents at 3-9, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22).

against it to the West Virginia Supreme Court of Appeals. It turned out that he made a pretty good investment. His candidate defeated the incumbent and ultimately cast the deciding vote in favor of overturning the \$50 million verdict against his company.

The legal issue is thorny; it is whether it was a violation of the Fourteenth Amendment's Due Process Clause for the justice not to recuse himself from hearing the case when it was brought by a company whose CEO was such a substantial donor. That is not an easy question, and I am not expressing any opinion about it. But one thing is for certain: it just does not look good.⁴⁸ It is a sad state of affairs when this comes up as a constitutional question when it is so clearly bad policy for a state to allow this to happen. West Virginia cannot possibly benefit from having that much money injected into a judicial campaign; the appearance of bias is high, and it destroys the credibility of that judgment. One cannot help but be skeptical of this judge's impartiality.

Several studies have shown that roughly seventy percent of the public believes that judges are influenced by campaign contributions, and more than one quarter of judges themselves think campaign contributions affect their decisions.⁴⁹ I suspect that number would approach one hundred percent across both groups if they were asked about a \$3 million contribution from a single donor. There have also been a number of recent studies telling us that judges are, in fact, influenced by campaign contributions.⁵⁰ Unsurprisingly,

48. See Editorial, *A Sale on Robes*, BIRMINGHAM NEWS, Mar. 4, 2009, at 8 ("It just doesn't look good. And appearances do matter, at least if citizens are to have confidence in their courts."); Editorial, *Finally*, REGISTER HERALD (Beckley, W. Va.), Feb. 18, 2008 ("Benjamin clearly was aided by Blankenship's multi-million dollar campaign against incumbent Warren McGraw and even[] though the justice has stated unequivocally he isn't influenced by Blankenship, it just doesn't look good."); Allan N. Karlin & John Cooper, Editorial, *Perception That Justice Can Be Bought Harms the Judiciary*, SUNDAY GAZETTE MAIL (Charleston), Mar. 2, 2008, at 3C ("It is time to say publicly what attorneys across the state are saying privately: Justice Brent Benjamin needs to . . . step down from hearing cases involving Massey Energy and its subsidiaries. His continued involvement in Massey litigation endangers the public perception of the integrity of the Supreme Court of Appeals.").

49. See, e.g., 2007 Annenberg Survey, *supra* note 4, at 3 (69% of public believes raising money affects judges' decisions to a great or moderate extent); GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE CAMPAIGN, JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 4 (2001), <http://faircourts.org/files/JASNationalSurveyResults.pdf> (76% of public believes campaign contributions have great or some influence on judges' decisions); GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE CAMPAIGN, JUSTICE AT STAKE - STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf (26% of judges believe campaign contributions have great or some influence on judicial decisions).

50. See, e.g., Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 667-74 (2009). For a list of similar empirical studies, see *id.* at nn.147-52; but see Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals*

they also show that people who live in states that hold partisan judicial elections are considerably more distrusting of their judges, less likely to believe they act fairly and impartially, and more likely to agree that judges are just politicians in robes.⁵¹

All of this is deeply troubling because the legitimacy of the judicial branch rests entirely on its promise to be fair and impartial. If the public loses faith in that – if they believe that judges are just politicians in robes – then there is no reason to prefer their interpretation of the law or Constitution over the opinions of the real politicians representing the electorate. Judges rely on the other branches of government to enforce our orders. With the executive wielding the power of the sword and the legislature the power of the purse, you could say that courts wield the power of the quill. The judicial power lies in the force of reason and the willingness of others to listen to that reason. After all, a quill is nothing more than a feather that, by itself, is harmless.

Whatever courts do, we have the power to make the political branches really angry. In fact, one of the judiciary's primary roles is to limit the other branches when they circumvent the Constitution. As such, the judiciary's effectiveness relies on the knowledge that the judges will not be subject to retaliation for their judicial acts. Judicial legitimacy depends on the claim that we are doing something beyond mere politics – that we are applying a set of laws that transcend and provide a check against the popular will.

But in spite of our courts' occasional unpopular decision-making, it has seldom been a question whether even the most unpopular decision will be enforced.⁵² Be it President Eisenhower sending the 101st airborne into Little Rock, Arkansas, to ensure that the schools were integrated after *Brown v. Board of Education*⁵³ and *Cooper v. Aaron*,⁵⁴ or President Nixon sealing his own fate and turning over incriminating tapes and documents in response to the Supreme Court's decision in *United States v. Nixon*,⁵⁵ it is only because

or *Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 19-22 (Univ. of Chi. Law & Econ., Olin Working Paper No. 357, 2007), available at <http://ssrn.com/abstract=1008989>.

51. Jamieson & Hardy, *supra* note 4, at 11 (“Multivariate statistical analyses of the 2007 Annenberg survey show that Americans who live in states that hold partisan judicial elections are more distrusting of the courts than Americans who live in states that do not hold such elections.”).

52. This was not always the case. In the wake of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), President Andrew Jackson defied the Supreme Court's ruling and supposedly said, “John Marshall has made his decision, now let him enforce it.”

53. 347 U.S. 483 (1954).

54. 358 U.S. 1 (1958).

55. 418 U.S. 683 (1974). It was certainly not a foregone conclusion that President Nixon would turn over the subpoenaed materials. President Nixon's attorney, James St. Clair, made some overtures at the oral argument in *United States v. Nixon* that suggested the President might not comply with an unfavorable ruling from the Court. Transcript of Oral Argument at 500, *United States v. Nixon*, 418 U.S. 683

the courts are viewed as being fair, impartial, and independent that there was any compulsion to follow such controversial orders. If there continues to be so much money poured into judicial campaigns, that reputation cannot be maintained. Justice, like friendship, cannot be bought; if you have to pay for it, it is not worth much.

The last thing I want to talk about is how to protect and, to some extent, restore our judiciary's reputation. Many of the people in this room have already done a great deal toward that end. Missouri has led the way in promoting the merit-selection system. My first piece of advice is always for states with elective judiciaries to switch to merit selection instead, and, thankfully, I do not need to make that plea here today.⁵⁶ But as with anything, there is room for improvement.

In preparing to come here, I read an article by former Missouri Supreme Court Chief Justice Charles B. Blackmar. In the article he described something of a debacle in one of Missouri's earlier experiences under the merit-selection plan.⁵⁷ The Missouri Legislature had just created three new judgeships in Jackson County, and when the five-person judicial commission met to pick panels for the three spots, it was bitterly divided. Two members of the commission, one of whom was Justice Blackmar's father, objected that the other three members had chosen the panels based on inappropriate political considerations. Just by looking at the makeup of the panels you could tell they were stacked in a politically motivated way.⁵⁸ *The Kansas City Times* reported that one of the commissioners in the majority, who was openly hos-

(1974) (Nos. 73-1766 & 73-1834), reprinted in 3 CONSTITUTIONAL ASPECTS OF WATERGATE: DOCUMENTS & MATERIALS 671 (A. Stephen Boyan, Jr. ed., 1976):

Justice Marshall: Well, do you agree that [the issue of executive privilege] is before this Court, and you are submitting it to this Court for decision?

Mr. St. Clair: This is being submitted to this court for its guidance and judgment with respect to the law. The President, on the other hand, has his obligations under the Constitution.

56. The merit-selection plan is used to select judges for the Missouri Supreme Court and the courts of appeals. While a majority of Missouri's circuit/trial court judges are chosen through elections, the cost and vitriol that typifies high-court races usually does not spill down to the trial court level, probably because only appellate court decisions establish precedent that affects a wide range of cases. As a result, many of my concerns with electing judges are significantly diminished at the trial court level. Also, because trial court judges are elected from relatively small geographic and political regions, the concern that the voters do not know whom they are voting for is somewhat diminished.

57. Blackmar, *supra* note 23, at 206. For a more in-depth account, see WATSON & DOWNING, *supra* note 28, at 113-20. As part of this symposium, Missouri Supreme Court Chief Justice Laura Denvir Stith and Jeremy Root provided a more recent account of Missouri's experience with the state's merit-selection plan. See Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 720-25 (2009).

58. See WATSON & DOWNING, *supra* note 28, at 115.

tile to the merit-selection plan, admitted to striking a deal with legislators about the make-up of the three panels.⁵⁹ This led to a stalemate because the governor refused to appoint any judges from the panels as constituted. The deadlock lasted for more than two years, until the bar eventually voted to replace one of the commissioners with a lawyer who promised to break the stalemate.⁶⁰

I bring this up because it is an example of the type of behavior that we should try to eliminate in the selection commissions. We need these non-partisan court plans to remain true to their names, and we need to show the public that they operate in a non-partisan fashion, especially here in Missouri, which is a particularly desirable target for the opponents of appointive judiciaries. Examples like these strengthen the opponents' claims that these commissions just replace electoral politics with backroom politics.

Over the years, my home state of Arizona has encountered similar criticisms after it moved to a merit-selection system in 1974. Arizona responded to the criticism with a number of reforms that have been helpful.

For instance, Arizona has made its selection proceedings much more transparent. Anyone can read the applications for each of the candidates online.⁶¹ The public is invited to comment about the applicants and to sit in during the screening and interview process.⁶² The public is also welcome to attend the meetings of the commission on who should be interviewed and who should ultimately be placed on the list sent to the governor. Not many people take advantage of the opportunity, but I think it has been helpful to keep the commission proceedings open and transparent. This helps provide a check on the commissions to make sure they are evaluating judges based on merit rather than politics, and it also takes a lot of ammunition away from those who oppose merit selection. *The Wall Street Journal*, which has published articles opposing merit-selection plans, published a column last year focusing on Missouri's process of selecting judges and arguing that "picking judges behind closed doors only takes things further from our democratic ideals."⁶³ That might be right. At the very least, closing the doors conjures up images of the smoke-filled backrooms that party bosses used to dominate, and I do not see the point of saddling merit-selection plans with that baggage. One way to meet this criticism is to maximize transparency and open the doors as wide as possible.

59. *Id.* at 117 & n.25.

60. *Id.* at 118-19.

61. The URL is http://www.supreme.state.az.us/jnc/view_applications.htm.

62. *See, e.g.*, Commissions on Appellate and Trial Court Appointments, *Notice of Public Meeting*, <http://www.supreme.state.az.us/jnc/pdf%20files/Maricopa%20Meeting%20Notices/Public%20Meeting%20Notice%20March%2027.pdf> (inviting members of public to attend candidate interviews held on March 27, 2009, and to comment in writing beforehand).

63. Collin Levy, *Grisham's Judicial Appeal*, WALL ST. J., Mar. 20, 2008, at A18.

Another reform Arizona made was to move from attorney-dominated selection commissions to commissions dominated by lay members of the public, who now outnumber attorneys two to one on Arizona's commissions.⁶⁴ There is nothing in the goals of a non-partisan court plan that requires it to be dominated by attorneys. It certainly helps to have people with legal expertise on the commissions, but I have no doubt members of the public who are duly engaged and attentive can quite ably select judges. And this move helps curb the accusations that attorney or bar politics dominate the selection process.

Arizona also requires that each panel its commissions send to the governor be bipartisan.⁶⁵ And in 1992, Arizona passed a constitutional amendment implementing a comprehensive system for the review of judges, which basically consists of an independent evaluation commission appointed by the state supreme court that develops performance standards and thresholds that it uses to evaluate judges and inform the public about their performance on the bench.⁶⁶ This puts some teeth into retention elections and replaces the smear campaigns that accompany partisan elections with substantive evaluations of how judges are performing. I know that Missouri has already implemented a similar plan and completed its first complete, in-depth evaluations of judges selected under the merit-selection plan this past election cycle.⁶⁷ Missouri's Chief Justice Laura Denvir Stith is a strong advocate for the evaluation process. It not only helps maintain confidence in the court system, but it also serves to educate the public about what it is that judges do.

This brings me to my final recommendation, which is something that applies to every state in our nation, regardless of how they choose their judges. We must bring real and meaningful civics education back into our classrooms. Knowledge of our system of government is not passed down

64. ARIZ. CONST. art. VI, § 36 ("There shall be a nonpartisan commission on appellate court appointments which shall be composed of the chief justice of the supreme court, who shall be chairman, five attorney members, who shall be nominated by the board of governors of the state bar of Arizona and appointed by the governor with the advice and consent of the senate in the manner prescribed by law, and ten nonattorney members who shall be appointed by the governor with the advice and consent of the senate in the manner prescribed by law.").

65. ARIZ. CONST. art. VI, § 37 ("[The commission] shall submit to the governor the names of not less than three persons nominated by it to fill such vacancy, no more than two of whom shall be members of the same political party unless there are more than four such nominees, in which event not more than sixty percentum of such nominees shall be members of the same political party.").

66. ARIZ. CONST. art VI, § 42. For an in-depth discussion of how this amendment came about, its implementation, and its effects, see A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects, and Concerns*, 30 ARIZ. ST. L.J. 643 (1998).

67. See Laura Denvir Stith, 2009 State of the Judiciary Address (Jan. 28, 2009), available at <http://www.courts.mo.gov/page.asp?id=28987>; Laura Denvir Stith, 2008 State of the Judiciary Address (Feb. 5, 2008), in 64 J. MO. B. 70, 73 (2008).

through the gene pool. It must be learned by each new generation of Americans.

But we are failing to impart the basic knowledge that young people need in order to become effective citizens and leaders in our democracy. Only a little more than one-third of Americans can even name the three branches of government, much less say what they do.⁶⁸ Two-thirds of Americans know at least one of the judges on the Fox television show *American Idol*, but only one in seven can identify the Chief Justice of the United States.⁶⁹ In part, this is because our nation's schools are failing to educate a diverse population to become responsible and empowered citizens. Our nation's public schools were founded to help create citizens with the knowledge, skills, and virtues to sustain and strengthen democracy. In the 1960s, the typical U.S. student was offered courses in American history, government, and civics to learn about citizenship and the rights and responsibilities that come with it.⁷⁰ Today, however, civics is vanishing from the curriculum,⁷¹ and we need to bring it back.

In addition, programs that teach civics need a makeover. All too often students find civics curricula dry and boring, and it tends to be one of their least favorite subjects in school. Currently, civics curricula often lack interactivity and relevance to the lives of their audiences. They do not convey to young people that civics is about who we are as a people and how we can have an impact on the issues that we care about.

I have brought together a team of experts in law, history, civics, gaming, and web design at Georgetown Law and Arizona State University. Together, we created www.ourcourts.org, a free, online, interactive program to teach sixth, seventh, and eighth graders about civics. This is the age, eleven through fifteen year olds, when students can grasp complex issues of fairness and justice, when they need to be empowered to question the validity of rules and to understand why we have them. This is the age when we need to capitalize on the inherent curiosity of young people, or we will lose the opportunity.

The Our Courts project will have two components. The first component will be a series of interactive activities and educational resources to be used primarily in classrooms.

The second part of Our Courts will be primarily for young people to use in their free time. A recent study found that children spend forty hours a week using media – whether it be computers, television, video games, or music. That is more time than they spend in school or with their parents. If we

68. See 2007 Annenberg Survey, *supra* note 4, at 1.

69. *Id.* at 1. On the upside, from 2006 to 2007 the percentage of Americans who could identify the Chief Justice rose from nine to fifteen percent. *Id.*

70. CARNEGIE CORP. OF N.Y. & CTR. FOR INFO. & RES. ON CIVIC LEARNING, THE CIVIC MISSION OF SCHOOLS 5 (Cynthia Gibson & Peter Levine eds., 2003), available at http://www.civicmissionofschools.org/site/campaign/cms_report.html.

71. *Id.*

capture just a little bit of that time to get them thinking about government and civic engagement, rather than playing shoot-em-up video games, it will be a big step in the right direction. So we are designing a fast-paced interactive world that will allow students to choose cases to research and argue in court as “guardians of law” – which is just a fancy title for “lawyers.” In this fictional world, the rule of law is just being developed, so with the outcome of each case the world will change, sometimes in dramatic ways. This feature will allow the student to see how the law, and their choices of how to use it, can have big impacts on the world around them.⁷²

We have a big job to do to ensure that our children and grandchildren have the information and skills that they need to use the tools of their generation wisely. We are fortunate in the United States to have a stable and a durable democratic government. But we can't be complacent in assuming this good fortune will continue. I am reminded of the oft-repeated anecdote of Benjamin Franklin being asked by a Philadelphia woman at the close of the Constitutional Convention, “Well Doctor what have we got a republic or a monarchy?” Franklin responded, “A republic . . . if you can keep it.”⁷³ It is the citizens of our nation who must preserve our system of government, and we cannot forget that.

Missouri is called the “Show-Me State.” It has shown the nation how we can do a better job of selecting our judges.

Thank you, Missouri.

72. While this particular game is still in development, two games are now available on the Our Courts website: <http://ourcourts.org/play-games>. “Supreme Decision” and “Do I Have a Right?” both teach students about the role of the judiciary and what it means for something to be a constitutional right.

73. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 85 (Max Farrand ed., 1966).