

WHEN BATHTUB CROCODILES ATTACK: THE TIMING AND PROPRIETY OF CAMPAIGNING BY JUDICIAL RETENTION ELECTION CANDIDATES

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“I did not seek this fight, but I will not shrink from it.”
—California Chief Justice Rose Bird, 1986¹

“We’re not forming campaign committees. We’re not going to
become politicians.”
—Iowa Chief Justice Marsha Ternus, 2010²

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1. *CBS Evening News* (CBS television broadcast May 21, 1986), available at <http://www.youtube.com/watch?v=Kd162US36to>.

2. Rod Boshart, *Ternus: Iowa Judges Won't Become Politicians*, E. IOWA GOV'T (Aug. 28, 2010, 10:12 PM), <http://easterniowagovernment.com/2010/08/28/ternus-iowa-judges-wont-become-politicians/>.

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INTRODUCTION

Judicial retention elections have historically been low-key affairs. Voters, often largely ignorant of the candidates for whom they’re voting,³ usually give a rubber stamp “yes” vote in sufficient numbers to outnumber those who voted “no” instead. Many of those who physically make it to the polls fail to vote in the retention election at all.⁴ In the vast majority of cases, the judge is retained and moves on to another multi-year term.

Times are changing, however. While most judicial retention elections are still relatively unnoticed by the public, some recent retention contests have become money-soaked, political maelstroms—and signs suggest that this trend will continue.⁵ If the 2010 retention elections in Iowa and Illinois are any example, future retention elections may feature a public bombarded by advertisements decrying “activist”⁶ and “out of control” judges who threaten

3. See G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 625 (2009) (citing JUSTICE AT STAKE CAMPAIGN, JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 4 (2001), available at http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf).

4. See *infra* Part I.A.2.

5. See *infra* note 230 and accompanying text.

6. For a discussion on “activist” judges, see *A Conversation About Judicial Independence and Impartiality*, 89 JUDICATURE 339, 343 (2006) [hereinafter *Conversation*] (statement of Shirley Abrahamson, C.J.) (“None of us can pull or change or temper a decision because we are concerned that somebody might say—and this is a code word—‘you are an activist judge.’ ‘Activist judge’ means the person doesn’t like the decision. If you understand that, you understand everything that’s happening in the United States, I think, to judges.”).

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the rights of the people.⁷ Some judges will fight back,⁸ while others may choose not to do so.⁹

The pressure that elected judges feel when deciding a controversial case was framed by the late Justice Otto Kaus of the Supreme Court of California as the “crocodile in the bathtub” dilemma: “[I]t [is] like finding a crocodile in your bathtub when you go in to shave in the morning. You know it’s there, and you try not to think about it, but it’s hard to think about much else while you’re shaving.”¹⁰ To extend Kaus’s metaphor, a judge today has two options should the crocodile attack. He can either dull his razor fighting off the beast or instead hope to survive the attack without giving up the ultra-fine edge of his blade so that, afterward, he can still get that perfect shave.¹¹ In other words, the dilemma becomes: should judges campaign, risking the possibility that they’ll be cynically viewed as “politicians in robes,”¹² or should they allow public opinion to take its course, for good or ill?

After retention elections involving extensive electioneering, regardless of the outcome, the public is often left with a lack of confidence in the judiciary out of fear either that judges are “legislating from the bench” or that they’re bought and paid for by powerful special interests. In both cases, the judiciary may be seen as a political entity—a result seemingly inevitable once campaigning heats up. Be that as it may, states that currently hold judicial elections are unlikely to shift away from them in the near future,¹³ raising the

7. See, e.g., IowaForFreedom, *TV Ad: Send Them a Message*, YOUTUBE (Sept. 13, 2010), <http://www.youtube.com/watch?v=Y0Or8tGuleY> [hereinafter *Send Them a Message*].

8. See Larry Aspin, *The 2010 Judicial Retention Elections in Perspective: Continuity and Change from 1964 to 2010*, 94 JUDICATURE 218, 227–30 (2011) (providing an example of a judge who “ran an active and expensive campaign for retention”).

9. See Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send a Tremor Through the Judicial Retention System*, A.B.A. J., Jan. 2011, at 56–57 (explaining that the Iowa justices facing retention in 2010 did not campaign or raise money).

10. Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

11. Male pronouns are used only in the interest of extending the simile; no disrespect is intended toward female members of the judiciary and the legal profession.

12. Sandra Day O’Connor, *The Essentials and Expendables of the Missouri Plan*, Speech Before the University of Missouri School of Law (Feb. 27, 2009), in 74 MO. L. REV. 479, 489 (2009) (modified for publication purposes).

13. Tiffany L. Carwile, Note, *Stop Restricting Speech and Educate the Public: A Review of the ABA’s Proposed Campaign Activity Canon of the Model Code of Judicial Conduct*, 15 WM. & MARY BILL RTS. J. 1053, 1085 (2007); Ofer Raban, *Judicial Impartiality and the Regulation of Judicial Election Campaigns*, 15 U. FLA. J.L. & PUB. POL’Y. 205,

need for an exploration of appropriate campaign conduct in retention elections. Given the events of the 2010 Iowa and Illinois elections, the promise of engaged opposition campaigns in 2012, and the vast unawareness regarding retention elections generally, the time is ripe for reevaluating the rules and norms governing retention contest electioneering¹⁴ to determine whether they are serving societal goals. While state constitutions generally rigidly fix the states' methods of judge selection, the rules governing judicial electioneering are fairly malleable due to their relative ease of amendment and the lack of public attention that such rules receive.

This Article focuses on two related issues: what set of rules should be adopted to govern judicial electioneering and whether judges should campaign in response to opposition. Part I places current trends in retention elections in context by providing a historical overview. Part II examines the different fundraising and campaigning rules that exist among different retention election systems to determine which are most desirable. Every state has adopted some form of one of three rule sets to govern when retention election candidates may campaign, and each rule set permits electioneering under different circumstances: the Active Opposition Rule (after active opposition appears), the Candidacy Rule (after the judge declares his or her candidacy), and the Fixed Time Rule (during a set time window before the election). After considering each rule's impact upon judicial impartiality, judicial accountability, and an informed electorate, the Article concludes that the Fixed Time Rule is the most desirable. Part III addresses the new crocodile in the bathtub dilemma: whether candidates should campaign in response to an opposition effort. While there are reasonable arguments supporting the idea that judges facing active opposition should not campaign,¹⁵ such activity is unlikely to further politicize an election already politicized by the opposition. Such campaigning can actually help protect the impartiality of the judiciary.

Note that this Article does not attempt to evaluate and compare different methods of judicial selection, nor does it endorse any

208 (2004) (“[N]o state currently holding judicial elections is likely to do away with them in the near future.”). *But see* ADAM SKAGGS ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2009–10*, at 23–26 (Charles Hall ed., 2011), <http://www.brennancenter.org/page/-/Democracy/NewPolitics2010.pdf> (describing recent legislative efforts to modify or abolish merit selection).

14. The term “electioneering” is used throughout this article to refer collectively to the acts of fundraising and campaigning, which are sometimes regulated by different timing rules within the same state.

15. *See infra* Part III.

particular selection system.¹⁶ Instead, the focus is solely on issues within the preexisting retention election framework, based on the theory that those states that use and will continue to use such contests may benefit from a thorough analysis of the rules that govern the timing of electioneering during retention elections. This Article also provides guidance to judges deciding whether to campaign in response to opposition.

I.

RETENTION ELECTIONS: THEN AND NOW

A. *Rubber Stamp Electorate: Historical Trends in Judicial Retention Elections*

Retention elections are generally the final step in the method of judicial selection commonly referred to as merit selection¹⁷ or the Missouri plan.¹⁸ In the typical merit selection system, an independent judicial selection commission, comprised of lawyers and non-lawyers appointed by a variety of public and private officials, compiles a list of three to five candidates and presents it to the gov-

16. Examples of different forms of selection methods include partisan elections, nonpartisan elections, merit selection, and pure appointment. There is already a vast literature elsewhere exploring the concerns of choosing among the methods. See, e.g., Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623 (2009); Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077 (2007); Ryan L. Souders, Note, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529 (2006).

17. Some, perhaps not unreasonably, take exception to this term, preferring "commission selection." See, e.g., Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 29 n.186 (1995) ("It is unclear from where this label first came. However, what is clear is that this value-laden label is, today, a deliberate choice of most proponents of the system."). Most of the current literature, however, appears to prefer the traditional "merit selection" and "Missouri plan" labels, so that terminology is used here for simplicity and clarity.

18. "Although not the first state to adopt a commission plan, Missouri's system has been the one most frequently looked to as a model." Webster, *supra* note 17, at 29 n.185. The predecessor California plan differed from the Missouri plan, however.

They approved a proposal calling for nominations of candidates to fill vacancies on the supreme court and the courts of appeal by the governor, subject to confirmation by a commission composed of the attorney general, the chief justice of the supreme court, and a presiding justice of the courts of appeal.

Once confirmed, the judge was required to stand for retention at the next gubernatorial election and, thereafter, at regular intervals.

Id. at 29–30 (footnotes omitted).

ernor.¹⁹ The governor then selects one of those candidates for the bench; some states also require confirmation by one or both houses of the legislature.²⁰ Depending upon the state, after a full term²¹ or after a shorter probationary period,²² the citizens vote on whether to retain the judge.

The only issue in a retention election is whether the judge will continue to serve; the judge runs for retention alone and faces no opposing candidates. The retention election question is usually framed along the lines of “Shall Judge Zimmerman be retained in office?” with accompanying “yes” and “no” choices. Most states with retention elections require only a simple majority in order for a judge to be retained.²³ Only New Mexico (57%)²⁴ and Illinois (60%)²⁵ require higher affirmative votes.²⁶ If the judge is retained, he or she is given a full term, at the end of which there is another retention election.²⁷ If the judge is not retained, the process starts over with the selection commission presenting a new list of candidates to the governor.

19. LARRY C. BERKSON & RACHEL CAUFIELD, *AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 2* (2004), available at <http://www.ajs.org/selection/docs/Berkson.pdf>.

20. See Thomas R. Phillips, *The Merits of Merit Selection*, 32 *HARV. J.L. & PUB. POL'Y* 67, 76 (2009). Some states have measures for handling a situation where a governor fails to make a selection. See, e.g., COLO. CONST. art. VI, § 20(1) (providing for the Chief Justice to make the selection if the governor fails to do so within 15 days of having been presented the nomination list); IND. CONST. art. VII, § 10 (same, but within 60 days); UTAH CONST. art. VIII, § 8(1) (same, but within 30 days); MO. CONST. art. V, § 25(a) (providing for selection by the nonpartisan judicial nominating commission after 60 days); TENN. CODE ANN. § 17-4-112 (2012) (allowing governor to request an additional list of nominees from the nominating commission).

21. See, e.g., CAL. CONST. art. VI, § 16(a), (d)(1) (providing for appointed candidates to serve for remainder of current 12-year term).

22. BERKSON & CAUFIELD, *supra* note 19, at 2; see also, e.g., ALASKA CONST. art. IV, § 6 (providing for an approximately three year probationary period followed by ten year term after retention); UTAH CONST. art. VIII, § 9 (same).

23. Aspin, *supra* note 8, at 224.

24. N.M. CONST. art. VI, § 33(A).

25. ILL. CONST. art. VI, § 12(d).

26. Aspin, *supra* note 8, at 224 n.16.

27. The length of a full term varies by state but lasts between six and twelve years for state supreme courts. See *Judicial Selection in the States*, AM. JUDICATURE SOC'Y, <http://www.judicialselection.us/> (last visited Feb. 28, 2012). Kansas Court of Appeals judges have the shortest terms of any state judges who must face retention, serving only four-year terms. See *id.*; KAN. STAT. ANN. § 20-3006(b)(2) (2011).

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While sixteen of the nineteen states with appellate court judicial retention elections use the merit selection system,²⁸ three states utilize a hybrid system for selecting judges.²⁹ In these states, whenever a vacancy is created on the court, that vacancy is filled through a partisan election.³⁰ The winner of that election then sits for a full term and faces a retention election at the end of that term and all subsequent terms.³¹ If a judge leaves the bench before the expiration of the term, the seat is temporarily filled by appointment until the next election,³² at which point the process starts over with a partisan election.

1. History of Merit Selection

Merit selection is the result of a compromise in the early 20th century. While the federal constitution adopted in 1787 provides for the lifetime appointment of judges,³³ by the mid-1800s, populist concerns about control of judicial appointments by political machines led most states to select judges through contested elections.³⁴ This shift did little to quell complaints about the

28. Those sixteen states are Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming. *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Mar. 27, 2012). In Tennessee, if a judge does not receive a recommendation for retention by the judicial evaluation commission, that judge must face a contested election rather than an uncontested retention election. TENN. CODE ANN. § 17-4-114(c) (2011). However, all 68 judges evaluated by the commission since it was created in 1994 have been recommended for retention. See Brian T. Fitzpatrick, *Election As Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473, 484 (2008); see also, e.g., TENN. JUDICIAL EVALUATION COMM'N, TENNESSEE APPELLATE JUDGES EVALUATION REPORT (2010), available at http://www.tncourts.gov/sites/default/files/docs/jpec_evaluations_2010.pdf. Montana has a retention election when an incumbent is unopposed, but because of the unusual nature of this arrangement, the state is excluded from the analysis. *Methods of Judicial Selection*, supra. Idaho has merit selection for magistrate judges and is also excluded. See IDAHO CODE ANN. §§ 1-2220, 1-2205(b) (2011).

29. Illinois, Pennsylvania, and New Mexico. *Methods of Judicial Selection*, supra note 28.

30. ILL. CONST. art. VI, § 12(a); N.M. CONST. art. VI, § 33(A); PA. CONST. art. V, § 13(a).

31. ILL. CONST. art. VI, § 12(d); N.M. CONST. art. VI, § 33(A)-(D); PA. CONST. art. V, § 15(b).

32. ILL. CONST. art. VI, § 12(c); N.M. CONST. art. VI, § 35; PA. CONST. art. V, § 13(b).

33. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .").

34. Hallie Sears, *A New Approach to Judicial Retention: Where Expertise Meets Democracy*, 24 GEO. J. LEGAL ETHICS 871, 873 (2011); see also Jed Handelsman

politicization of the judiciary, however, and individuals on both sides of the ideological spectrum expressed discontent.³⁵ Left-leaning advocates believed that judges had a class bias against the lower classes, while those on the right felt that judicial elections “enmeshed the judiciary in politics, undermined respect for the courts, and discouraged the selection of highly qualified jurists.”³⁶

The discontent over purely electoral selection methods led to the consideration of alternatives.³⁷ Professor Albert Kales at Northwestern University School of Law first proposed the merit selection system in 1914.³⁸ Under merit selection, apolitical judicial nominating commissions, instead of party leaders, selected candidates. This replacement “ensured that qualifications, not party service, were the criteria for elevation to the bench.”³⁹ Hypothetically, the judicial selection process could thus be insulated from politicians and the public.⁴⁰

Rather than being an essential part of the original merit selection plan, retention elections were “originally offered only to quiet the fears of devotees of the elective method.”⁴¹ These elections were expected to result in the removal of a judge from the bench only rarely, if ever. In fact, many backers of merit selection expected that the elections would eventually be removed from the process altogether.⁴² This never came to pass.

Over the course of the past century, many states implemented the merit selection system. Merit selection received some initial formal support when the American Judicature Society recommended its use in 1920.⁴³ In 1934, California became the first state to adopt any kind of merit selection model,⁴⁴ under which gubernatorial nominations were subject to confirmation by a commission.⁴⁵ Three years later, the American Bar Association endorsed Califor-

Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1080, 1092–93 (2010) (explaining how New York triggered a wave of states adopting judicial elections).

35. See Tarr, *supra* note 3, at 606–07.

36. *Id.*

37. See Sears, *supra* note 34, at 873.

38. See Tarr, *supra* note 3, at 608 & nn.17–18.

39. *Id.* at 611.

40. *Id.* at 608.

41. *Id.* at 609 (quoting Glenn Winters, president of the American Judicature Society).

42. *Id.*

43. *Id.*

44. Sears, *supra* note 34, at 873–74.

45. See *supra* note 18.

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nia's move,⁴⁶ adding powerful institutional support for merit selection.⁴⁷ In 1940, Missouri enacted its own version of merit selection that became a popular model for other states.⁴⁸ By 1960, three states employed merit selection to choose state supreme court justices,⁴⁹ and by 1980 eighteen did so.⁵⁰ As of 2011, sixteen states use a variant of the model for at least some of their appellate courts.⁵¹

2. Historical Trends in Retention Election Outcomes

Historically, judges facing a retention election have almost always been retained. Out of 7,689 judicial retention election candidates between 1964 and 2010, only sixty-seven judges—less than one-hundredth of one percent—were rejected by voters.⁵² The mean affirmative vote nationwide in retention elections was 69.5% in 2010, a decline from the 75% that had remained fairly steady since 1998.⁵³ In the typical retention election, individual voters tend to treat candidates as a single bloc, voting the same way for all judges facing retention in the election.⁵⁴ Those instances in which judges are removed are usually the result of targeted efforts against particular judges; other judges facing retention in the same election are mostly unaffected.⁵⁵ Clearly voters are “not indiscriminately throwing all the rascals out.”⁵⁶

Retention election voters tend to be largely uninformed about the candidates. A study by the Justice at Stake Committee⁵⁷ found that 73% of voters reported having only some or a little information

46. Sears, *supra* note 34, at 874.

47. Tarr, *supra* note 3, at 609.

48. Sears, *supra* note 34, at 874.

49. Alaska, Kansas, and Missouri. See Tarr, *supra* note 3, at 605.

50. *Id.*

51. See *supra* note 28.

52. Aspin, *supra* note 8, at 225 fig. 6. Note that these figures only include states that have retention elections for the major trial courts and appellate courts. See *id.* at 218 n.1. Over half of those rejections came from Illinois, which requires a 60% affirmative vote for a judge to be retained; only one of those Illinois judges rejected had a vote total of less than 50%. Larry Aspin, *Judicial Retention Election Trends 1964–2006*, 90 JUDICATURE 208, 210 (2007) [hereinafter Aspin 2007].

53. Aspin, *supra* note 8, at 219.

54. Since 1988, the average absolute difference from the district mean affirmative vote has been 2.2% or less. Aspin, *supra* note 8, at 222 fig. 3.

55. Aspin 2007, *supra* note 52, at 210.

56. *Id.* This was particularly true in Iowa in 2010. See *infra* p. 255–56 (discussing retention of Judge Hanson).

57. “Justice at Stake is the only national organization that focuses exclusively on keeping courts fair and impartial. Justice at Stake leads a nonpartisan national partnership of more than 50 organizations, protecting our justice system through public education, litigation and reform.” *Justice at Stake’s Mission*, JUSTICE AT STAKE

about judicial candidates, while 14% reported that they had none at all.⁵⁸ A 1992 study found that more than two-thirds of Florida voters admitted “some confusion about retention elections,” 40% believed that judges appeared on the ballot because they “had done something wrong,” and only 30% understood that retention elections were a normal event.⁵⁹

Perhaps as a result of this lack of knowledge, many voters fail to vote in judicial retention elections at all—a phenomenon known as “rolloff.”⁶⁰ While rolloff has historically hovered around 34% for retention elections nationwide,⁶¹ in recent years it has declined to an average of about 24%,⁶² with a low of 18.6% in Alaska and a high of 42.9% in Arizona.⁶³ The recent rise in opposition campaigns was likely a significant contributor to this decline.⁶⁴

Judges are much less likely to be retained when they receive negative attention from multiple sources.⁶⁵ For example, in April 2010, the Alaska Commission on Judicial Conduct found “probable cause” that Judge Richard Postma suffered from “mental health difficulties” that were or could become permanent and that made him

CAMPAIGN, <http://www.justiceatstake.org/about/index.cfm> (last visited Mar. 26, 2012).

58. JUSTICE AT STAKE CAMPAIGN, JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 4 (2001), *available at* http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf. The survey even included voters in states with voter guides. Tarr, *supra* note 3, at 625.

59. Webster, *supra* note 17, at 35.

60. The “rolloff” of a race is the percentage of those who went to the polls to vote on election day, but failed to vote in that particular race. MARK LAWRENCE KORNBLOH, WHY AMERICA STOPPED VOTING: THE DECLINE OF PARTICIPATORY DEMOCRACY AND THE EMERGENCE OF MODERN AMERICAN POLITICS 16 (2000). For example, if 1000 people cast a ballot, but 200 did not vote in a certain retention election, the rolloff for that race would be 20%. Precise explanations for rolloff in retention elections vary and are far from definitive. *See* Aspin, *supra* note 8, at 220–21 (stating that there is contradictory evidence regarding whether increased retention election awareness and the propagation of voter guides affect rolloff).

61. *See* Aspin 2007, *supra* note 52, at 209 fig. 1, 212.

62. *See* Aspin, *supra* note 8, at 219 fig. 1.

63. *Id.* at 220. However, it would seem that some of this can be accounted for by the fifty-three retention races voters were asked to weigh in on in Maricopa County, Arizona. *See id.* at 222. This would likely tax even the most diligent voter.

64. *Id.* at 221. *But see id.* (“Campaigns against judges, however, were neither necessary nor sufficient to reduce rolloff. Rolloff increased 2.5 percent in Alaska despite the late campaign against Supreme Court Justice Dana Fabe and the Alaska Judicial Council recommendation against the retention of Superior Court Judge Richard Postma. On the other hand, rolloff decreased 11.8 points in Tennessee and 9.5 points in Indiana in the absence of any campaigns against the judges standing for retention.”).

65. *Id.* at 225.

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“unable to fulfill the duties of his office.”⁶⁶ When this was coupled with a later recommendation against retention by the Alaska Judicial Council, Postma was unable to win retention, receiving only 46% of the vote.⁶⁷

Though most judges seeking retention have been retained, there have been incidents where major campaigns were organized in opposition to particular judges’ retentions. Massive efforts were undertaken in Iowa and Illinois in 2010,⁶⁸ but they were not unprecedented—their most notable forerunner was the 1986 California retention election, still the most expensive retention election of all time.⁶⁹

3. California 1986

In 1986, the death penalty was a significant issue nationwide,⁷⁰ but perhaps nowhere more so than California. Proponents of the death penalty had grown upset with Chief Justice Rose Bird of the California Supreme Court, as well as with two of her colleagues, Justices Joseph Grodin and Cruz Reynoso. Bird had voted to reverse every one of the sixty-one death penalty cases that had come before the court in her nine years on the bench, and Grodin and Reynoso had typically followed her lead.⁷¹

Employing slogans such as “bye bye Birdie,”⁷² opponents of the justices spent about \$6.6 million in their “strenuous, emotionally

66. *Id.*

67. *Id.*

68. *See infra* Parts I.B.1–2.

69. SKAGGS ET AL., *supra* note 13, at 20.

70. Precisely why the death penalty has been a significant issue in the United States is a very complex issue. *See, e.g.*, Carol S. Steiker, *Capital Punishment and American Exceptionalism*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 57, 61 (Michael Ignatieff ed., Princeton University Press 2005) (offering ten reasons why the death penalty has been an exceptional issue relative to other western democracies). As a 1995 article noted, “Judicial campaigns in which the death penalty is an issue can degenerate to almost Orwellian levels of absurdity, raising serious questions about the ability of judges to remain fair and impartial.” Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 785 (1995); *see also* Uelmen, *supra* note 10, at 1135–37.

71. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1432 (2001); *see also* Nicholas L. Georgakopoulos, *Judicial Reaction to Change: The California Supreme Court Around the 1986 Elections*, 13 CORNELL J.L. & PUB. POL’Y 405, 410 (2004).

72. *CBS Evening News*, *supra* note 1.

charged” effort to oust them.⁷³ Having already formally announced his opposition to Bird, California Governor George Deukmejian publicly warned Justices Grodin and Reynoso that he would oppose their retention bids unless they voted to uphold more death sentences.⁷⁴ Deukmejian eventually carried out his threat and opposed the retention of the two associate justices as well.⁷⁵

Bird actively campaigned for retention, explaining that she “did not seek this fight, but . . . [would] not shrink from it.”⁷⁶ True to her word, Bird’s largely positive campaign “stress[ed] the traditional independence of the judiciary—the one message that pollsters had determined would not work.”⁷⁷ According to a CBS Evening News broadcast, the 50-year-old Bird employed “plunging neck lines, glittering jewels, and all the help from Hollywood she [could] get,” including personal appearances at campaign events by Academy Award winning director Warren Beatty.⁷⁸ Proponents of the justices collectively spent about \$4 million.⁷⁹

None of the three justices were retained, with Bird garnering only 34% in affirmative votes, Reynoso, 40%, and Grodin, 43%.⁸⁰ Some observers predicted that the California election would have broader consequences outside the state. Before election day, Dan Rather noted that “this big money, high profile fight could . . . make judges nationwide think twice about politics, pressures, and principles.”⁸¹ Gerald Uelmen, then-Dean of the Santa Clara University School of Law, warned, “The California events of 1986 should

73. Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2038, 2040 (1988).

74. Bright & Keenan, *supra* note 70, at 760.

75. *Id.* When asked why he chose to run for governor rather than a second term as attorney general, Deukmejian explained that “Attorneys General don’t appoint judges—Governors do.” *California Governor George Deukmejian*, NAT’L GOVERNORS’ ASSOC., http://www.nga.org/cms/home/governors/past-governors-bios/page_california/col2-content/main-content-list/title_deukmejian_george.html (last visited Dec. 7, 2011).

76. *CBS Evening News*, *supra* note 1.

77. Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. 715, 740 (2011) (internal quotation marks omitted). For samples of ads supporting Bird, see tt4jd, *1986 Rose Elizabeth Bird Campaign 30 Sec Spots.wmv*, YOUTUBE (Oct. 25, 2011), <http://www.youtube.com/watch?v=YB8xFq3lGXI>.

78. *CBS Evening News*, *supra* note 1. Bird specifically decided not to run a joint campaign with the other two justices up for retention. Thompson, *supra* note 73, at 2037.

79. Thompson, *supra* note 73, at 2038.

80. Dann & Hansen, *supra* note 71, at 1432.

81. *CBS Evening News*, *supra* note 1.

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not be dismissed as an aberration. Political forces have been unleashed that will return to haunt us.”⁸²

Contrary to the warnings, there was little nationwide fallout from the California races. Generally, retention election candidates continued to be retained as a matter of course, with only an occasional contested retention election. One notable contest involved Tennessee Supreme Court Justice Penny White, who was not retained in 1996 after she voted to overturn a single death penalty conviction.⁸³ Another notable incident arose from the Pennsylvania Supreme Court’s retention elections in 2005, when Justice Russell Nigro was defeated and his colleague Justice Sandra Schultz Newman was narrowly retained after the public reacted negatively to the so-called “Pay Grab” controversy, involving a sudden pay increase for government officials.⁸⁴ Because the justices benefited from the new legislation and were the only statewide candidates on the ballot at the election, they suffered the electorate’s wrath, even though neither justice had played a role in passing the pay increase.⁸⁵

The infrequency of contested retention elections nationally may not accurately reflect the full impact of the California 1986 races, however. It is possible that judges facing retention, aware of what happened in California, started aligning their judicial decisions more closely with public opinion to avoid a similar fate. Indeed, after the 1986 election, “California’s Supreme Court had one of the highest rates of upholding death sentences in the nation.”⁸⁶ In 1988, ousted Justice Grodin explained that neither he nor former Justice Otto Kaus, who resigned from the bench of his own accord in 1985,⁸⁷ could be certain that their votes in important cases were not subconsciously affected by a fear of not being retained.⁸⁸ Still, the events of California in 1986 seem like an aberra-

82. Gerald F. Uelmen, *Commentary: Are We Reprising a Finale or an Overture?*, 61 S. CAL. L. REV. 2069, 2073 (1988) (responding to Thompson, *supra* note 73).

83. See Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310 (1997).

84. Thomas A. Donovan, *Why Do We Elect Judges?*, FED. LAW. Feb. 2009, at 6, 8.

85. *Id.* (“Although the state’s chief justice had publicly defended the need to raise judicial salaries, only the legislative and executive branches had been responsible for enacting the pay raise.”).

86. Kenneth J. Aulet, *It’s Not Who Hires You but Who Can Fire You: The Case Against Retention Elections*, 44 COLUM. J.L. & SOC. PROBS. 589, 609 (2011).

87. Maura Dolan, *Otto Kaus Dies; Former Justice on State High Court*, L.A. TIMES, Jan. 13, 1996, http://articles.latimes.com/1996-01-13/local/me-24215_1_state-high-court/.

88. Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge’s Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988); see also Republi-

tion. In California's next judicial election, no organized opposition formed to unseat the five candidates up for retention, and none of the candidates had to spend much beyond the \$2300 filing fee to run.⁸⁹ All five justices were retained,⁹⁰ and the fear that retention elections would routinely be opposed, in California or elsewhere, proved to be unfounded.⁹¹

B. Rubber Stamp No More: Judicial Retention Elections in 2010

While retention elections generally remain "rubber stamp" affairs, national and state politics have become extremely polarized in recent years, and partisans on both sides of the aisle have grown comfortable using nastier tactics. This is as true in judicial elections as other races, and is reflected by the flood of money pouring into judicial races. From 2000 through 2009, state supreme court candidates raised a combined \$206.9 million, more than double the previous decade's total.⁹² This increase has translated into mudslinging attack ads sponsored by powerful special interests who are playing a significantly greater role.⁹³

Against this backdrop of increasingly costly and increasingly partisan judicial elections, from 2000 to 2009, retention elections

can Party of Minn. v. White, 536 U.S. 765, 791 (2002) (O'Connor, J., concurring) (citing Grodin and stating that merit selection "obviously reduces threats to judicial impartiality, even if it does not eliminate all popular pressure on judges").

89. Dann & Hansen, *supra* note 71, at 1432.

90. See MARCH FONG EU, SECRETARY OF STATE, STATEMENT OF VOTE, GENERAL ELECTION NOVEMBER 6, 1990, at 48, *available at* <http://www.sos.ca.gov/elections/sov/1990-general/1990-general-sov.pdf>. As a contemporary news report explained, however, the reason for the judges' retention and the lack of opposition were likely precisely because those judges acted in line with the 1986 opposition and "[v]oter approval of the five . . . would ensure that a conservative majority—all appointees of Gov. George Deukmejian—will continue to lead the seven-member court as it has since 1987." Philip Hager, *No Opposition, Little Notice for 5 State Justices Up for Election*, L.A. TIMES (Nov. 4, 1990), http://articles.latimes.com/1990-11-04/news/mn-5654_1_supreme-court-justices. Since the departures of the defeated justices in 1986, the court had "upheld 76 death sentences and reversed only 26." *Id.*

91. Outside of California that year, "10 judges were defeated and 19 others were within 5 percentage points of their state's retention threshold." Aspin, *supra* note 8, at 224. From 1988 through 2006, 28 judges nationwide were not retained. See Aspin 2007, *supra* note 52, at 211 tbl. 2.

92. JAMES SAMPLE, ADAM SKAGGS, JONATHAN BLITZER & LINDA CASEY, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE 1* (2010). Note that this figure includes both retention elections and standard judicial elections involving opposing candidates. See *id.* at 2.

93. SKAGGS ET AL., *supra* note 13, at 3 (indicating that independent spending made up 29.8% of all spending in state high court elections, a percentage significantly higher than the last four years).

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were the one type of judicial election that defied the pattern—retention candidates raised only \$2.2 million during that period, less than one percent of the total raised by supreme court candidates in any type of election.⁹⁴ In 2010, however, a number of states saw concerted efforts to remove particular judges from office. Spending skyrocketed in retention elections to almost \$4.9 million in 2010 alone, with candidates raising \$2.8 million and independent groups spending \$2.1 million.⁹⁵ Iowa and Illinois accounted for the lion's share of this spending.⁹⁶

1. Iowa 2010

The most salient retention election race of 2010 resulted in the rejection of all three Iowa Supreme Court justices up for retention—Chief Justice Marsha Ternus, Justice Michael Streit, and Justice David Baker—over their votes in a controversial same-sex marriage case. Just a year earlier, in *Varnum v. Brien*, the Iowa Supreme Court, in a unanimous 7-0 vote, held that the state's "statute limiting civil marriage to a union between a man and a woman violate[d] . . . the equal protection clause of the Iowa Constitution."⁹⁷

Opposition to the decision and the justices emerged immediately.⁹⁸ "Bob Vander Plaats, a former Republican candidate for governor, organized an anti-retention effort called 'Iowa for Freedom.'⁹⁹ Commercials advocating that the judges be rejected emphasized the "activist"¹⁰⁰ nature of the decision and questioned what the justices would "do to other long-established Iowa traditions and rights" should the public retain them.¹⁰¹ The ads included pictures of a church, a boy scout, hunters, and children pledging allegiance to the American flag.¹⁰² The idea of "sending a

94. SAMPLE ET AL., *supra* note 92, at 1–2. Concern about particular judicial races being expensive is not a new phenomenon. The ABA Special Committee on Standards of Judicial Conduct charged with drafting the original 1972 Model Rules of Judicial Conduct apparently was "informed of campaigns for judicial office in which costs ran into the tens of thousands of dollars." E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 99 (1973).

95. SKAGGS ET AL., *supra* note 13, at 7.

96. *Id.* at 7–8.

97. *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009).

98. Curriden, *supra* note 9, at 57.

99. *Id.*

100. *See supra* note 6.

101. *See Send Them a Message, supra* note 7; *see also* IowaForFreedom, *Iowa for Freedom*, YOUTUBE (Oct. 20, 2010), <http://www.youtube.com/watch?v=MBEynTYEyPY> [hereinafter *Iowa for Freedom* Oct.].

102. *See Send Them a Message, supra* note 7; *Iowa for Freedom* Oct., *supra* note 101. One seemingly Internet-only video even featured a picture of a home with a

message” was a recurring theme, both during¹⁰³ and after¹⁰⁴ the campaign. The anti-retention campaign cost about \$1 million,¹⁰⁵ with almost all of the money coming from out of state¹⁰⁶—a mere \$10,000 originated from within Iowa.¹⁰⁷

In spite of this flurry of opposition, “[t]he justices raised no money[,] . . . declined to campaign,”¹⁰⁸ and gave no interviews¹⁰⁹ beyond a single commentary by Ternus regarding the election. Ternus explained, “We’re not forming campaign committees. We’re not going to become politicians.”¹¹⁰ She added, “I hope it’s not a one-sided debate. I hope that people who understand the system and the role of the court will speak out more and more and I believe that’s beginning to happen.”¹¹¹ In-state supporters of the justices created their own organization, Fair Courts for US, and spent nearly \$400,000 in an effort to retain the justices.¹¹² However,

white picket fence. *See* IowaForFreedom, *Iowa for Freedom*, YOUTUBE (Sept. 24, 2010), <http://www.youtube.com/watch?v=WZG-eKFP8IA> [hereinafter *Iowa for Freedom* Sept.].

103. *See Send Them a Message*, *supra* note 7 (telling viewers to “send them a message”). CBS Evening News similarly mentioned before the 1986 California retention election that “the Bird race is sending a message to elected judges across the nation, putting them on notice that they may no longer be immune to political pressure.” *CBS Evening News*, *supra* note 1.

104. Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REGISTER (Nov. 3, 2010), <http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices> (quoting Vander Platts as saying “The people of Iowa stood up in record numbers and sent a message . . . that it is ‘We the people,’ not ‘We the courts.’”).

105. Linda Casey, *Independent Expenditure Campaigns in Iowa Topple Three High Court Justices*, NAT’L INST. ON MONEY IN STATE POLITICS (Jan. 10, 2011), <http://www.followthemoney.org/press/ReportView.phtml> (indicating that \$990,651 was spent opposing the justices’ retention).

106. *Id.* “Iowa for Freedom” spent \$171,025 and was based in Iowa, but was funded by the Mississippi-based American Family Association’s AFA Action Inc. *See id.*

107. *Id.* (indicating that the lone Iowa-based organization spent \$10,178 against retention).

108. Curriden, *supra* note 9, at 57.

109. Ryan C. Cicoski, *Judicial Independence and the Rule of Law: A Warning from Iowa*, DEL. LAW., Summer 2011, at 19.

110. Boshart, *supra* note 2.

111. *Id.* After the election, Streit reflected on his decision not to campaign, explaining, “When you get involved in politics, you get labeled. You label yourself, or you let other people label you. . . . You have expectations that you’ve raised in other people’s minds on how you’re going to behave, and you will try to reach those expectations.” Patrick Caldwell, *Disorder in the Court*, in JUSTICE FOR SALE: A SPECIAL REPORT FROM THE AMERICAN PROSPECT MAGAZINE 14, 20 (2011) (internal quotation marks omitted).

112. Cicoski, *supra* note 109, at 19.

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Fair Courts bought no television or newspaper advertisements, unlike the justices' opposition, which also organized a highly visible bus tour¹¹³ that visited twenty cities.¹¹⁴

All three justices were rejected by voters, with each receiving only about 45% in affirmative votes.¹¹⁵ In a statement posted on the court's website after the election, the justices said:

We hope Iowans will continue to support Iowa's merit selection system for appointing judges. This system helps ensure that judges base their decisions on the law and the Constitution and nothing else. Ultimately, however, the preservation of our state's fair and impartial courts will require more than the integrity and fortitude of individual judges, it will require the steadfast support of the people.¹¹⁶

In an interview several months after the election, sitting Iowa Supreme Court Justice David Wiggins commented that the ousted judges "took the position that judges should not get involved in politics. They maintained their integrity. . . . And sometimes you lose your job by doing the right thing."¹¹⁷ Wiggins, who joined the *Varnum* opinion, is up for retention in 2012.¹¹⁸

Surprisingly, Judge Robert Hanson, the Iowa trial court judge who initially ruled in the same case that limiting marriage to a man and a woman violated the state constitution,¹¹⁹ was retained in the same election.¹²⁰ No major opposition campaign was waged against Hanson's retention;¹²¹ he won easily with a 66% affirmative vote.¹²² Reacting to the vote, Hanson said, "I'm extremely grateful for the support from Polk County voters. Unfortunately, I'm also totally disheartened with what's happened to the three supreme court jus-

113. *Id.*

114. See Jason Hancock, *Iowans Vote to Oust All Three Supreme Court Justices*, IOWA INDEP. (Nov. 2, 2010), <http://iowaindependent.com/46917/iowans-vote-to-oust-all-three-supreme-court-justices>.

115. Aspin, *supra* note 8, at 228–29 tbl. 3.

116. Schulte, *supra* note 104.

117. Caldwell, *supra* note 111, at 20 (internal quotation marks omitted).

118. See O. Kay Henderson, *Branstad: Justice Wiggins to be Targeted in '12*, RADIO IOWA (Apr. 16, 2011), <http://www.radioiowa.com/2011/04/16/branstad-justice-wiggins-to-be-targeted-in-12/>.

119. See *Varnum v. Brien*, No. CV5965, 2007 WL 2468667 (Iowa Dist. Ct. Aug. 30, 2007), *aff'd*, 763 N.W.2d 862 (Iowa 2009).

120. Curriden, *supra* note 9, at 58.

121. See Aspin, *supra* note 8, at 228–29 tbl. 3 (lacking any reference to an opposition campaign against Hanson).

122. Curriden, *supra* note 9, at 58.

tices. It's a shocking, SHOCKING lack of appreciation of our judicial system."¹²³

According to some, the justices' refusal to campaign was an important factor in their defeat.¹²⁴ Albert Klumpp, a leading researcher of retention elections, explained that the justices could have expected a five percentage point bump had they campaigned,¹²⁵ which, if not resulting in retention, at least would have made the outcome very close. Chief Justice Wallace Jefferson of the Texas Supreme Court also highlighted the importance of campaigning, saying, "Retention judges need to think about campaigning. . . . This may not sound popular, but sometimes you need to tell your side of the story. I think retention is good because it forces judges to get out there to explain themselves and to be held accountable."¹²⁶

2. Illinois 2010

A counterexample to the 2010 Iowa retention election may be found in the 2010 retention contest of Chief Justice Kilbride of the Supreme Court of Illinois.¹²⁷ After Kilbride joined an Illinois Supreme Court ruling¹²⁸ that overturned limits on medical malpractice awards,¹²⁹ pro-business interests¹³⁰ organized a \$700,000 media campaign¹³¹ against Kilbride's retention.¹³² The campaign did not focus on Kilbride's role in the medical malpractice ruling, how-

123. Dave Price, *Judge Hanson Responds to Justice Retention Vote*, PRICE OF POLITICS, ETC. (Nov. 7, 2010, 8:15 PM), <http://whoipolitics.blogspot.com/2010/11/judge-hanson-responds-to-same-sex.html>.

124. Curriden, *supra* note 9, at 58.

125. *Id.* (quoting Albert Klumpp, Research Analyst at McDermott Will & Emery).

126. *Id.*

127. Recall that Illinois uses a hybrid system where justices are initially selected in partisan elections and then run in retention elections. *See supra* p. 6.

128. *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 899, 917 (Ill. 2010).

129. Editorial, *How Should We Respond to the 2010 Judicial Elections?*, 94 JUDICATURE 102, 102 (2010); *see also* Monique Garcia, *State Supreme Court Justice Wins Retention Battle*, CHI. TRIB. (Nov. 2, 2010), http://articles.chicagotribune.com/2010-11-02/news/ct-elect-kilbride-20101102_1_jury-awards-retention-battle-constitutionality-of-state-law (describing pro-business group that sought to "dump a judge it sees as unwilling to stop large jury awards").

130. Aspin, *supra* note 8, at 230 (listing the U.S. Chamber of Commerce, the American Tort Reform Association, and the American Justice Partnership, a creation of the National Association of Manufacturers).

131. *Id.* at 227.

132. Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 CT. REV. 118, 125 (2011).

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ever—instead, Kilbride was portrayed as being soft on crime,¹³³ a nearly ubiquitous and often effective strategy when judges are up for election.¹³⁴ The opposition campaign featured “probably the most outrageous ad of the entire 2010 judicial election season . . . Dressed in orange jumpsuits, actors posing as convicted criminal[s] recounted the grisly details of their crimes, and then said that [Chief] Justice Thomas Kilbride had taken their side and voted against law enforcement and victims.”¹³⁵ In the end, however, the “soft on crime” strategy may have backfired because it may have caused voters to view the opposition effort as dishonest.¹³⁶

Unlike his Iowa peers, Kilbride opted to campaign and raised over \$2.7 million,¹³⁷ a sum greater than the \$2.2 million raised by all retention election candidates nationwide from 2000 to 2009 combined.¹³⁸ Kilbride’s campaign featured numerous “positive” television commercials and included endorsements from law enforcement.¹³⁹ Major plaintiffs’ law firms also supported

133. *Id.* at 230.

134. This strategy was “financed by groups focused solely on civil lawsuit awards,” including the American Tort Reform Association. SKAGGS ET AL., *supra* note 13, at 20; *see also* JudicialCampaignAds, *Vote No on Justice Kilbride*, YOUTUBE (Oct. 26, 2010), <http://www.youtube.com/watch?v=aPmGtxw2en8>. Kilbride’s opponents likely used this strategy because they feared that the medical malpractice issue would not resonate with voters. Generally, the American electorate has taken a very punitive (as opposed to rehabilitative) stance regarding criminals over the last four decades, and politicians who are “tough on crime” are rewarded. For a discussion on how emphasis on the issue of crime has affected American electoral politics, *see* Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 414, 428 (2003).

135. SKAGGS ET AL., *supra* note 13, at 20; *see also* JudicialCampaignAds, *supra* note 134.

136. Aspin, *supra* note 8, at 230.

137. SKAGGS ET AL., *supra* note 13, at 5.

138. *Id.* at 20.

139. Aspin, *supra* note 8, at 230; *see also, e.g.*, FairCourtsPage, *Justice Kilbride Tough on Crime (Illinois 2010)*, YOUTUBE (Oct. 8, 2010), <http://www.youtube.com/watch?v=eTOUGFXgqS8> (featuring endorsements from law enforcement officers and a state attorney). Note that some of these commercials, however, similarly pandered to voters’ fear of criminals by portraying Kilbride as tough on crime. *See, e.g.*, Norman L. Reimer, *Fear Unleashed: Money, Power and the Threat to Judicial Independence (Inside NACDL)*, THE CHAMPION, Nov. 2010, *available at* <http://www.nacdl.org/champion.aspx?id=16254> (transcribing an ad that says “Justice Tom Kilbride—a strong advocate for the victims of crime—endorsed by our police and prosecutors. Tom Kilbride wrote the opinion that protected victims of sex crimes from their attackers and issued rulings to simplify the prosecution of sexual predators and domestic violence abusers. We need judges who stand up for victims—not criminals. For Fairness. For Victims. For Justice. Vote YES for Tom Kilbride.”); *see also* Schotland, *supra* note 132, at 125 (“Every judge’s campaign slogan,

Kilbride by contributing \$1.5 million to the Illinois Democratic Party.¹⁴⁰

Kilbride was retained with a 65.9% affirmative vote, enough to clear the requisite 60% threshold in Illinois.¹⁴¹ Rolloff was only 5.8%,¹⁴² far below the 34% historical national average.¹⁴³ The race was the most expensive retention election ever in the state, and the second most expensive ever nationwide.¹⁴⁴ While Kilbride did not apologize for raising such substantial sums to defend his seat on the bench, he also recognized the danger posed by the increasing politicization of the judiciary, saying, “If we are going to allow the courts to be politicized to this degree, where there’s more and more big-time money coming in, it’s going to ruin the court system and we might as well shut down the third branch.”¹⁴⁵

3. Importance, or Unimportance, of 2010

Given the events of 2010,¹⁴⁶ an essential question becomes whether those elections foreshadow a new reality for judicial elec-

in advertisements and on billboards, is some variation of ‘tough on crime.’ The liberal candidate is the one who advertises: ‘Tough but fair.’ Television campaigns have featured judges in their robes slamming shut a prison cell door.”) (quoting Hans A. Linde, Comment, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000 (1988)).

140. SKAGGS ET AL., *supra* note 13, at 20.

141. *See supra* note 25 and accompanying text.

142. Aspin, *supra* note 8, at 229.

143. *See supra* p. 248.

144. SKAGGS ET AL., *supra* note 13, at 20. Only the 1986 California retention election was costlier. *Id.*

145. Reimer, *supra* note 139.

146. Overall, there were 482 judges up for retention across 12 states in 2010. Aspin, *supra* note 8, at 224. Of those, eighteen judges in six states had opposition of some kind to their retention, with “opposition” consisting of a formal effort to prevent a judge’s retention or a recommendation against retention by an official judicial evaluating body. *See id.* at 226, 228–29. In this statistic, opposition does not include a recommendation against retention from a bar association. *Compare id.* at 224 fig.5, *with id.* at 228–29. Including the Iowa justices, six judges out of the eighteen were not retained. *Id.* at 228. Two Colorado district judges were not retained after allegations arose that they had made mistakes as prosecutors in 1999. *Id.* at 227. “The 1999 conviction was overturned in 2008, the defendant then won a \$10 million settlement, both judges were censured for not being more diligent, and the lead detective in the case was indicted in June of 2010 on eight counts of perjury related to the trial.” *Id.* The formal opposition against them was relatively modest, spending less than \$12,000. *Id.* Both judges received about 38% in affirmative votes. *Id.* at 228–29. The previously mentioned Judge Postma was not retained in Alaska. *See supra* pp. 248–49. Also in Alaska, “a late-breaking campaign during the final two weeks against Justice Dana Fabe failed, and she was retained.” *How Should We Respond to the 2010 Judicial Elections?*, *supra* note 129, at 102. Ten

tions or are instead merely a blip on the radar. In all likelihood, most retention election candidates will be retained without much fanfare,¹⁴⁷ and most judicial decisions will continue to be rendered with little regard for public opinion. Instead, the concern is that some judges facing retention elections will find themselves confronting the “crocodile in the bathtub” dilemma: whether to make the correct (in his or her professional opinion) but unpopular judicial ruling and potentially unleash the fury of oppositional forces, or to make the popular, but incorrect¹⁴⁸ ruling, and avoid public denunciation.¹⁴⁹

II. RECONSIDERATION OF RETENTION ELECTION ELECTIONEERING RULES

A. *Competing Goals Surrounding Retention Elections*

Before evaluating the propriety of judicial electioneering, it is helpful to take a step back and explore the values served by retention elections and the merit selection system. The primary aim of retention elections is to balance the competing values of judicial impartiality and judicial accountability. Indeed, retention elections were the result of a political compromise that attempted to reconcile the tension between these two concerns.¹⁵⁰

judges nationwide who were retained survived very close elections, and came within five percentage points of not being retained. Aspin, *supra* note 8, at 224.

147. *Cf.* Schotland, *supra* note 132, at 125 (“For any judge—even United States Supreme Court justices—‘hot-button’ issues are rare (even at the Supreme Court, only a minute fraction of their decisions). For most trial judges, such issues are non-existent.”).

148. No opinion is expressed or implied in this article regarding the correctness of the Iowa Supreme Court’s *Varnum v. Brien* decision or the Illinois Supreme Court’s *Lebron v. Gottlieb Memorial Hospital* decision.

149. There are two additional concerns resulting from the 2010 retention elections that are not explored in this Article. First, current or would-be judges, seeing the insecurity that accompanies being an elected judge, may choose to leave the bench or never seek it, respectively. *See* Schotland, *supra* note 132, at 127–28. Second, politicians may see retention elections as a way to rally the public, leading to campaigns with the only genuine purpose of furthering those politicians’ careers. *See id.* at 127.

150. *See supra* Part I.A.1.

1. Judicial Impartiality

Maintaining the impartiality of the judiciary is of paramount importance.¹⁵¹ As Supreme Court Justice Sandra Day O'Connor explained, "Our effectiveness as judges relies on the knowledge that we will not be subject to retaliation for our judicial acts."¹⁵² She went on:

We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.¹⁵³

As Justice Stevens has written, "[I]n litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity."¹⁵⁴ In addition to impartiality itself, the appearance thereof is important as well¹⁵⁵ so litigants

151. MODEL CODE OF JUDICIAL CONDUCT Preamble [1] (2010) ("An independent, fair and impartial judiciary is indispensable to our system of justice."). It is important to distinguish judicial impartiality from judicial independence. "The two concepts are often intertwined and interdependent, and when [separated] . . . independent decision making [refers to] judicial impartiality and judicial branch separateness [refers to] judicial independence." *Conversation, supra* note 6, at 339 (statement of Ruth McGregor, C.J.); *see also* Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 198–99 (2004) ("Judicial impartiality refers to the constitutional imperative that judges treat all parties before them fairly and equally and decide cases according to the evidence and the law. . . . Judicial independence is linked to impartiality . . . [b]ut [] also implicates the separation of powers and the freedom of the courts from the other branches of government.").

152. *Conversation, supra* note 6, at 339 (statement of Sandra Day O'Connor, J.).

153. *Republican Party of Minn. v. White*, 536 U.S. 765, 788–89 (2002) (O'Connor, J., concurring) (emphasis added) (citing Julian N. Eule, *Crocodiles in the Bath tub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994)).

154. *White*, 536 U.S. at 798 (Stevens, J., dissenting).

155. *See* *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266 (2009) ("A judge shall avoid impropriety and the appearance of impropriety.") (quoting ABA ANNOTATED MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2004)) (internal quotation marks omitted); *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2010) ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.").

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“can feel they are treated fairly.”¹⁵⁶ Impartiality is the cornerstone upon which the judicial branch is built.

The appearance of impartiality also holds constitutional significance: even if a judge is truly impartial, the appearance of bias may be so intolerable as to violate due process. In *Caperton v. A.T. Massey Coal Co.*, a West Virginia jury entered a \$50 million judgment against Massey Coal.¹⁵⁷ The timing of the case was such that one of the seats on the West Virginia Supreme Court would be up for election before the appeal would be heard. Don Blankenship, the CEO of Massey Coal, knew that the winner of the election would hear the appeal¹⁵⁸ and spent more than \$3 million to support West Virginia Supreme Court candidate Brent Benjamin—\$1 million more than the amount spent by the campaign committees of Benjamin and his opponent combined.¹⁵⁹ Benjamin was elected,¹⁶⁰ and the \$50 million verdict was reversed by a 3-2 vote, with Justice Benjamin siding with the majority.¹⁶¹ The U.S. Supreme Court, while specifically declining to determine whether Justice Benjamin was in fact biased,¹⁶² held that the “probability of actual bias on the part of the judge . . . [was] too high to be constitutionally tolerable,” reversed the West Virginia Supreme Court,¹⁶³ and remanded with instructions for Justice Benjamin to recuse himself.¹⁶⁴ In *Caperton*, the Supreme Court makes clear that the appearance of impartiality is as crucial as actual impartiality.¹⁶⁵

156. *Conversation*, *supra* note 6, at 340 (statement of Ruth McGregor, C.J.).

157. *Caperton*, 129 S. Ct. at 2257. West Virginia does not have intermediate appellate courts, so all trial level appeals are made to the state supreme court. *The West Virginia Judicial System*, OFFICIAL WEBSITE FOR THE STATE OF WEST VIRGINIA, <http://www.state.wv.us/wvsca/wvsystem.htm> (last visited May 19, 2012).

158. *Caperton*, 129 S. Ct. at 2257 (“Knowing the Supreme Court of Appeals of West Virginia would consider the appeal in the case, Blankenship decided to support an attorney who sought to replace Justice McGraw.”).

159. *Id.*

160. *Id.* The U.S. Supreme Court declined to determine whether Blankenship’s expenditures were the cause of the electoral outcome, however. *See id.* at 2264.

161. *See Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223 (W. Va. 2008), *rev’d*, 129 S. Ct. 2252 (2009).

162. *Caperton*, 129 S. Ct. at 2263.

163. *Id.* at 2257, 2267 (internal citation omitted) (internal quotation marks omitted). Interestingly, the West Virginia Supreme Court, with a different membership that did not include the recused Justice Benjamin, went on to again reverse the \$50 million verdict in a subsequent opinion. *See Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322, 357 (W. Va. 2009).

164. *Caperton*, 129 S. Ct. at 2263–64, 2267.

165. *See also* *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (“Courts, in our system, elaborate principles of law in

2. Judicial Accountability

Judicial accountability prevents a judge from disregarding the law or otherwise damaging the integrity of the court. According to the American Judicature Society, “Independence and accountability are different sides of the same coin. Both are necessary to maintain that delicate balance which permits our system of justice to function effectively.”¹⁶⁶ There are many things for which voters might hold a judge accountable. Beyond the correctness of judicial rulings, a judge might also be evaluated based upon his or her management of the court’s financial resources, efficiency in disposing of cases,¹⁶⁷ ability to ensure disadvantaged litigants (e.g., non-En-

the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.”).

166. Editorial, *The Judicial Independence and Accountability Task Force*, 88 JUDICATURE 108, 121 (2004); see also Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 911 (2006) (explaining that judicial independence is well-examined, but that judicial accountability is often neglected, much in the same way one knows that F.D.R. is on the heads side of a dime but may only know that “a torch and stuff” are on the tails side).

[J]udicial independence enables judges to follow the facts and law without fear or favor, so as to uphold the rule of law, preserve the separation of governmental powers, and promote due process. Given these objectives, one may fairly conclude that judges who are subject to intimidation from outsiders interested in the outcomes of cases the judges decide lack the independence necessary to follow the facts and law. At the same time, one may just as fairly conclude that judges who are so independent that they can disregard the law altogether without fear of reprisal likewise undermine the rule of law values that judicial independence is supposed to further.

Geyh, *supra* at 915–16.

167. Judges have intense pressures to resolve cases quickly; it is well documented that the number of cases on their dockets generally overwhelms judges. “‘The justice system’s funding has been decreasing in constant dollars for at least two decades,’ said David Boies, co-chairman of a commission formed by the American Bar Association to study court budget issues. ‘We are now at the point where funding failures are not merely causing inconvenience, annoyances and burdens; the current funding failures are resulting in the failure to deliver basic justice.’” John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES, Nov. 27, 2011, at A18, available at <http://www.nytimes.com/2011/11/27/us/budget-cuts-for-state-courts-risk-rights-critics-say.html>. Signs indicate this trend is not going to relent soon. See CONFERENCE OF STATE COURT ADM’RS, PRELIMINARY COSCA BUDGET SURVEY: SUMMARY (2011), available at http://www.americanbar.org/content/dam/aba/administrative/task_force/cosca_bdgtsrvy_maysummaryv3.authcheckdam.pdf (indicating state court systems are facing significant budget shortfalls, and have taken drastic steps to reduce costs, including furloughing judicial officers and staff, delaying filling judicial vacancies, and reducing the use of

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glish speakers and pro se litigants) receive a fair hearing, mental competence to discharge his or her duties, and so on.¹⁶⁸ Criticizing or removing a judge for failing to adequately perform these administrative duties should be relatively uncontroversial.

In contrast, only in certain circumstances should a judge be removed for his or her *substantive* rulings.¹⁶⁹ As Justice Stevens explained in his *Republican Party of Minnesota v. White* dissent,

Informed criticism of court rulings, or of the professional or personal conduct of judges, should play an important role in maintaining judicial accountability. However, attacking courts and judges—not because they are wrong on the law or the facts of a case, but because the decision is considered wrong simply as a matter of political judgment—maligns one of the basic tenets of judicial independence—intellectual honesty and dedication to enforcement of the rule of law regardless of popular sentiment.¹⁷⁰

To expound on Justice Stevens' position, judicial errors might be divided into two categories: intentional deviations from the law and honest mistakes. Intentional deviations constitute a willful violation of the judicial oath and should be punished, as they represent a usurpation of the legislative and executive powers to make the law.¹⁷¹ On the other hand, a judge who holds a good faith belief that he or she is following the law and nevertheless makes a mistake should generally avoid reprisal.¹⁷² Note, however, that enough honest mistakes, particularly on questions for which there

retired judges); *Obama Getting Fewer Judges Confirmed Than Nixon*, CBSNEWS (Sept. 6, 2010, 2:53 PM), <http://www.cbsnews.com/stories/2010/09/06/politics/main6839525.shtml> (“Forty-seven [federal judicial] vacancies have been labeled emergencies by the judiciary because of heavy caseloads.”).

168. See *Conversation*, *supra* note 6, at 343 (statement of Shirley Abrahamson, C.J.).

169. See *id.* at 341.

170. See *Republican Party of Minn. v. White*, 536 U.S. 765, 802–03 (2002) (Stevens, J., dissenting) (quoting Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 387 (2002)).

171. Geyh, *supra* note 166, at 934–35.

172. *Id.*

To threaten or punish judges with loss of tenure, resources, or jurisdiction for honestly held but unacceptable views of the law, encourages judges to jettison their conceptions of what the law requires in favor of what they believe those in a position to punish them want to hear—which is antithetical to the rule of law values that customary independence is calculated to preserve. This is not to suggest that judges should be unaccountable for unacceptable decisions—decisions at the edge are subject to appellate review. They give rise to discussions in the media, which elicit reactions from voters, who petition the politi-

is an objectively correct answer,¹⁷³ raise questions of judicial competence and make removal a potentially appropriate response.

The primary problem presented by this dichotomy, however, is in identifying which mistakes are intentional and which are honest—an especially difficult enterprise which has in some sense been left to the voters.¹⁷⁴ However, there is no check on the voters regarding the appropriateness of their reasons in voting for or against a judge.¹⁷⁵ As a result, judicial “[e]lections can . . . lumber off, crushing judges who have done their best to follow the law.”¹⁷⁶ Consequently, it seems possible or even likely that certain issues (for example, abortion, same-sex marriage, and gun rights) could become litmus tests in future retention elections, significantly politicizing the process, much in the same way abortion has essentially become a litmus test for U.S. Supreme Court nominees.¹⁷⁷

The possibility that the electorate will retaliate against a judge for a good faith, honest ruling is the danger that springs from excessively emphasizing judicial accountability. However, accountability has its benefits and should not be cast aside entirely. Instead, this value must simply be balanced against the competing interest of impartiality.

3. Informed Electorate

A final interest to be considered in evaluating campaigning rules in retention elections is that of having an informed electorate. Given that citizens will be voting on the retention of their judges, it follows that citizens should be informed about the process of judicial retention elections. As noted above, voters often have little or

cal branches, which explore amendments to existing law that judges must consider anew.

Id. at 926–27.

173. For example, allowing a conviction for treason to stand based upon the testimony of only one witness and no confession by the accused would clearly be incorrect because the U.S. Constitution explicitly requires two witnesses to convict in the absence of a confession. U.S. CONST. art. III, § 3, cl. 1. This is an extreme example to show that not all judicial decisions can be swallowed up by the “subjective” designation that might be thrust upon them. Without getting into an extensive discussion on this topic, suffice it to say that the more routine the matter being decided and the lower the court, the more likely that a judicial question has a legally objective answer.

174. See Geyh, *supra* note 166, at 927, 932–35.

175. Schotland, *supra* note 132, at 124–25 (“One cannot deny that voters can use their opportunity to vote any way they wish.”).

176. Geyh, *supra* note 166, at 924.

177. See, e.g., Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 744 (2011).

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no knowledge regarding the retention election process once they get to the polls.¹⁷⁸ Rolloff in judicial elections is also a concern.¹⁷⁹ Beyond retention elections, increasing knowledge about the judicial branch might also promote confidence in government because the judicial branch is the “least understood branch of government.”¹⁸⁰

Some efforts have already been undertaken to address voter ignorance. In several states, bar associations, state-sponsored commissions, or both have produced judicial performance evaluations to better inform the public regarding the candidates on whom they are voting.¹⁸¹ Whether these guides have been effective is unclear. State commissions almost always recommend that judges be retained and the voters usually follow suit.¹⁸² However, not all voters simply follow the recommendation to retain or reject. Instead, voters in some states, such as Alaska, Arizona, and Colorado, have tended to vote to retain judges with higher evaluation scores while voting against judges with lower evaluation scores, even though the evaluating body recommended that those lower-scoring judges be retained.¹⁸³ But these voting trends were not universal, and in other states, such as Missouri and Utah, were nonexistent.¹⁸⁴

While there is some correlation between recommendations against retention and lower affirmative vote totals, the difference is usually not sufficient to keep a judge from being retained.¹⁸⁵ For example, in 2010, a voting guide was prepared by eleven bar associations in Chicago, summarizing the recommendations of the as-

178. *See supra* pp. 247–48.

179. *See supra* p. 248.

180. *Conversation, supra* note 6, at 341–42 (statement of Shirley Abrahamson, C.J.); *see also* ERIC LANE & MEG BARNETTE, BRENNAN CTR. FOR JUSTICE, A REPORT CARD ON NEW YORK’S CIVIC LITERACY 14 (2011) (explaining that only 55% of those polled in a civic literacy exam could correctly identify the judiciary as the government branch with the power to deem laws unconstitutional, whereas 66% and 60% of respondents could identify the roles of the executive and legislative branches, respectively).

181. *See Judicial Campaigns and Elections: Voter Guides*, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/voter_guides.cfm?state (last visited Apr. 3, 2012).

182. Aspin, *supra* note 8, at 222. Although, some research indicates that voters may differentiate between judges who are highly recommended and judges who are also recommended, but not as highly. *Id.* at 222 n.8.

183. Larry T. Aspin, *Retention Elections and Evaluations: A Response to Current Trends in Contested Judicial Elections?*, in *FUTURE TRENDS IN STATE COURTS 2007* 104, 107 (Carol R. Flango et al. eds., 2007), *available at* http://ncsonline.org/WC/Publications/KIS_Ctfutu_Trends07.pdf.

184. *Id.*

185. *See Aspin, supra* note 8, at 223.

sociations.¹⁸⁶ Thirteen of the 65 retention election candidates were not recommended by at least one association, and one candidate failed to receive even one association recommendation. Nonetheless, all 65 judges were retained, including the one not recommended by any bar association.¹⁸⁷

Regardless of the efficacy of voter guides, encouraging judges to meet the electorate in the midst of a retention election may be worthwhile because it provides an additional opportunity for judges to explain the judicial role to the public and for the public to better understand its role in the process.

B. Current Rules Governing Retention Elections

1. Judicial Codes of Conduct

Electioneering by judicial candidates is regulated by a judicial code of conduct. The state codes are often arranged into about four to seven canons propounding general principles that guide judicial behavior.¹⁸⁸ Each canon has a number of more specific rules accompanied by commentary on the rules, which is usually derived from either the American Bar Association Model Code or the decisions of state judicial advisory committees.

All but one of the state judicial codes of conduct are based upon some version of the ABA Model Code of Judicial Conduct.¹⁸⁹ Nonetheless, there is great variety among the state analogs. Because the Model Code has changed so much over the years,¹⁹⁰ not all states have kept up with the ABA's changes. Additionally, many states have intentionally deviated from the ABA Model Code.

2. Three Types of Retention Election Campaign Rules

All retention election candidates are permitted to campaign in at least some circumstances; no state prohibits a retention election candidate from campaigning entirely. The particular rules in place

186. *Id.*

187. *See id.* at 223–24. The universally not-recommended judge received a 64.2% affirmative vote, which was sufficient to clear the requisite 60% threshold. *Id.* at 224.

188. *E.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2010) (“A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”).

189. Brent Dorner, Comment, *2007 Model Code of Judicial Conduct: Are the Speech Restrictions Necessary?*, 33 J. LEGAL PROF. 341, 342 (2009). Montana is the sole exception, though it has rules governing judicial conduct that resemble the Model Code. *Id.* at 342 n.13; *see also* Tom Lininger, *On Dworkin and Borkin*, 105 MICH. L. REV. 1315, 1323 (2007).

190. *See infra* Part II.B.3.

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vary by state. There are essentially three different types of rule sets for campaigning in retention elections: the Fixed Time Rule, the Candidacy Rule, and the Active Opposition Rule. Each rule set creates a different time window during which judges are permitted to fundraise and campaign, though some states have separate rules for the timing of fundraising and campaigning (activities collectively referred to as “electioneering” in this Article). This section describes the content of the three rule sets.

Fixed Time Rule

The Fixed Time Rule permits a judge to begin electioneering a certain number of days before the election. The amount of time varies by jurisdiction, ranging from 180 days to 2 years.¹⁹¹ The current ABA Model Code of Judicial Conduct¹⁹² adopts the Fixed Time Rule, though it does not recommend a period of time.¹⁹³ In spite of the ABA’s endorsement, the Fixed Time Rule is the least commonly used rule by states with judicial retention elections, and is found in only three of the nineteen jurisdictions.¹⁹⁴

191. KAN. CODE OF JUDICIAL CONDUCT R. 4.2(B)(1)–(3) (2009), *available at* <http://www.kscourts.org/kansas-courts/supreme-court/orders/2009/2009SC006.pdf> (one year); OKLA. CODE OF JUDICIAL CONDUCT R. 4.2(B)(1)–(3) (2011) (codified at OKLA. STAT. tit. 5, ch.1, app. 4), *available at* <http://www.okbar.org/public/judges/codeOfJudicialConduct.pdf> (180 days); MD. CODE OF JUDICIAL CONDUCT R. 4.1(c)(2)(B)(i) (2010) (two years).

192. MODEL CODE OF JUDICIAL CONDUCT (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2010_mjcj_final_for_website.authcheckdam.pdf.

193. *See id.* R. 4.2. For a full discussion of the history of the ABA model rule, *see infra* Part II.B.3.

194. Kansas and Oklahoma use the rule for all judicial retention elections. KAN. CODE OF JUDICIAL CONDUCT R. 4.2(B)(1)–(3) (2009), *available at* <http://www.kscourts.org/kansas-courts/supreme-court/orders/2009/2009SC006.pdf>; OKLA. CODE OF JUDICIAL CONDUCT R. 4.2 (2011), *available at* <http://www.okbar.org/public/judges/codeOfJudicialConduct.pdf>. First-time retention election candidates in Maryland can campaign at any time under the Candidacy Rule, *see infra* Part II.B.2.b (describing the Candidacy Rule), while judges who have been retained at least once campaign under the Fixed Time Rule. MD. CODE OF JUDICIAL CONDUCT R. 4.1, 4.4(c) (2010). Regarding Oklahoma, note that one of the comments to the state’s relatively new rule specifies that candidates cannot seek or use endorsements of any kind unless there is active opposition. OKLA. CODE OF JUDICIAL CONDUCT, R. 4.2 Comment [4] (2011). In examining the language of the current rule itself, this comment is likely the result of poor editing rather than an actual rule. First, an extraneous “and” appears after the last portion of the rule. *Id.* R. 4.2(B)(3) (“A candidate for elective judicial office may . . . seek, accept, or use endorsements from any person or organization other than a partisan political organization; and.”). Second, the rule’s predecessor did include an active opposition component. *In re Amendments to the Code of Judicial Conduct*, 1997 OK 79 (1997)

Candidacy Rule

The Candidacy Rule permits a judge to begin electioneering once he or she becomes a “candidate” for reelection. Though this rule appears simple on its face, many jurisdictions only vaguely define when a judge becomes a candidate or else allow a judge to determine when his or her candidacy starts by simply announcing his or her candidacy.¹⁹⁵ This could be years in advance of the actual election.¹⁹⁶ For example, in Illinois, a judge can become a candidate “as soon as he or she makes a public announcement of candidacy,”¹⁹⁷ and, in Iowa, a judge becomes a candidate “as soon as he or she declares or files as a candidate with the election or appointment authority.”¹⁹⁸ The Candidacy Rule is used in eight jurisdictions.¹⁹⁹

(mentioning an active opposition requirement in Canon 5D). Finally, the Scope of the Code states that “[c]omments neither add to nor subtract from the binding obligations set forth in the Rules,” OKLA. CODE OF JUDICIAL CONDUCT Scope (2011). Therefore, it seems that no active opposition requirement of any kind applies to any provision in Oklahoma.

195. See also CHARLES G. GEYH & W. WILLIAM HODES, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 97, 97 (2009) (indicating one becomes a candidate “largely by self-designation”).

196. *Id.*

197. ILL. CODE OF JUDICIAL CONDUCT Terminology (2007) (codified at ILL. S. CT. R. 67) (2007), available at <http://www2.illinois.gov/jib/Documents/Codeof-Conduct.pdf> (defining “Candidate”).

198. IOWA CODE OF JUDICIAL CONDUCT Terminology (2010) (codified at Iowa Ct. R. ch. 51) (defining “Judicial candidate”).

199. The eight jurisdictions are Arizona, California, Illinois, Iowa, New Mexico, Pennsylvania, South Dakota, and Tennessee. In Illinois, Pennsylvania, and Tennessee, declared candidates may *campaign* at any time, but can only solicit funding in a Fixed Time Rule fashion. See ARIZ. CODE OF JUDICIAL CONDUCT Terminology (2009), available at http://www.azcourts.gov/portals/37/NewCode/2009Code_Internet_Maste_5-03-10.pdf (“‘Judicial candidate’ means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment.”); Ariz. Judicial Ethics Advisory Comm., Advisory Op. 05-03 (2005), available at http://www.azcourts.gov/Portals/37/ethics_opinions/2005/05-03.pdf (stating that judges running for retention are “subject to the same ethical standards and election laws as all other candidates”); CAL. CONST. art. VI, § 16(d) (1) (describing method of retaining judges); CAL. CODE OF JUDICIAL ETHICS Canon 5 (2011), available at http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf (failing to mention any special requirements for judges facing retention elections); ILL. CODE OF JUDICIAL CONDUCT Terminology (codified at Ill. Ct. R. 67) (2009) (defining “candidate”); ILL. CODE OF JUDICIAL CONDUCT CANON 7B(1)(a)(i)–(iii) (allowing judicial candidates to campaign); CODE OF JUDICIAL CONDUCT Canon 7B(2) (prohibiting campaign committees from soliciting funds earlier than one year before the election); IOWA CODE OF JUDICIAL CONDUCT Terminology (defining “judicial candidate”); IOWA CODE OF JUDICIAL CONDUCT Canon 4(B)(1)–(3) (codified at Iowa Ct. R. ch. 51:4.2(B)(1)–(3) (2010)) (permitting re-

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Although it may seem unlikely that a candidate would electioneer for an extended period of time, the possibility is not a trifling concern. The 2007 Model Code Revision Committee took the possibility very seriously and “often used as a discussion hypothetical a judge elected to a ten-year term who immediately announced plans to run for reelection.”²⁰⁰

Active Opposition Rule

The Active Opposition Rule permits a judge to campaign only in response to active opposition to his or her retention.²⁰¹ Only one

tion election candidates to campaign); N.M. CODE OF JUDICIAL CONDUCT R. 21-001(A) (defining “candidate”); N.M. CODE OF JUDICIAL CONDUCT R. 21-700(B) (permitting candidates to campaign); PA. CONFERENCE OF STATE TRIAL JUDGES, RETENTION MANUAL 30 (June 2011), *available at* <http://ethics.pacourts.us/RetentionManualFinal.pdf> (allowing a judge to “publicly declare his or her candidacy for retention at any time, thereby becoming a candidate for retention”); JUDICIAL ETHICS COMM. OF THE PA. CONFERENCE ON STATE TRIAL JUDGES, DIGEST OF INFORMAL OPINIONS – OPINION 1/11b/99, *available at* <http://ethics.pacourts.us/digests.htm> (“The time for campaigning is not the same as the time for soliciting under Canon 7B. The Canons do not set forth the time when campaigning can begin. On July 21, 1999 the Judicial Ethics Committee rescinded its Formal Opinion 90-1 which had held that the time when a candidate for judicial office was permitted to begin to campaign was the same as the time when the candidate’s campaign committee was permitted to begin to solicit funds under Canon 7B (2) of the Code of Judicial Conduct.”); PA. CODE OF JUDICIAL CONDUCT CANON 7(B)(2) (2012) (prohibiting soliciting funds earlier than “thirty days prior to the first day for filing nominating petitions or the last day for filing a declaration of intention to seek reelection on a retention basis”); PA. CONST. art. V, § 15(b) (specifying the last day for filing a declaration of candidacy for retention election is “the first Monday of January of the year preceding the year in which his term of office expires”); 42 PA. CONS. STAT. ANN. § 3153(a) (West 2011) (same); S.D. CODE OF JUDICIAL CONDUCT Terminology (2011) (codified at S.D. CODIFIED LAWS app. to ch. 16-2 (2011)) (defining “candidate”); S.D. CODE OF JUDICIAL CONDUCT Canon 5(C)(1)(a)(i)–(iv) (permitting candidates to campaign); TENN. CODE OF JUDICIAL CONDUCT Terminology (2011) (defining “candidate” as including judges facing retention elections); TENN. CODE OF JUDICIAL CONDUCT Canon 5C(1)(b)(i)–(iii) (permitting candidates to campaign); TENN. CODE OF JUDICIAL CONDUCT Canon 5C(2)(a) (prohibiting acceptance of *solicited* funds earlier than 180 days before the election); Tenn. Judicial Ethics Comm., Opinion 01-01 (2001), *available at* <http://www.tncourts.gov/sites/default/files/01-01.pdf> (permitting acceptance of *unsolicited* funds at any time).

200. GEYH & HODES, *supra* note 195, at 106.

201. The Active Opposition Rule was the creation of the 1972 ABA Model Code of Judicial Conduct and was retained through 1990. “The 1972 version of the Model Code of Judicial Conduct permitted a campaign by a judge who ‘has drawn active opposition.’” Utah Ethics Advisory Committee, Informal Op. 00-5 (Aug. 31, 2000), *available at* http://www.utcourts.gov/resources/ethadv/ethics_opinions/2000/00-5.htm; *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 5C (1990) (provision on judges and candidates subject to public election does not include the

of the eight jurisdictions employing this rule requires official certification that there is active opposition.²⁰²

The Florida Code of Judicial Conduct commentary states that “active opposition is difficult to define but is intended to include any form of organized public opposition or an unfavorable vote on

Active Opposition Rule). For more background on the creation of the 1972 Model Code, see THODE, *supra* note 94, at 99.

202. Florida is the exception. In Florida, judges’ political activity is limited by statute. FLA. STAT. ANN. § 105.071 (West 2011). In order to campaign, the judge must submit a certification of active opposition, “specifying the nature thereof,” to the secretary of state. FLA. CODE OF JUDICIAL CONDUCT, Canon 7C(2) (2008). The eight states with the Active Opposition Rule are Alaska, Colorado, Florida, Indiana, Missouri, Nebraska, Utah, and Wyoming. *See* ALASKA CODE OF JUDICIAL CONDUCT Canon 5C(1) (as amended by Order Amending Code of Judicial Conduct Canon 5A(1), Canon 5C, and the Application Section Concerning a Judge’s Activities, 2011 Alaska Ct. Order 1762 (July 1, 2011)) (permitting limited campaign activities without active opposition); ALASKA CODE OF JUDICIAL CONDUCT Canon 5C(2) (permitting advertising in newspapers, on television, and other media, in addition to distributing campaign literature, in response to active opposition); COLO. CODE OF JUDICIAL CONDUCT Canon 4 R. 4.3(A) (2010) (codified at COLO. REV. STAT. ch. 24 app. (2011), *available at* <http://www.cobar.org/repository/JudicialConduct.pdf>) (stating that judges seeking retention “should” not engage in any campaign activity unless that judge faces “active opposition”); FLA. CODE OF JUDICIAL CONDUCT Canon 7C(2) (2008), *available at* http://www.floridasupremecourt.org/decisions/ethics/09-15-2008_Code_Judicial_Conduct.pdf (permitting limited campaign activities in the absence of active opposition); FLA. CODE OF JUDICIAL CONDUCT Canon 7C Commentary (“The term ‘limited campaign activities’ is not intended to permit the use of common forms of campaign advertisement which include, but are not limited to, billboards, bumperstickers, media commercials, newspaper advertisements, signs, etc. Informational brochures about the merit retention system, the law, the legal system or the administration of justice, and neutral, factual biographical sketches of the candidates do not violate this provision.”); FLA. CODE OF JUDICIAL CONDUCT Canon 7C(2) (requiring that judges submit a certification of active opposition “specifying the nature thereof” to the secretary of state in order to campaign “in any manner authorized by law”); IND. CODE OF JUDICIAL CONDUCT R. 4.2(D)(1)–(3) (2011), *available at* http://www.in.gov/judiciary/rules/jud_conduct/jud_conduct.pdf (permitting retention election candidates to campaign in response to active opposition); MO. CODE OF JUDICIAL CONDUCT Canon 5(B)(3) (2010) (permitting retention election candidates to campaign in response to active opposition); NEB. REV. CODE OF JUDICIAL CONDUCT § 5-304.2(B) (2011), *available at* <http://court.nol.org/rules/pdf/Ch5Art3.pdf> (permitting candidates to campaign in response to active opposition); UTAH CODE JUD. ADMIN. ch. 12, R. 4.2(B) (2012), *available at* <http://www.utcourts.gov/resources/rules/ucja/ch12/Canon.4.htm> (permitting a candidate to campaign in response to active opposition); WYO. CODE OF JUDICIAL CONDUCT Canon R. 4.2(B) (2011) (codified at WYO. CODE R. § 4.2 (LexisNexis 2011), *available at* http://www.courts.state.wy.us/CourtRules_Entities.aspx?RulesPages=JudicialConduct.xml (permitting a candidate to campaign in response to active opposition).

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a bar poll.”²⁰³ Of course, other jurisdictions are free to adopt their own interpretations. Note, however, that the Active Opposition Rule does not necessarily prevent a judge from responding to all criticism of any kind. As the Utah Judicial Council explained,

[T]here may be other activities, short of operating a campaign, in which a judge could participate. . . . [F]or instance, a judge’s letter to the editor in response to a public letter to the editor would not constitute operating an election campaign. (Although a letter to the editor might implicate other Canons such as those involving the integrity of the judiciary, comment on pending cases, or exhibiting biases and prejudices.) It might therefore be possible for a judge to respond to public comments which do not rise to the level of active public opposition, without the response constituting the operating of an election campaign.²⁰⁴

Some jurisdictions allow candidates to begin fundraising before they are allowed to campaign, though other jurisdictions do not even permit the collection of contributions until active opposition has appeared. If judges are not permitted to fundraise prior to the emergence of active opposition, “judges up for retention can be vulnerable to last-minute attacks.”²⁰⁵

3. History of the ABA Model Rules

The existence of such a variety of rules in different states stems largely from the fact that the ABA Model Code has undergone significant changes over time. The ABA guidelines for judicial behavior were originally created in 1924 and received significant overhauls in 1972, 1990, and 2007.²⁰⁶ Minor amendments were

203. FLA. CODE OF JUDICIAL CONDUCT Canon 7C Commentary.

204. Utah Ethics Advisory Comm., Informal Op. 00-5 (Aug. 31 2000), *available at* http://www.utcourts.gov/resources/ethadv/ethics_opinions/2000/00-5.htm.

205. *How Should We Respond to the 2010 Judicial Elections?*, *supra* note 129, at 105. *See also infra* Part II.B.4 (discussing the merits of the Active Opposition Rule).

206. The original guidelines for judicial behavior were ratified by the ABA in 1924 as the “Canons of Judicial Ethics.” Benjamin B. Strawn, Note, *Do Judicial Ethics Canons Affect Perceptions of Judicial Impartiality?*, 88 B.U. L. REV. 781, 786 (2008). In 1972, these thirty-two canons were consolidated into seven canons contained in the newly-renamed “Model Code of Judicial Conduct.” *Id.* “By 1990, forty-seven states had adopted the 1972 Code or some variation of it.” *Id.* at 787. The Model Code was further consolidated into five canons in 1990 and then into four canons in 2007. *Id.*

made in the intervening years, with the most recent revisions having been made in 2010.²⁰⁷

The 1924 Canons of Judicial Ethics contained no timing recommendations,²⁰⁸ simply providing general guidelines for judicial office candidates.²⁰⁹ The 1971 draft of the Model Code included a Fixed Time Rule for fundraising²¹⁰ along with a prohibition on fundraising earlier than 90 days before the primary election,²¹¹ though each jurisdiction was encouraged to determine an appropriate time limit.²¹² The final version of the Model Code ratified by the ABA in 1972 instead created different rules for judicial candidates participating in contested elections and retention elections.²¹³ Candidates

207. ABA MODEL CODE OF JUDICIAL CONDUCT (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_table_of_contents.html.

208. The 1924 Canons of Judicial Ethics were considered “hortatory” rather than compulsory. See Strawn, *supra* note 206, at 786. But see THODE, *supra* note 94, at 43 (indicating that the “Committee consistently took the position that the Code should set enforceable mandatory standards” rather than “hortatory guide-lines”).

209. See CANONS OF JUDICIAL ETHICS CANONS 30 (1924), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1924_canons.auth_checkdam.pdf (discussing “Candidacy for Office”). Interestingly, the 1924 Canons prohibited receiving campaign contributions from lawyers, *see id.* at Canon 32, but this practice was later approved in a 1941 ABA opinion, THODE, *supra* note 94, at 99; *see also* ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 226 (1941). Note that because retention elections were not introduced in any state until 1934, separate rules for retention election candidates and other judicial candidates would probably not have been contemplated, though the American Judicature Society endorsed merit selection in 1920. *See supra* notes 43-44 and accompanying text.

210. When the term “fundraising” is used in this Article, this generally refers to fundraising by the candidate’s campaign committee rather than personal solicitations by the candidate, which are prohibited by the current model code. *See* MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8) (2010) (“[A] judge or a judicial candidate[] shall not . . . personally solicit[] or accept campaign contributions other than through a campaign committee . . .”). However, some courts have struck down prohibitions on personal solicitation as unconstitutional. GEYH & HODES, *supra* note 195, at 99.

211. The language suggests that fundraising for the general election can take place at any time after the 90-day threshold is reached for the primary election. *See* DRAFT MODEL CODE OF JUDICIAL CONDUCT Canon 7E (1971) (“A candidate’s committees may solicit funds for his campaign no earlier than [90] days before primary election and no later than [90] days after the last election in which he participates during the election year.”) (brackets in original).

212. *Id.* Canon 7E cmt. (1971).

213. The explanation for this distinction is that the Committee concluded that some aspects of merit system elections require special treatment In theory the merit system election removes a judge from politics and from the rigors of the campaign trail, but in a significant

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in contested elections could only solicit funds under a Fixed Time Rule, while retention election candidates were governed by the newly created Active Opposition Rule.²¹⁴

This language was kept through 1990, when a Fixed Time Rule for the collection of campaign contributions²¹⁵ and a Candidacy Rule for campaigning were adopted.²¹⁶ This change was made, in part, because the canon containing the Active Opposition Rule was adopted less widely than other canons and was often ignored even when it was in place.²¹⁷ In the drafting stage, the revised rule originally called for different rules for different types of elections, but this approach proved to be too linguistically repetitive, eventually resulting in sets of rules that applied to all judicial candidates.²¹⁸ Because the committee “could find no basis for treating retention elections differently from other public elections,” a rule specifying that retention candidates could not engage in certain political activity was deleted.²¹⁹ The explanation for the removal of the active opposition requirement is surprisingly sparse; the consolidation of the rules for all judicial election candidates apparently simply “eliminated the need for” the Active Opposition Rule.²²⁰

In moving to a Fixed Time Rule, “the most controversial aspect . . . proved to be the suggested time period for election fundraising.”²²¹ The 1990 revised code settled on one year rather than the 90 days found in the 1972 code.²²² The committee extended the time for fundraising out of concern that candidates needed

number of instances the theory fails. . . . In thus authorizing a response analogous to self-defense, the *Code* allows a merit system candidate with active opposition to campaign under the same standard that is applicable to a candidate who is competing against another candidate for judicial office.

THODE, *supra* note 94, at 100.

214. See MODEL CODE OF JUDICIAL CONDUCT Canon 7B(2), (3) (1972) (“[A candidate] whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).”). See also *supra* note 201.

215. MODEL CODE OF JUDICIAL CONDUCT Canon 5C(2) (1990).

216. *Id.* at 5C(1)(b).

217. LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 46 (1992).

218. *Id.* at 47. The term “all judicial candidates” here includes all individuals seeking appointment to the judiciary, all judicial election candidates, and political activity by incumbent judges.

219. *Id.* at 53.

220. *Id.*

221. *Id.* at 54.

222. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(2) (1972); MODEL CODE OF JUDICIAL CONDUCT Canon 5C(2) (1990).

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more time to fundraise effectively.²²³ Rather than suggesting a specific period of time, the “Committee intended that each jurisdiction should adopt time limits for pre-election and post-election (if any) fund-raising that best suit[ed] local conditions.”²²⁴ The committee blessed post-election fundraising as a “necessary evil” in order to allow candidates to incur debt to respond to last-second attacks.²²⁵

As noted above, the current ABA Model Code²²⁶ adopts the Fixed Time Rule for both campaigning²²⁷ and fundraising,²²⁸ though it does not recommend a period of time:

Although the creation of this time period is not new, its use in this Rule to disconnect the status of *being* a judicial candidate from being permitted to engage in the *activities* of a candidate is an important feature of the reorganization of Canon 4. During its deliberations, the Commission was mindful of the need to establish a time period to ensure that a judge elected to a ten-year term could not immediately announce plans to run for reelection, establish a campaign committee, and raise campaign funds for almost ten full years. With the time period in place, the judge can continue to call himself or herself a candidate for ten years, but can raise campaign funds only after the time period has been satisfied, typically one year before the first primary.²²⁹

4. Evaluation of Electioneering Rules

In light of the 2010 elections and promises from various groups across the country to engage in active opposition to judges sitting for retention in 2012,²³⁰ electioneering rules and norms for

223. MILORD, *supra* note 217, at 54.

224. *Id.*

225. *Id.*

226. MODEL CODE OF JUDICIAL CONDUCT (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2010_mcjc_final_for_website.authcheckdam.pdf.

227. *See id.* R. 4.2.

228. *Id.* R. 4.4(B)(2).

229. MODEL CODE OF JUDICIAL CONDUCT, Reporter’s Explanation of Changes, 65–66 (2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/judicialethics/mcjc_2007.authcheckdam.pdf.

230. *See, e.g.*, SKAGGS ET AL., *supra* note 13, at 9 (“Bob Vander Plaats, a failed Iowa gubernatorial candidate who led the Vote No campaign, told his supporters, ‘We have ended 2010 by sending a strong message for freedom to the Iowa Supreme Court and to the entire nation that activist judges who seek to write their own law won’t be tolerated any longer.’”); Schotland, *supra* note 132, at 118 (“The 2010 Iowa judicial elections were, as former Arkansas Governor Mike Huckabee said soon after, of an ‘historic nature,’ likely ‘one that . . . will give legs to a larger

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retention election candidates should be reevaluated.²³¹ This admonition is in no way a suggestion that all retention elections are in sudden danger of being politicized, resulting in a catastrophic destruction of judicial impartiality. Instead, this Article aims to initiate a dialogue regarding how judicial retention electioneering rules should be structured going forward.

Because under all three rule sets judges can always campaign in the presence of active opposition,²³² the question regarding what rule should be in place to govern the timing of retention election campaigns is really a question of what rule should govern when a judge does not yet face active opposition. This section explores this question and concludes that the Fixed Time Rule is the most desirable. The Fixed Time Rule best balances the competing values of judicial impartiality and accountability by providing a guaranteed window during which judges can prepare to defend themselves from opposition, and by preventing judges from electioneering perpetually, risking bias or fears of bias. Additionally, the Fixed Time Rule allows judges to engage in greater outreach to the citizenry to explain the courts' role in government.

“Thanks for voting to retain me! I hereby announce my candidacy . . .”

Allowing judges to campaign even when an election is not imminent, as permitted under the Candidacy Rule, unnecessarily opens the door to partiality and the appearance of partiality. Because many jurisdictions have such exploitable rules for becoming a retention candidate, an incumbent judge could become a “candidate” years in advance of the actual election,²³³ and could potentially shake down lawyers and parties for contributions as a regular matter. This risk is potentially ruinous to judicial impartiality while providing no obvious benefit; there is simply no legitimate reason for a judge to “campaign,” if activity so far from the election could even fairly be characterized in that way, and fundraise ten years

movement over the next few years.’”). Current Iowa Supreme Court Chief Justice Mark Cady expressed in February 2012 that it is “hard for (him) to tell” if politics have shifted away from attacks on the court. O. Kay Henderson, *Chief Justice “Very Concerned” About November’s Retention Election*, RADIO IOWA (Feb. 24, 2012), <http://www.radioiowa.com/2012/02/24/chief-justice-very-concerned-about-novembers-retention-election> (internal quotation marks omitted).

231. *Cf. How Should We Respond to the 2010 Judicial Elections?*, *supra* note 129, at 105 (“The states that are more restrictive ought to at least discuss the dangers these [Active Opposition Rule] restrictions can create.”).

232. Assuming the Fixed Time Rule is sufficiently generous.

233. *See supra* Part II.B.2.

before an election. The ABA was correct in its 2007 assessment that such boundless electioneering should not be permitted.

As undesirable as the Candidacy Rule might be, however, one advantage is that it almost certainly passes constitutional muster. In *Republican Party of Minnesota v. White*,²³⁴ the Supreme Court considered constitutional limitations on judicial electioneering rules, striking down the “announce clause” in Minnesota’s Judicial Code of Conduct, which prohibited judicial candidates “from announcing their views on disputed legal and political issues.”²³⁵ Similarly, rules limiting the time during which a judicial candidate can campaign (that is, the Fixed Time and Active Opposition Rules) could be subject to challenge under *White*,²³⁶ given the uncertainty of the breadth of the case. One view holds that, after *White*, “efforts to preserve potent constraints on judicial campaign speech are overwhelmingly doomed to failure,”²³⁷ while the opposite camp takes solace in the majority’s rather cryptic admonition that “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”²³⁸

The more persuasive interpretation of *White* is that the case should not be read as a prohibition against any restrictions upon judicial candidates. *White* certainly did not hold that states must allow judges to perpetually campaign. While drawing an appropriate line in the shadow of *White*’s ambiguities may be difficult, a rule that prohibits campaigning by judges when the next election is still several years away hardly seems unreasonable, particularly in light of the fact that *White* was concerned only with conduct less than two years away from an election.²³⁹

234. 536 U.S. 765 (2002).

235. *White*, 536 U.S. at 768, 787–88.

236. *Cf.* Briffault, *supra* note 151, at 223–28 (discussing questionable constitutionality of bans on personal contribution solicitations by judges). Because numerous articles have been written on *White* and its implications for other canons of judicial behavior, the nuances of the opinion will not be rehashed here.

237. Nat Stern, *The Looming Collapse of Restrictions on Judicial Campaign Speech*, 38 SETON HALL L. REV. 63, 64 (2008).

238. *Republican Party of Minn. v. White*, 536 U.S. 765, 783 (2002); *cf.* Briffault, *supra* note 151, at 186 (“[T]he special nature of the judicial function can justify restrictions on campaign conduct that would not be constitutional in the nonjudicial setting.”).

239. Gregory Wersal, the *White* plaintiff, ran for supreme court justice in 1996 and 1998. *White*, 536 at 768–69. He announced his candidacy for the November 1998 general election in January 1997, a little less than two years before the election. *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 973 (D. Minn. 1999). “In February 1998 [eight months before the election], Wersal sought an advisory

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Fixed Time Rule vs. Active Opposition Rule

Having dismissed the Candidacy Rule, this Article now turns to the Fixed Time and Active Opposition Rules. Because retention elections are so rarely contested and uncontested judges are almost universally retained, in those jurisdictions employing the Fixed Time Rule, it is difficult to foresee many judges campaigning when they do not face any real opposition—whether it reaches the level of “active opposition” or not. However, the Fixed Time Rule has the benefit of permitting judges to both fundraise and campaign as insurance against potential opposition. During the Fixed Time window, judges might raise campaign funds and prepare campaign literature and media buys, but wait for active opposition to appear before actually campaigning.

The problem with the Active Opposition Rule is that judges cannot respond to late-breaking opposition. Knowing that the judge cannot campaign or even fundraise until the opposition emerges, some calculated opposition efforts will be timed to exploit this weakness. Indeed, precisely this strategy was utilized in 1996 against both Tennessee Supreme Court Justice Penny White and Nebraska Supreme Court Justice David Lanphier, both of whom were defeated in their retention bids after opposition groups launched their attacks only two months before the elections.²⁴⁰ More recently, an unsuccessful campaign opposing the retention of Alaska Justice Dana Fabe in 2010 emerged a mere two weeks before election day.²⁴¹ In light of this risk, some candidates in jurisdictions that permit preemptive fundraising have raised money as insurance against a possible attack that never materialized.²⁴² Thus while the Active Opposition Rule furthers the laudable goal of discouraging

opinion from the Office of Professional Responsibility” regarding whether it would enforce the relevant judicial canon provisions against him. *Id.*

240. Tarr, *supra* note 3, at 613–14. A similar strategy was also used against Kansas Supreme Court Justice Carol Beier in 2010, but was unsuccessful. Sears, *supra* note 34, at 877.

241. *See supra* note 146.

242. *See, e.g.*, Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1407–08 n.40 (2003) (listing numerous preemptive fundraising efforts by judges); Tarr, *supra* note 3, at 614 (“[F]earful of opposition by anti-abortion groups that ultimately did not materialize, California Chief Justice Ronald George and Justice Ming Chin raised \$886,936 and \$710,139, respectively, for their retention elections in 1998.”). The preemptive fundraising was presumably permissible because there was either an exception to the pure Active Opposition Rule or the jurisdiction operated under either the Fixed Time or Candidacy Rules, which naturally permit a candidate to preemptively fundraise against feared opposition.

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unnecessary electioneering activities by judges, it undesirably leaves judges open to being caught off guard by last minute attacks.

To some, the Fixed Time Rule might be considered worse than the Active Opposition Rule because the Fixed Time Rule allows judges to fundraise and campaign as insurance, injecting a monetary element into a system that might otherwise lack it and possibly damaging judicial impartiality in the process. This concern is not unfounded; there are real dangers that spring from monetary donations being given to a judicial candidate; the public should diligently ensure that judges are not surrendering their impartiality by being swayed by big donors rather than the law.

However, some element of politics may be unavoidable if *any* election system is employed. Additionally, many jurisdictions prohibit judges from personally soliciting funds,²⁴³ somewhat reducing fears of improper influence. Judges who have reservations about preemptively fundraising are free to refrain from doing so under the Fixed Time Rule, and indeed, could essentially proceed as if the Active Opposition Rule were in place if they so desired.

Moreover, there are strong arguments that judicial campaigning in retention elections promotes an informed electorate. Because of a lack of understanding regarding the judiciary generally, “judges in many states have been encouraged to meet with the public more ‘to talk about the role of the judge.’”²⁴⁴ Limited campaigning—in a prescribed pre-election window—is a way to further this goal. With the Fixed Time Rule, this interest in voter education can be furthered even in the absence of active opposition.

Ultimately, the potential benefits of the Active Opposition Rule are somewhat speculative, and are outweighed by the Fixed Time Rule’s capacity for mitigating the risks posed by last-second attacks and promoting public knowledge about the judiciary. Fixed Time Rule campaigning in the absence of active opposition *protects* the impartiality of the judiciary because it permits judges to shield themselves from political blitzes that would be more effective under a pure Active Opposition Rule, which leaves judges vulnerable by requiring them to react rather than being prepared in advance. If judges can only electioneer in response to opposition, their impartiality may be compromised out of fear that they could not effectively campaign if they needed to do so to retain their seats.

243. Briffault, *supra* note 151, at 223. *But see id.* at 224–28 (discussing possible unconstitutionality of such provisions).

244. *Conversation*, *supra* note 6, at 341 (statement of Shirley Abrahamson, C.J.).

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The Fixed Time and Active Opposition Rules are not, however, mutually exclusive. For example, the Active Opposition Rule could be structured such that while campaigning is not permitted, preparatory activities—such as collecting contributions, buying airtime, and printing literature—could be allowed in a Fixed Time Rule manner. In other words, candidates could make preparations during a Fixed Time window but could not begin the actual campaign until active opposition appears. Perhaps judges subject to such a hybrid rule could get the best of both worlds: judges' campaign committees would still collect contributions, but if no campaign is ultimately waged, the potential corrupting influence of these contributions is likely diminished.

A different hybrid rule could permit judges to campaign both in a Fixed Time window prior to the election and before that window if active opposition appears. Because this hybrid takes the precision of the Fixed Time Rule and opens it up to abuse due to the discretionary nature of the Active Opposition Rule, requiring certification of active opposition may be appropriate if this hybrid rule is adopted. Otherwise, the active opposition exception potentially swallows the Fixed Time Rule. On the whole, such a hybrid rule is probably unnecessarily complicated, and a simple Fixed Time Rule is preferable to both hybrids, particularly if the time allotted for fixed time campaigning is sufficiently generous.

Regardless of which particular approach is ultimately accepted, a clear time limit for electioneering before a retention election is necessary. Rather than suggesting a time duration here, this Article follows the guidance of the ABA and leaves this decision up to the individual states.²⁴⁵ Different political conditions and different courts might require different Fixed Time windows. Note that judges compiling war chests for future elections can be thwarted; some states require that excess campaign funds for judicial candidates be surrendered to the state, returned to contributors, or donated to a charitable organization a short time after the election.²⁴⁶

245. *See supra* notes 226–28 and accompanying text.

246. *See, e.g.*, N.M. CODE OF JUDICIAL CONDUCT R. 21-800(E) (2004) (“A candidate for judicial office in either a partisan or retention election who has unused campaign funds remaining after election, and after all expenses of the campaign and election have been paid, shall refund the remaining funds pro rata to the campaign contributors, or donate the funds to a charitable organization, or to the State of New Mexico, as the candidate may choose, within thirty (30) days after the date the election results are certified.”).

The Fixed Time Rule best serves the values of retention elections. By being able to prepare for opposition ahead of time, judges cannot be caught off guard by last-minute attacks. By eliminating this weakness, judges will have more confidence in their ability to win a retention battle and will consequently be more willing to make unpopular, but correct, decisions. In this way, the rule promotes judicial impartiality but leaves the accountability aspect of retention elections undisturbed. Should judges choose to campaign in the absence of opposition, doing so would serve the goal of educating the citizenry about the nature of retention elections and the judicial branch generally. While a few judges might engage in “unbridled” campaigning that would not fulfill these values, experience dictates that the risk is small and insufficient to undermine the probable benefits of this rule.

III. SHOULD JUDGES FACING ACTIVE OPPOSITION CAMPAIGN?

Many see campaigning by judges as anathema to the judicial role. Nonjudicial candidates are permitted, and even encouraged, to engage in a wide range of activities, such as meeting with constituents and promising to change the law.²⁴⁷ The activities of judicial candidates, on the other hand, are much more limited.²⁴⁸ In spite of this, some judicial campaign ads seem to toe the line of propriety, most often because they explain how the judge will be tough on crime; this tactic is routinely decried by the defense bar.²⁴⁹ Judges taking money from potential litigants and their attorneys is also widely frowned upon.²⁵⁰ Yet a judge facing retention who refuses to campaign is more likely to be rejected by voters than one who does campaign.

247. See Schotland, *supra* note 132, at 126 n.32 (indicating that nonjudicial candidates can use open or private meetings, make promises, cultivate and reward sponsorship, participate in diverse multi-member bodies, build up patronage through constituent work, and fundraise).

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

249. See, e.g., Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 358 (2010) (explaining that criminal defendants and their attorneys “could have a genuine concern that they will not be facing a fair and impartial tribunal”).

250. See, e.g., ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, *BUYING JUSTICE: THE IMPACT OF CITIZENS UNITED ON JUDICIAL ELECTIONS* 4–7 (2010) (citing polls of citizens, business leaders, trial lawyers, and judges all indicating a dislike of contributions to judicial campaigns).

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Because it is more important for a judge in a retention election to be able to maintain his or her seat on the bench and therefore not subject his or her rulings to the will of the public, retention election candidates should campaign if they believe doing so is necessary. This conclusion is somewhat paradoxical, since fundraising and campaigning may sometimes infringe upon judicial impartiality and the appearance thereof. Nevertheless, campaigning allows a judge to better protect the rulings that he or she has made and in this way protect judicial impartiality generally.

As an initial matter, note that the participants on either side of a retention election battle are uniquely positioned relative to the participants in other judicial elections. In contested non-retention elections (meaning those where opposing candidates vie for the same position), the incumbent and challengers are all bound by the same rules.²⁵¹ In contrast, a judge facing a retention election is bound by a code of judicial conduct, which restricts some of his or her actions. The judge's opposition, meanwhile, has no such restrictions and is likely bound by few rules at all.²⁵² As the history of American politics has shown, some individuals will press the limits of propriety.²⁵³ Though the sitting judge is more restricted in his or

251. See MODEL CODE OF JUDICIAL CONDUCT R. 4.1–4.2 (2010).

252. Cf. Briffault, *supra* note 151, at 196.

253. The Iowa opposition's suggestion that other freedoms would be at risk should the justices be retained comes to mind. See *supra* Part I.B.1. At least some of these suggestions strain credulity. This is not to imply that anything the opposition movement did in Iowa, or any other campaign, was illegal. Instead, there is a wide range of tactics that are legal, but, at least in this author's opinion, are underhanded. As a more recent example, the American Crossroads super PAC, which only can make independent expenditures and is forbidden from making contributions to candidates, has recently explored the possibility of "coordinating" with candidates insofar as the candidates "would be consulted on the advertisement script and would then appear in the advertisement." American Crossroads, FEC Advisory Opinion Request 2011-23, at 3 (2011). Coordinated expenditures are deemed contributions by law. 2 U.S.C. § 441a(a)(7)(B)(i) (2006). The idea behind the American Crossroads request was that, because of the wording of the Federal Election Commission (FEC) regulation defining "coordinated communications," FEC Coordinated Expenditures Rule, 11 C.F.R. § 109.21 (2011), these proposed actions would not fall within the technicalities of the rule and therefore be permissible. See generally American Crossroads, *supra*. This tactic had already been utilized by a state Democratic committee at the time of American Crossroads' request. See *id.* at 2. The FEC ultimately deadlocked 3-3 on the request, leaving the permissibility of the tactic an open question. FEC, Certification in the Matter of American Crossroads, AO 2011-23 (Dec. 5, 2011), available at <http://saos.nictusa.com/aodocs/1189803.pdf>. Permitting this tactic would essentially destroy limits on contributions to candidates. Letter from J. Adam Skaggs & David Earley, Brennan Ctr. for Justice, to Anthony Herman, Gen. Counsel, Fed. Election Comm'n (Nov. 14, 2011), available at http://brennan.3cdn.net/3373da0d1d6f0197db_pum6bnoc

her campaigning, he or she still has the incumbency advantage to offset this edge held by the opposition.

The 2010 Iowa justices' decision not to campaign was certainly well-intentioned. Rather than risk further politicizing the Iowa Supreme Court, the justices stayed above the fray and let the people make their own decision, based upon the information available to them. Justice Streit would later say, "We didn't think Iowa voters would ever swallow Vander Plaats's story, and I don't have that confidence anymore today."²⁵⁴

Beyond a more general politicization of the judiciary, the Iowa justices may have feared the appearance of partiality that can stem from judges accepting campaign contributions.²⁵⁵ This fear is not unfounded. Almost half of surveyed state judges agreed that campaign donations influence judicial decisions, according to a 2001 poll.²⁵⁶ The Conference of Chief Justices, which represents 57 chief justices from every state and U.S. territory, wrote in a 2009 brief to the U.S. Supreme Court: "As judicial election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation's elected judges may be imperiled."²⁵⁷

Fears of judicial partiality stemming from campaign contributions may be incongruous with a post-*Caperton* and *Citizens United* world, however. As a result of *Citizens United* and its progeny, nota-

1.pdf (advising the FEC to reject the position taken by American Crossroads in FEC Advisory Opinion Request 2011-23). Of course, this behavior must be expected from the most skilled players of the political "game." See generally DAVID SIRLIN, *PLAYING TO WIN: BECOMING THE CHAMPION* 18 (2005) (explaining that exploiting the weaknesses of the written rules, without violating those rules, and refusing to adhere to unwritten rules of "honor" are essential to success in the realm of high-level competitive game playing). Importantly, Sirlin notes that

[e]xploring extreme 'corner cases' of a game is what high-level play is about.

Exploring extreme situations in life can easily be socially unacceptable, morally wrong, and illegal. [In c]ompetitive games . . . the end (winning) justifies the means (as long as it's through moves the game defines as legal). Real life requires civic virtues like kindness, understanding, justice, and mercy.

Id. at 1.

254. Caldwell, *supra* note 111, at 19.

255. See *supra* p. 254.

256. SAMPLE ET AL., *supra* note 92, at 12. As one Ohio Supreme Court justice put it, "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race." Adam Liptak & Jane Roberts, *Tilting the Scales?: The Ohio Experience; Campaign Cash Mirror's a High Court's Rulings*, N.Y. TIMES (Oct. 1, 2006), <http://query.nytimes.com/gst/fullpage.html?res=9A06E7D81730F932A35753C1A9609C8B63>.

257. SAMPLE ET AL., *supra* note 92, at 9, 12 (quoting Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 4, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), 2009 WL 45973, at *4).

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bly *SpeechNow.org v. FEC*,²⁵⁸ individuals, organizations, and corporations can now give unlimited amounts to “independent expenditure only committees,” more commonly referred to as “super PACs,” which in turn can make unlimited independent expenditures promoting or opposing candidates.²⁵⁹ Consequently, the decision of the judge to campaign or not may be largely irrelevant; if someone wants to promote a judge’s retention candidacy, that person can simply run his or her own independent campaign to support the candidate, whether the judge likes it or not. While direct campaign contributions can still be made, these are subject to statutory limits in most states.²⁶⁰ As of December 2011, super PACs are already having a major impact in the 2012 presidential election,²⁶¹ suggesting that they may also influence future judicial elections.

Indeed, the Iowa justices and the then-candidate in *Caperton* all received independent support unconnected with the candidates. *Caperton*, however, held that “there are objective standards that require recusal when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable” and that the \$3 million Blankenship spent in the election was suffi-

258. 599 F.3d 686 (D.C. Cir. 2010).

259. See Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1629, 1631–32, 1647–56 (2012). An independent expenditure, by definition, is not coordinated with a candidate. Coordinating with a candidate causes the expenditure to be converted into an in-kind contribution, subject to contribution limits. Because of this lack of coordination, the Supreme Court held in *Citizens United* “that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).

260. See, e.g., SKAGGS, *supra* note 250, at 15 n.2. See also STATE LIMITS ON CONTRIBUTIONS TO CANDIDATES 2011–2012 ELECTION CYCLE, NAT’L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2011-2012.pdf (last updated Sept. 30, 2011).

261. See, e.g., T.W. Farnam & Dan Eggen, *Super PACs Herald a Punishing Campaign Season*, WASH. POST (Dec. 8, 2011), http://www.washingtonpost.com/politics/super-pacs-herald-a-punishing-campaign-season/2011/12/08/gIQAEiHPgO_story.html; Maggie Haberman & Kenneth P. Vogel, *Adelson Discusses \$20 Million Check to Pro-Newt Gingrich Group, Denies Commitment*, POLITICO (Dec. 15, 2011, 1:49 PM), <http://www.politico.com/news/stories/1211/70501.html> (discussing possibility that casino magnate would direct \$20 million to super PACs supporting Newt Gingrich); *Who’s Financing the ‘Super PACs’*, N.Y. TIMES, <http://www.nytimes.com/interactive/2012/01/31/us/politics/super-pac-donors.html> (last updated May 7, 2012). The current contribution limit to a presidential candidate is \$5,000 annually—\$2,500 for the primary election and \$2,500 for the general election. See 2 U.S.C.A. § 431 (West 2012); *Contribution Limits 2011-12*, FEC, <http://www.fec.gov/pages/brochures/contriblimits.shtml> (last visited Dec. 16, 2011).

cient to require the justice to recuse himself.²⁶² Hence, while the independent expenditures themselves were permissible in both cases on First Amendment grounds, the independent expenditures in *Caperton* required recusal of the justice on due process grounds. It was in this way that Justice Kennedy—who authored both *Caperton* and *Citizens United* on behalf of five-member majorities—distinguished *Caperton* in *Citizens United*.²⁶³ The end result is that one is free to support a judicial candidate through independent expenditures as much as one wants. If, however, one goes over some indeterminate threshold of support, the judge is required to recuse him or herself from deciding particular cases.

While one might initially conclude that the Iowa justices valued remaining apolitical over winning, it was not that choosing to campaign led to certain victory and choosing not to campaign led to certain defeat. Instead, from the justices' perspective, campaigning entailed costs that they were unwilling to bear. If the justices viewed campaigning as an absolute evil, rather than an undesirable means to the desirable end of winning, then campaigning was simply never a possibility, whatever the cost. The effort and strain involved in campaigning might also have been viewed as burdensome and not worth the likely, though not certain, increase in affirmative votes.²⁶⁴ This author speculates that the justices perceived campaigning as an absolute evil and therefore decided they would rather face a greater risk of not being retained than taint their honor by violating a perceived absolute prohibition against campaigning.²⁶⁵

However noble their intentions might have been, the justices were not facing novices. The opposition consisted of “veterans of the previous battles against same-sex marriage in other states [who] had become adept at distilling years of history and legal scholarship into 30-second sound bites.”²⁶⁶ The justices needed all the help they could get if they were going to win. As mentioned earlier, failing to campaign may have actually been the difference in Iowa in

262. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257, 2263–64 (2009) (internal citation omitted) (internal quotation marks omitted).

263. See *Citizens United*, 130 S. Ct. at 910 (“*Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.”); see also Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 611–15 (2011) (discussing the inconsistency between *Citizens United* and *Caperton*).

264. The strain of campaigning on a judge might be even higher relative to a nonjudicial candidate due to the special restrictions with which the judge must comply. See *supra* Part III.

265. See *supra* Part I.B.1.

266. Cicoski, *supra* note 109, at 19.

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2010.²⁶⁷ While the justices initially accepted their defeats with grace, Justice Streit later expressed that he was “still angry—about the lack of support he and his fellow justices received from groups that promised it [and] about the bind he and his fellow justices were put in.”²⁶⁸ Justice Streit believes in hindsight that the justices should have campaigned.²⁶⁹

Though the justices may have felt confident that they did the right thing at the time, both in their judicial decisions, most notably legalizing same-sex marriage in Iowa, and in their decision not to campaign, this is cold comfort to those in Iowa who would benefit from unpopular decisions. As Wisconsin Chief Justice Shirley Abrahamson explains, “[J]udicial independence is not for the judges, and it’s not for the lawyers; it’s for the people who come to court, and it’s for everyone else who doesn’t come to court but whose life is affected by what happens in court.”²⁷⁰

The Iowa justices should have campaigned in response to the opposition.²⁷¹ By failing to campaign and defend their seats, the justices partially ceded their judicial impartiality. Instead of ensuring that their own interpretation of the Iowa Constitution remained in place, they increased the risk that the views of the opposition would become governing law. Of course, this is a bit of an oversimplification, as it is not the opposition that gets to choose the judge’s successor, but the selection commission and the governor. However, a governor who knows why a judge was not retained would be likely to give the opposition what it wants. Therefore, the Iowa justices’ decision not to campaign may have endangered the *Varnum* opinion.

That being said, such a change in the membership of a court does not necessarily mean that the unpopular decision will be overruled. Perhaps the replacements will believe that the case was rightly decided or should remain undisturbed on stare decisis grounds.²⁷² However, knowing that the crocodile in the bathtub at-

267. Curriden, *supra* note 9, at 58.

268. Caldwell, *supra* note 111, at 19.

269. *See id.*

270. *Conversation*, *supra* note 6, at 341 (statement of Shirley Abrahamson, C.J.).

271. *See, e.g.*, Schotland, *supra* note 132, at 124 (explaining that “most knowledgeable observers have faulted” the justices for not campaigning, though Schotland himself does not).

272. For example, the Iowa Supreme Court has explained that “we do not overturn our precedents lightly and will not do so absent a showing the prior decision was clearly erroneous. Stare decisis does not prevent the court from correcting past judicial announcements that were plainly wrong.” *Iowa v. Derby*, 800

tacked once for a particular move, the replacement judge may reasonably believe the crocodile might attack again for the same “offense.”²⁷³ Indeed, the same-sex marriage crocodile would have two feet out of the bathtub before the replacement justices even arrived. To continue shaving after having seen what the crocodile did to one’s predecessor would be quite a feat indeed.

Ultimately, judges should make their decisions to the best of their professional ability and defend them by campaigning whenever opposition appears. “While . . . ‘good’ judges will ignore the political consequences of unpopular decisions, these ‘good’ judges will be the very ones most likely to be removed.”²⁷⁴ By the time a sitting judge is faced with the question of whether to campaign in response to active opposition, the crocodile is already out of the bathtub. It is too late to step out of the bathroom; the only choice is whether to fight back. Certainly there is something to be said for attempting to preserve the judiciary’s impartiality by not campaigning. But this value is largely unattainable once a major opposition appears—the election is already highly politicized. If the judge is rejected, his or her replacement will be viewed as the triumph of this politicized opposition movement. If the judge is retained, the nonacceptance of the political opposition becomes a political affirmation of the judge.

One need only look to Chief Justice Kilbride in the 2010 Illinois retention elections for a counterexample to the Iowa justices. Kilbride raised a staggering \$2.7 million to combat the \$700,000 campaign waged against his retention. Rather than allow the opposition effort to unseat him, he decided to fight back.²⁷⁵ It is certainly possible that Kilbride could have won without campaigning, particularly because the true motives behind the opposition effort were uncovered before the election and were received negatively.²⁷⁶ In essence, Justice Kilbride correctly valued winning highly and discounted the detriments of campaigning by judges. But it is certainly possible that Kilbride could have won without campaigning; particularly because the true motives behind the opposition effort were uncovered before the election and were received negatively.

N.W.2d 52, 59 (Iowa 2011) (internal citations omitted) (internal quotation marks omitted).

273. As Albert Einstein, and later Justice Scalia, put it, “Insanity . . . is doing the same thing over and over again, but expecting different results.” *Sykes v. United States*, 131 S. Ct. 2267, 2284 (Scalia, J., dissenting).

274. Uelmen, *supra* note 82, at 2072.

275. *See supra* notes 137–141 and accompanying text.

276. *See supra* notes 137–141 and accompanying text.

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Finally, the mere existence of active judicial campaigns does not mean that judges will descend into the mud with their opposition. Judges can, and overwhelmingly do, run “predominantly positive, traditionally themed advertisements.”²⁷⁷ Candidates in nonpartisan elections ran zero attack ads in 2010.²⁷⁸ Most judges who campaign do so in a manner that is respectful of the judiciary’s role. The negative ads are largely being distributed by outside groups that the judge cannot control, regardless of whether he or she campaigns.²⁷⁹

CONCLUSION

An impartial judiciary is essential to this country’s system of law, but judges should not be completely unaccountable. The Fixed Time Rule best balances these competing interests by allowing a judge to make correct but unpopular rulings because it gives the judge a fair chance to defend his or her seat without allowing the judge to engage in a perpetual campaign. Even in the absence of opposition, judges should be permitted to electioneer a certain amount of time before a retention election to preemptively guard against would-be attackers and to inform the electorate regarding the retention election process as well as the judicial role. Thus states with retention elections should adopt the Fixed Time Rule to govern judicial electioneering.

Further, encouraging judges facing opposition to campaign makes the best of a bad situation and protects the judges’ impartiality and the rule of law. A judge facing retention does not relinquish his or her impartiality by campaigning, but instead embraces it by increasing the chance that he or she will remain on the bench and be able to defend the court’s precedents. A failure to campaign invites the rule of the masses rather than the rule of law. When faced

277. SKAGGS ET AL., *supra* note 13, at 13.

278. *Id.* at 18. However, such positive ads by the candidates do not necessarily lead to a collegial court; some judges are literally at each other’s throats. In June 2011, it was reported that Wisconsin Supreme Court Justice David Prosser, who had recently won a contested election to retain his seat, and Justice Ann Walsh Bradley were involved in a physical altercation where Bradley may have charged at Prosser and Prosser may have choked Bradley. *See* Crocker Stephenson, Cary Spivak & Patrick Marley, *Justices’ Feud Gets Physical*, JSONLINE (June 25, 2011), <http://www.jsonline.com/news/statepolitics/124546064.html>. No charges were filed over the alleged altercation. Andrew Harris, *Wisconsin Judges in Alleged Fracas Won’t Be Charged, DA Says*, BLOOMBERG (Aug. 25, 2011, 6:07 PM), <http://www.bloomberg.com/news/2011-08-25/wisconsin-judges-in-alleged-assault-won-t-face-charges-prosecutor-says.html>.

279. *See supra* Part III.

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with the bathtub crocodile lumbering toward him, the judge should fight back with his razor rather than be devoured by the beast out of fear that his blade might be dulled.