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FROM WHENCE COMETH OUR STATE APPELLATE JUDGES: POPULAR ELECTION VERSUS THE MISSOURI PLAN

*Justice Robert L. Brown**

I. INTRODUCTION

The perennial debate within the legal profession and the judiciary is whether popular election or the Missouri Plan is the more appropriate and valid method of choosing our state appellate judges. Viewed most simplistically, proponents of elected judges emphasize the democracy and public contact inherent in elections, while those espousing an appointment process like the Missouri Plan, with a retention-election component, contend that appointments are less political and give rise to greater judicial independence; that the caliber of the selected judges is higher; and that diverse backgrounds are more apt to be represented on an appointed bench. Opinions on the issue can be expressed with the vehemence and passion of a holy war.

II. BACKGROUND

Some history is necessary here. The selection of federal judges is the purest example of an appointment system. Once selected by the President of the United States with the advice and consent of the United States Senate, a federal judge serves "during good behavior,"¹ which, as a practical matter, means for life. Because election by the people is not involved at any stage of the federal appointment process, judicial independence historically has been presumed.

However, most federal judges have carried water for a United States Senator, the President himself, or were close friends of one or the other prior to appointment. The end result in the federal appointment system is that in many cases the pool of candidates is limited either by political party or political friendships.² Those without such connections need hardly apply.

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1. U.S. CONST. art. III, § 1.

2. One example of an exception to this conclusion is a procedure used by U.S. Senator Bob Graham of Florida. A bi-partisan committee of both lawyers and lay people receives applications from those interested in the federal judgeship. Top candidates are interviewed, and the committee submits three names to Senator Graham. Members of the public may express their opinion about the finalists. Senator Graham then interviews the finalists, makes his choice, and submits that name to the President.

State appellate judges, by and large, are not selected by executive appointment with a tenure that goes unchallenged "during good behavior."³ At present count, twenty-one states initially elect their appellate judges in either partisan or nonpartisan elections.⁴ Twenty other states and the District of Columbia provide for appointments by the governor or legislature with or without a nominating commission.⁵ Nine states have a patchwork quilt selection process which includes a combination of merit selection initially, and some other method for subsequent retention.⁶ After the initial appointments, eighteen states have elections on whether to retain those judges.⁷

The radical idea of actually electing state judges in partisan elections came into vogue during the presidency of Andrew Jackson from 1829 to 1837, when democracy was in full flower.⁸ Electing judges was part of the movement toward populism, and it was thought that with judicial elections, "men of the people" would reduce the number of "aristocrats" on the bench.⁹ That assessment was not unanimous. In 1835, Alexis de Tocqueville viewed judicial elections in America with some alarm and as an encroachment on judicial independence:

Some other state constitutions make the members of the judiciary elective, and they are even subjected to frequent re-elections. I venture to predict that these innovations will sooner or later be attended with fatal conse-

3. See *Judicial Selection in the States: Appellate and General Jurisdiction Courts—Summary of Initial Selection Methods*, AM. JUDICATURE SOC'Y (rev. June 11, 1996). The states of Massachusetts, New Hampshire, and Rhode Island do provide for life tenure after selection by either a nominating commission (Mass.), the governor (N.H.), or the legislature (R.I.). See *id.*

4. See *id.* Those states are Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin. See *id.*

5. Those states are Alaska, California (G), Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Iowa, Maine (G), Maryland, Massachusetts, Nebraska, New Jersey (G), New Hampshire (G), New Mexico, Rhode Island, South Carolina (L), Utah, Vermont, Virginia (L), and Wyoming (G refers to governor; L to legislature). See *id.*

6. See *id.* Those states are Arizona, Florida, Indiana, Kansas, Missouri, New York, Oklahoma, South Dakota, and Tennessee. See *id.* Tennessee, for example, now provides for evaluation of appellate judges by a panel of judges, lay people, and lawyers. See *id.* Refusal to be evaluated may determine whether the appellate judge can stand in a retention election. See *id.*

7. See Lyle Warrick, AM. JUDICATURE SOC'Y, *Judicial Selection in the United States: A Compendium of Provisions*, 19-22 (2d ed. 1993). Those states are Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, Pennsylvania, Tennessee, Utah, Wyoming. See *id.*

8. See generally Burton M. Atkins, *Judicial Elections: What the Evidence Shows*, 50 FLA. B. J. 152 (1976).

9. See Bradley C. Canon, *The Impact of Formal Selection Process On the Characteristics of Judges - Reconsidered*, 6 L. & SOC'Y REV. 579, 580 (1972).

quences; and that it will be found out at some future period that by thus lessening the independence of the judiciary they have attacked not only the judicial power, but the democratic republic itself.¹⁰

Candidates for state judgeships initially were elected in partisan contests. However, at the turn of the century, elections by party label began to meet with disfavor as people recoiled at the number of "party hacks" on the state courts.¹¹ During this period, many states converted to special elections that were nonpartisan. Other states, however, quickly became disenchanted with nonpartisan elections because the absence of party labels eliminated a cue about the candidate, and thus, an informed choice by the electorate.¹²

In 1940, the State of Missouri became the first state to adopt a merit plan for the selection and retention of judges. The Missouri Plan sought to meld the appointment process and popular election and contained these basic elements: (1) A commission composed of judges, lawyers, and laymen (2) which submitted nominations to the governor who made the appointment (3) subject to tenure by a non-competitive, retention election.¹³ In the year of its passage, the Missouri bar and lay leaders gathered more than 75,000 signatures to put the plan on the ballot. The measure passed by a majority of 54.6 percent.¹⁴ The next state to consider merit selection was New Mexico, where the measure failed. In 1951, only 37.1 percent of the New Mexico electorate voted to convert from popular elections to a Missouri Plan.¹⁵

III. THE DEBATE

Variations on popular election and the Missouri Plan now abound throughout the United States. No recent trend as far as a shift from one method to another can be identified. In 1994, Rhode Island converted from election of judges by the legislature to merit selection. In 1996, Mississippi switched from partisan elections to nonpartisan elections. Recently, both Arkansas and Texas refused to make a comparable change to nonpartisan elections. The dominant question still remains—whether popular election or the Missouri Plan is the better means for selecting our state appellate judges. This article explores the

10. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 289 (Vintage ed. 1954).

11. See Canon, *supra* note 9, at 580.

12. See Warrick, *supra* note 7, at 4. Iowa, Kansas, and Pennsylvania had abandoned nonpartisan elections by 1927. See Warrick, *supra* note 7, at 4.

13. Victor Eugene Flango & Craig P. Ducat, *What Difference Does Method of Judicial Selection Make: Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25, 26 (1979).

14. See Philip L. Dubois, *Voter Responses to Court Reform: Merit Judicial Selection on the Ballot*, 73 JUDICATURE 238, 239 (1990).

15. See *id.*

question from the following perspectives: (1) democracy, (2) political corruption, (3) judicial caliber, and (4) diversity on the bench.

A. Democracy

Both popular elections and the Missouri Plan, with its component of a retention election, employ an expression of the popular will. Elections, and particularly elections that are held at the time of the party primaries or the general election, are assured of a significant voter turnout. Democracy requires that a large number of voters participate so that we are assured that the people have spoken. With a retention election where the public is asked merely: "Should Judge Cardozo be retained?," voter interest may well be minimal. This is especially true if the retention election is a special election held at some date other than the date of the party primaries or the general election. A special election, like a school board election, may generate insignificant interest or, even worse, escape the voters' attention altogether.

The net result is that while both elections between opponents and retention elections where the electorate votes yea or nay on the incumbent require a public vote, only in adversarial elections is voter interest most likely to be stimulated. The exception to this is the retention election where the election evolves into a referendum on a wrenching issue associated with the judicial candidate like abortion, the death penalty, or term limits.

There have been several examples in recent years where judges were not retained in special elections due to intense campaigns on a single issue, but two have attracted the most national attention: the retention election of Chief Justice Rose Bird and Associate Justices Cruz Reynoso and Joseph Grodin in California in 1986, and that of Associate Justice Penny White in Tennessee in 1996. The California justices and Justice White were defeated due to either opinions written or votes cast on the propriety of assessing the death penalty in individual cases.¹⁶ But even in high-profile retention elections, voter turnout can be relatively sparse. For example, in Justice White's election, eighteen percent of eligible voters voted. She lost by a fifty-five to forty-five percent margin.¹⁷

Though popular elections, whether partisan or not, conducted at the same time as party primaries or general elections clearly win on democratic points, one commentator has accused judicial selection by popular elections of being fatally flawed: "I think, however, that democracy is a poor name for a system

16. Interview with former Tennessee Supreme Court Associate Justice Penny White in Hot Springs, Ark. (June 12, 1997). In Justice White's case, one opinion associated with her reversing a death sentence was the issue. *Id.*

17. *Id.*

in which voters routinely vote for people they know nothing about.”¹⁸ The question reduced to its essence is whether the price to pay for electing our judges is too dear.

What is sometimes forgotten in the debate is the beneficial impact a popular election has on the judicial candidate. Former Speaker of the House Sam Rayburn used to tell the story about then Vice President Lyndon Johnson and his excitement over the talent in the new administration of President John F. Kennedy in 1960. Johnson, so the story goes, was exuberant about the number of Rhodes Scholars and Harvard graduates who were part of the Kennedy team and expressed his excitement to Rayburn. Rayburn’s droll response was sobering: “That might be true, Lyndon, but I wish one of them had run for sheriff.”¹⁹ The point made was that not only is practical experience gleaned from a political campaign, but the experience better equips one for public service.

The Rayburn story highlights the fact that the political process can be edifying and an important educational tool *for the judge who is running for office*. Nothing but benefits fall to judicial candidates who must get out among the people and go to the plant gates, the coffee shops, and the courthouses throughout the state or judicial district. The same holds true of having judges speak at civic clubs and county bar associations and even answer questions and hear comments. It all combines to broaden that judge’s knowledge base and frame of reference.²⁰

B. Corruption

Perhaps the most pervasive argument heard in opposition to judicial elections is that they involve politics, and politics is fraught with corruption. Funds must be raised for judicial campaigns, so the argument goes, and those primarily interested in giving to judges are lawyers. Many lawyers are interested in good government. Some, no doubt, are interested in influence. It is estimated that in the election for the retention of the three California justices in 1986, the justices and their opponents all told spent upwards of \$11.4 million.²¹

18. Joel Achenbach, *Why Reporters Love Elections*, 49 U. MIAMI L. REV. 155, 158 (1994).

19. 2 ROBERT CARO, *THE YEAR OF LYNDON JOHNSON: MEANS OF ASCENT* (1990) (quotation paraphrased).

20. See Edmund B. Spaeth, Jr., *Reflections on a Judicial Campaign*, 60 JUDICATURE 10 (1976). Though he opposed the election of judges, Judge Spaeth discussed the positive aspects of campaigning for a judgeship. See *id.*

21. See Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 154 (1988). One other estimate of the amount spent in the three campaigns is \$7.5 million. See John T. Wold & John H. Culver, *The Defeat of the California Justices*, 70 JUDICATURE 348, 350 (1987).

Supreme court races in Arkansas in recent years have become expensive affairs. In 1990, the campaign committee in my bid for the Supreme Court, according to filed reports, spent approximately \$371,000. The campaign committee for my opponent, Judge Judith Rogers, spent about \$250,000. Thus, the total amount spent on the race for one seat on the Arkansas Supreme Court easily exceeded \$600,000. In 1996, in the campaign for Chief Justice of the Arkansas Supreme Court, the funds raised and spent were equally significant. Chief Justice W.H. "Dub" Arnold, again according to reports, spent \$131,000 and raised all but \$3,000 of that amount. His opponent, Lamar Pettus, spent over \$383,000, a major portion of which appears to have been borrowed or contributed to the campaign by the candidate himself. Even when no opponent is in the offing, fundraising and expenditures are necessary. Justice Annabelle Clinton Imber spent \$47,000 in her unopposed bid to this state's highest court in 1996.

While the fundraising does not approach that of a U.S. Senate race in Arkansas, where multi-million dollar campaigns are the norm and where soft money from national political parties pours in, the amounts are significant when lawyers, family, and friends are generally the only potential donors. The effect of the recently adopted constitutional amendment in Arkansas which reduces the limit on campaign contributions from \$1,000 to \$100 per donor will have an impact if it is ultimately upheld in federal court.²² It is generally accepted that the low limit of \$100 will protect against the perception that a lawyer contributing \$1,000 or more through his family or law partners has influence with the judge. At the same time, the reduced limit will benefit incumbents and judicial candidates who are independently wealthy.

The Arkansas Supreme Court has adopted safeguards in the Arkansas Code of Judicial Conduct to provide a protective shield against the most egregious fundraising abuses by the judicial candidate. First, judicial candidates may not ask for contributions in campaigns or even for publicly-stated support; only a committee appointed by the candidate may do so.²³ Neither may a judicial candidate receive funds, personally or directly, though the Code in something of a *non sequitur* also provides that if the candidate does receive a contribution, the candidate must immediately turn the money over to his or her committee.²⁴ Finally, there is a time limit on when the committee can

22. See Campaign Contribution and Disclosure Act, 1995 ARK. ACTS 1 (adopted as Proposed Initiated Act Number One by popular vote on November 5, 1996; codified at ARK. CODE ANN. §§7-6-201 to 224 (Michie Supp. 1997)). A federal district court struck down the limit for state appellate court candidates, and the matter is presently on appeal to the Eighth Circuit Court of Appeals. See *Russell v. Burris*, 978 F. Supp. 1211 (E.D. Ark. 1997).

23. See ARK. CODE OF JUDICIAL CONDUCT Canon 5(C)2 (1997).

24. See *id.*

solicit campaign funds. The committee may not raise money earlier than 180 days before a primary election or later than 45 days after the last contested election.²⁵ Breaches of these canons as set forth in the Arkansas Code of Judicial Conduct subject the judicial candidate to sanctions by the Arkansas Judicial Discipline and Disability Commission.²⁶

Isolating a judicial candidate by requiring a campaign committee as a buffer has obvious advantages, but it cannot be described as a perfect solution. There is no proscription against appointing a campaign committee earlier than six months before a primary election in Arkansas.²⁷ This raises the question of whether a judge should recuse on cases when a member of his or her committee is participating. This question is also relevant when a member of a committee of that judge's opponent is involved in a particular case. There is no ready answer to this question, and in Arkansas the issue is left to the discretion of the judge. In practice, judges do appear to disqualify from cases involving their committee chairs, but because committee membership may involve as many as 100 members, recusals are not automatic except perhaps during the six-month period of the campaign itself. An alternative is to advise opposing counsel that a member of the judge's committee is involved in the case. Opposing counsel may then suggest recusal.

Campaign contributions over a certain amount are reportable to the Arkansas Secretary of State and are typically listed in Arkansas's newspapers. Hence, it is unrealistic to assume that a candidate can be kept completely ignorant about his or her supporters in all instances. Nevertheless, the protections in the Arkansas Code of Judicial Conduct provide a realistic bulwark against solicitation of funds by judicial candidates. To the extent the candidate is sheltered from knowledge about his contributors, the perception of favored treatment for particular lawyers is reduced.

Corruption, however, may take other forms. A statewide contested election can only be won in this age of telecommunication with political advertising, which means thirty second television spots. It is true that precious little can be garnered about a candidate in thirty seconds, and attack spots can demean the system and be devastating to an opponent who does not have the time or resources to respond. Defeated California Justice Joseph Grodin had this to say about the effect of an attack ad in his race:

25. *See id.*

26. *See* ARK. CONST. amend. LXVI. THE Arkansas Judicial Discipline and Disability Commission was adopted by vote of the people in 1988 and now forms part of Amendment 66 of the Arkansas Constitution. *See id.*

27. *See* Ark. Judicial Ethics Advisory Comm., Op. 95-04 (1995).

And imagine the power of the 30-second television spot: here was a stomach-turning crime, committed by a person whose humanity was cloaked in blood; here is the mother, or the grandmother, or the daughter of the victim lamenting her loss, and suggesting, or implying, that the California Supreme Court, in its unalterable opposition to the death penalty, and in defiance of the public will, had in reliance upon some unidentified technicality set the defendant loose on the streets. Of course, it was no technicality, it was a matter of constitutional or statutory right, and of course the defendant was not turned loose, but returned for retrial—in fact by the time the opposition ran the principal ad I have described, the defendant in the case had already been retried, reconvicted, and resented to death. But try explaining all of that effectively in 30 seconds on television, or in any manner sufficient to offset the emotional impact of the opponents' appeal.²⁸

Television spots in judicial races in Arkansas, though hard-hitting, have not compared to the vitriol expressed in recent judicial races in California, Alabama, and Texas, for example. In the Brown/Rogers race in 1990, positive advertisements were run but also spots alleging absenteeism and lack of truthfulness. In the Arnold/Pettus race for chief justice in 1996, there were background spots on the candidates and one tough-on-crime ad by Pettus. There was also a Pettus spot which hinted at improper use of seized government property, a blue sports car, by his opponent. Reliance on television spots, which are imperative for any meaningful statewide race, may be an Achilles heel in certain judicial elections. This potential weakness, though, is not limited to judicial races. We also elect United States Senators and Presidents based on thirty second spots. The demands of the video climate in which we live should not be the basis for discarding popular elections.

Fundraising abuses have cast the judiciary in an unfavorable light in some jurisdictions. The controversy in Texas in the eighties over the Texas Supreme Court's refusal to review a lower court decision in the Texaco/Pennzoil case comes to mind.²⁹ There, the issue was the excessive amount of money poured into judicial campaigns for members of the Texas Supreme Court by plaintiff attorneys and defense attorneys as well as lawyers on both sides of that specific litigation.

There is, also, the potential for demagoguery and the extent to which a candidate can campaign on incendiary issues like the death penalty, abortion,

28. Joseph R. Grodin, *Judicial Elections: The California Experience*, 70 JUDICATURE 365, 366-67 (1987).

29. See Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184, 185 (1991).

term limits, or longer incarcerations. Voicing a position on an issue likely to come before the court is forbidden under Arkansas canons.³⁰ This should preclude statements, either pro or con, by candidates on the campaign hustings on such burning issues. But here the First Amendment also comes into play in the form of a candidate's political free speech. At least two federal district courts have struck down curtailments on political comment on First Amendment grounds.³¹

Commentators now accept the fact that politics is the essence of both popular elections and judicial appointments.³² The United States Senate confirmation hearings of Judge Robert Bork in 1987 and Justice Clarence Thomas in 1991 make that case dramatically. Even in states which use the Missouri Plan, nominating commissions are subject to considerable lobbying by single-issue groups and political parties in the development of a slate of judicial candidates. So is the governor once the slate is prepared and presented. It is politics, but politics of a different stripe.

Politics in a real sense may come into play in retention elections following merit selection. Again, there is the example of Justice White in Tennessee in 1996. She was appointed by a governor who was a Democrat in 1994. During her retention election two years later, the Tennessee Conservative Union mounted a formidable campaign against her premised on the theme that if you favor capital punishment, just say "no" to Penny White. In that campaign which occurred over a brief period of six weeks, the new Republican governor as well as the two Republican United States Senators in Tennessee announced that they had already voted or would vote not to retain her. Justice White was voted out of office, and the Republican governor was able to make the appointment to replace her.

Any system that submits the judge to a popular election is subject to criticism that that judge becomes subservient to popular views on certain

30. See ARK. CODE OF JUDICIAL CONDUCT Canon 5(A)3(d)(ii) (1997) ("A candidate for judicial office shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . .").

31. In *American Civil Liberties Union v. The Florida Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990), the district court recognized the Florida Bar's compelling interest in protecting the integrity of the judiciary but held that a prohibition against all discussion of disputed legal and political issues was not the most narrowly tailored means of protecting that interest. The holding influenced the district court in *Beshear v. Butt*, 863 F. Supp. 913 (E.D. Ark. 1994), where it was held that such a proscription of campaign speech was both substantially over broad and constitutionally vague. See also *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991) (holding that a prohibition against all discussion of disputed legal and political issues "unnecessarily violate[d] fundamental state and federal constitutional free speech rights of judicial candidates"), *cert. denied sub nom. Judicial Retirement & Removal Comm'n of Ky. v. Combs*, 502 U.S. 816 (1991).

32. See, e.g., RICHARD A. WATSON, *THE POLITICS OF THE BENCH AND BAR* (1969).

issues. It is contended that the judge is forever looking over a shoulder for an issue that could blast him or her off the bench and, as a result, hedges in politically sensitive cases. An appointed judge, however, might feel just as constrained to decide cases based on the political philosophy of the governor who appointed him or the special interest that judge represents. The question is one of the judge's strength of character and moral compass. Judicial independence flows from the makeup of the judge—not from the method of selection.

C. Caliber

Often cited in the popular election/Missouri Plan debate is the fact that many quality lawyers who would be excellent judges shy away from a political campaign for a judgeship. The reason given is that the scrutiny of an election is too intense and the fundraising demands too daunting. Also cited is the potential for personal attack and embarrassment before family and friends. An appointment under a Missouri Plan, according to this theory, avoids those pitfalls, though a retention election may loom in the future. Until recently, retention elections gave the incumbent a significant advantage.

It is undeniable that a political campaign does deter a number of potential judges from entering the election fray. And yet, the Missouri Plan unquestionably has a chilling effect on the pool of attorneys available for selection. This raises the issue of how the respective processes affect judicial ability on the bench. Several years ago, studies showed that elected judges and merit-selection judges compared favorably in objective areas like education and legal experience.³³ But other critical factors like judicial temperament are entirely subjective. The same can be said of moral courage; decisiveness; reputation for fairness and uprightness; patience; good health, physical and mental; and consideration for others; which were qualities ranked in a poll of judges in descending order of importance.³⁴ In short, there is no hard data to suggest that the quality of judges under either system is superior.

The most compelling argument in favor of merit selection is that the commission process filters out the poorest judicial candidates and demagogues.³⁵ The tradeoff, however, is whether the threat of a potentially unqualified rabble-rouser justifies the drastic limitation of candidates available

33. See Canon, *supra* note 9; see also Herbert Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104 (1964).

34. See Ann Henry & Elizabeth Crocker, *Filling the Chair*, 19 ARK. LAW. 164, 168 (1985) (quoting Maurice Rosenberg, *The Qualities of Justice - Are They Strainable?*, 44 TEX. L. REV. 1063, 1067 (1966)).

35. See WATSON, *supra* note 32 at 283-284.

for selection which occurs under the Missouri Plan. Opening the selection process to all comers, irrespective of party affiliation or special interest, by means of popular election appears eminently preferable.

D. Judicial Diversity

There are currently 227 women serving on state appellate courts throughout the United States.³⁶ Of that number, 127 (or 56%) were appointed by state governors with or without a nominating commission and 66 (or 29%) were elected by popular vote.³⁷ The remaining women were selected by other methods.

Similarly, 81 African-American judges sit on state appellate courts.³⁸ Forty-eight (or 59%) were appointed while 22 (or 27%) were elected by the state legislature or by popular vote.³⁹ Of the 81 judges, 37 African-Americans were selected in the southern states, 18 in the northeastern states, 9 in the western states, 15 in the midwestern states, and 2 in the District of Columbia.⁴⁰

In Arkansas, one woman currently sits on the seven-member Supreme Court, while there are no African-Americans.⁴¹ On the Arkansas Court of Appeals, three African-Americans and three women at this writing sit on the court, which is comprised of twelve members.⁴² Judge Andree Layton Roaf was appointed to the court of appeals effective January 1, 1997, but formerly sat on the Arkansas Supreme Court by appointment from January 1, 1995, to December 31, 1996. She was neither the first African-American to sit on the Arkansas Supreme Court⁴³ nor the first woman to sit as an associate justice.⁴⁴ She was, however, the first African-American woman to serve on the state's highest court. No African-American has been elected to the Arkansas Supreme Court.

36. See *Women Judges Currently Serving on State Courts of Last Resort and Intermediate Appellate Courts*, AM. JUDICATURE SOC'Y (January 1996).

37. See *id.*

38. See *African-American Judges Currently Serving on State Courts of Last Resort and Intermediate Appellate Courts*, AM. JUDICATURE SOC'Y (January 1996).

39. See *id.*

40. See *id.*

41. Justice Annabelle Clinton Imber was elected without opposition on November 5, 1996, to fill an unexpired two-year term.

42. Judge Andree Layton Roaf, Judge Olly Neal, and Judge Wendell Griffen are the African-American judges. Judge Judith Rogers, Judge Andree Layton Roaf, and Judge Margaret Mead are the female judges.

43. Federal District Judge George Howard, Jr., was appointed as Associate Justice to the Arkansas Supreme Court in 1977. Justice Richard Mays was appointed to the Supreme Court in 1980. Justice Perlesta A. Hollingsworth was appointed to the Supreme Court in 1984.

44. Federal District Judge Elsijane Trimble Roy was appointed to the State Supreme Court in 1977.

Whether a woman can be elected to the Arkansas Supreme Court is no longer an issue in Arkansas. Judge Judith Rogers was narrowly defeated in a Supreme Court election in 1990 but collected 49.9% of the vote. More recently in 1996, Justice Annabelle Clinton Imber was elected without opposition.

For African-Americans, the question of electability to the highest Arkansas court has not been answered. Be that as it may, court of appeals judges Andree Layton Roaf and Wendell Griffen have considered a race for the Arkansas Supreme Court and have been generally acknowledged as having statewide appeal. Without question, as matters stand today, minorities are more likely to be appointed to state appellate courts than elected. After appointment, studies show that minorities are as likely to be retained in a retention election as their white counterparts.⁴⁵

IV. CONCLUSION

Neither a popular election nor merit selection is free from severe disadvantages. The benefits of a popular election, however, both to the public and to the candidate tilt the balance in favor of that method. Whether this raises the spectre of a judge who is beholden to certain political supporters or accountable to the majority will on explosive issues like the death penalty comes down to the character of that judge. As for fundraising abuses and lawyer influence, these can be minimized, as has been done in Arkansas, with the adoption of the Arkansas Code of Judicial Conduct. The amount of campaign contributions to judicial candidates can also be severely limited which was done in Arkansas by last year's initiated Act, assuming that Act passes constitutional muster.

If judicial independence is the ideal to be attained, it may be at greater risk in a special retention election where the time for campaigning is abbreviated and where a single-issue campaign can be easily mounted. Adversarial campaigns of a longer duration provide more protection against demagogic attack. Other state legislatures, of course, could adopt a pure appointment mechanism comparable to the federal system and to the systems in Massachusetts, New Hampshire, and Rhode Island. The reality of that happening, however, is remote.

Caliber is no longer a viable argument against popular elections. Established lawyers may be more likely to be appointed under a Missouri Plan, but that does not mean their judicial skills are better honed. Moreover, I submit

45. See generally Robert C. Luskin et al., *How Minority Judges Fare in Retention Elections*, 77 JUDICATURE 316 (1994).

that the election of minorities to the Arkansas Supreme Court is imminent as more African-American judges serve on the trial bench and the court of appeals.

Other reforms should be at least debated. State-funded judicial elections is one such reform, though, admittedly, a judicial candidate's ability to spend his or her money cannot be curtailed.⁴⁶ A voter pamphlet which introduces judicial candidates to the public and which is disseminated by the state bar association is another.

46. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

