Recent Criminal Decisions of the U.S. Supreme Court

An AJA White Paper: The Debate over Judicial Selection & Retention

On the Admissibility of Evidence from Remote-Electronic Traffic Devices
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The lead article in this issue is Professor Charles Weisselberg’s annual review of the key criminal-law cases decided by the United States Supreme Court during the past Term of the Court (the Term that began in October 2009 and ended with the last decisions on June 30, 2010). This is the third year we’ve had the benefit of Professor Weisselberg’s analysis, and I hope you will take advantage of it if you need to keep up-to-date on criminal-law developments in the United States.

Prof. Weisselberg not only summarizes the key cases, but also notes where things may go from here or ways in which judges may need to react. For example, in addition to noting the Court’s holding in Padilla v. Kentucky that a criminal-defense lawyer must advise the defendant when the deportation consequences of a conviction are clear, Prof. Weisselberg also notes that trial judges may want to add to their scripts in plea hearings a question about whether the defendant has consulted with counsel about the possible immigration consequences of the plea and conviction.

Next in the issue is an American Judges Association White Paper. AJA President Mary Celeste took on the task of putting all of the debates over judicial-selection systems in context—a context both of American history and of recent United States Supreme Court decisions. Her goal was to identify challenges judges may face no matter the selection system, especially in light of recent developments in and out of court.

If you have even a passing interest in the debate over judicial-selection methods—or if you have wondered how the recent United States Supreme Court opinions on the limits on judicial speech or judicial-recusal standards may affect you—this White Paper will serve as an excellent overview for you. After you’ve read it, if you want to go further, take a look at the special issue on judicial-selection recently published by the Litigation Section of the State Bar of Texas (available on the web—see page 112). And then wait for the next issue of Court Review, in which we expect to have an update on recent developments by Georgetown law professor Roy Schotland, a leading expert on judicial-selection systems and election law.

Our issue concludes with a winning essay from the AJA’s law-student writing competition. Jessica Wang, a UCLA law student, reviews the admissibility questions that arise from remote-electronic traffic devices that take still photos or video of what’s taking place on the roadways.—Steve Leben

Cite as: 46 Cr. Rev. ___ (2009-2010).
This issue of Court Review contains the AJA White Paper The Debate over the Selection and Retention of Judges: How Judges Can Ride the Wave, and the next issue is scheduled to have an article by Professor Roy Schotland discussing the recent 2010 judicial elections. The information contained in these two articles should give judges information that could assist in retaining their employment.

Aside from being a full-blown politician, being a judge is probably one of the few jobs where even with exemplary performance you could be ousted for reasons unrelated to your performance. Politics, money, and data all play a role in the retention or election of a judge. With regards to politics, one need not look any further than what happened in this past election cycle to the Iowa State Supreme Court justices or the New Jersey governor’s announcement that he will be withholding appointments to the state supreme court of known Democrats. With regards to money, as an elected judge you may face a rival candidate who could be a subpar individual but have an enormous war chest. And with regards to data, as a merit judge you may face a “do not retain” by a judicial performance commission that may be based upon statistically insignificant data collection.

So how do judges ward off these potential challenges and keep their jobs? I recommend a continued membership in the AJA for starters. There is not only power in numbers, but a myriad of available resources through the AJA. The AJA is a member organization of the National Center for State Courts, along with 25 other national court-related organizations, including the Conference of Chief Justices, the Conference of State Court Administrators, the National Association for Court Management, and the National Association of State Judicial Educators. The AJA publishes White Papers and the Court Review to keep judges abreast of pertinent issues facing them; responds as the Voice of the Judiciary® to national media concerns and questions related to judges and the courts; comments on state proposals to modify laws affecting the judiciary; has an informative website; holds well-renowned educational conferences; and is a member of “Justice at Stake,” an organization that serves as a “watchdog” of all initiatives across the country that may affect the courts and the judiciary.

If knowledge is power, with approximately 2,000 members from mostly the United States and some from Canada, there is not a bigger and better knowledgeable judicial organization in North America than the AJA on matters related to the judiciary. So if you are a member, stay and continue to renew; if you are not a member or your membership has lapsed, join or rejoin. Not only will you learn how to keep your job, by attending the AJA conferences you will strengthen your knowledge about substantive law while simultaneously meeting members from every region of the United States and Canada at every level. Get involved as there are committees on almost every pertinent judicial subject matter, including domestic violence, education, access to justice, and the newly developing criminal and juvenile justice committee. I hope to see you at one of our upcoming conferences (see below and the back cover), and I hope that you enjoy this issue of Court Review.

### American Judges Association Future Conferences

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President’s Column

Mary Celeste

Court Review - Volume 46 67
Selected Criminal-Law Cases in the United States Supreme Court in the 2009-2010 Term, and a Look Ahead

Charles D. Weisselberg

Issues that are hot one Term are sometimes cold the next. In contrast with the 2008 Term—when the Court took on automobile searches, the scope of the Fourth Amendment exclusionary rule, and the Confrontation Clause—the big cases of 2009-2010 addressed different issues. This past year will be remembered for decisions on the right to counsel for immigrant defendants, the Eighth Amendment and juveniles, the application to the states of the Second Amendment right to keep and bear arms, and key decisions on jury-trial rights. While the 2008 Term gave us

Montejo v. Louisiana

—an important holding on the Sixth Amendment right to counsel and police interrogation—this year the Court returned to interrogation but through the Fifth Amendment. The justices decided three

Miranda

cases, one of which may significantly alter police practices. This article reviews some of the most significant criminal-law-related opinions of the Supreme Court’s 2009 Term, emphasizing those decisions that have the greatest impact upon the states. The article concludes with a brief preview of the current Term.

SECOND AMENDMENT

One of the blockbusters of the Term was

McDonald v. City of Chicago, Ill.

which applied the Second Amendment right to keep and bear arms to the states. Two years earlier, the Court had decided

District of Columbia v. Heller

finding that the Second Amendment confers an individual right to keep and bear arms.

Heller

struck down a District of Columbia law that essentially prohibited the possession of handguns in the home. Almost immediately after

Heller

came the question whether this right should be applied to the states through the Fourteenth Amendment. Five justices have now answered in the affirmative, though no single theory commanded a majority. Perhaps the most interesting part of the decision is the discussion of the incorporation and related doctrines. (Non-enthusiasts may wish to skip ahead.)

Justice Alito delivered the opinion of the Court, though parts of the opinion represent the views of only a plurality (with Justices Kennedy, Scalia, and Chief Justice Roberts joining Justice Alito). The opinion contains a lengthy review of the history of the incorporation doctrine, as well as the Privileges or Immunities Clause of the Fourteenth Amendment. The plurality turned aside an argument that the Court should reconsider the interpretation of the Privileges or Immunities Clause provided in the

Slaughter-House Cases.

There the Court gave the Clause a narrow reading, holding that it protects those rights that owe their existence to the federal government, federal laws, or the character of the nation, but that the Clause does not protect other fundamental rights. The plurality in

McDonald

saw “no need to reconsider that interpretation,” and turned to the question of whether the Second Amendment right should be incorporated through the Due Process Clause of the Fourteenth Amendment.

After reviewing the history and framework of the incorporation doctrine (perhaps necessary because no incorporation cases had reached the Court for decades), the majority found that the right to keep and bear arms is fundamental to our scheme of ordered liberty and is deeply rooted in our nation’s history and tradition. The plurality concluded that the right to keep and bear arms is incorporated through the Due Process Clause. Justice Thomas provided the fifth vote for the application of this right to the states, but under a different theory. While he joined the plurality’s opinion describing the incorporation doctrine and characterizing the right to keep and bear arms as fundamental and deeply rooted in history, he would have revisited the

Slaughter-House Cases

and held that the right is guaranteed by the Privileges or Immunities Clause, as a privilege of American citizenship.

Justice Stevens, in his last dissenting opinion, agreed that the Court should not reconsider the

Slaughter-House Cases, but saw the issue before the Court in terms of substantive due process. He would have found that the right to keep and bear arms is not implicit in the concept of ordered liberty. Justice Scalia, who joined the plurality, also wrote separately to challenge Justice Stevens’s views. Justice Breyer (joined by Justices Ginsburg and Sotomayor), relying upon some of Justice Stevens’s analysis, would have held that the right to keep and bear arms is not so fundamental or rooted in history that it should be incorporated through the Fourteenth Amendment’s Due Process Clause and applied to the states.

Footnotes
5. 83 U.S. (16 Wall.) 36 (1873).
6. 130 S.Ct. at 3030-31.
FOURTH AMENDMENT

The previous Term gave us several Fourth Amendment blockbusters, such as Arizona v. Gant7 (vehicle searches incident to arrest) and Herring v. United States8 (the exclusionary rule and good-faith reliance on information in a computer database). This Term, by contrast, saw few Fourth Amendment issues. In the one case with far-reaching potential, the justices avoided the most significant question.

City of Ontario v. Quon9—the case that wasn’t—raised the question of whether a public employee has a reasonable expectation of privacy in communications sent and received on his government-provided pager. Quon, a SWAT team officer, was issued a text pager by his department, with a monthly limit of how many characters could be sent or received without incurring additional fees. Quon went over his allotment several times. At one point, he was told that he could pay for the excess usage rather than have to city audit his messages, and he paid up. However, the City eventually decided to audit usage to see if the existing character limit was too low. The wireless company sent transcripts of the messages to the City, which discovered that many of Quon's messages were not work related, and some were sexually explicit. He was disciplined for violating rules by pursuing personal matters while on duty. Quon brought a civil-rights action; two other plaintiffs were people who had communicated by text with Quon—his wife and a fellow officer with whom he was romantically involved.

The case attracted much attention because of the question whether an employee has a reasonable expectation of privacy in electronic messages sent and received on his employer's equipment. On the facts of the case, that was not an easy question. Quon's department had a computer policy in place making clear that the City had the right to monitor and log all network activity, including e-mail and Internet use, with or without notice. But text pagers are not computers. The City initially told its employees that it would treat text messages just like e-mails. However, this notice was potentially undercut by the arrangement that allowed employees, such as Quon, to pay for any overages without audits.

In an opinion by Justice Kennedy, the Court declined to reach the reasonable-expectation-of-privacy question. Rather, the justices assumed arguendo that Quon had a reasonable expectation of privacy in the text messages, that the City's review of the transcript constituted a search within the meaning of the Fourth Amendment, and that the principles that apply to a government employer's search of an employee's physical office also apply when the employer intrudes upon privacy in the electronic sphere. With these assumptions, the Court simply found that the City conducted a reasonable search.

There was some debate among members of the Court as to whether to follow the approach by the plurality in O'Connor v. Ortega.10 O'Connor addressed the framework for Fourth Amendment claims against employers. The first step of the analysis is determining whether there is an expectation of privacy because some government offices may be so open that no such expectation is reasonable, considering the "operational realities of the workplace."11 Justice Scalia joined in most of Justice Kennedy's opinion in Quon, but wrote separately to argue that the "operational realities" rubric in O'Connor is "standardless and unsupported."12 In the end, however, the Court said that under the approach of either the O'Connor plurality or Justice Scalia (who said the inquiry should be whether the Fourth Amendment applies in general to such messages on employer-issued pagers), the outcome would be the same.

The most significant aspect of Quon is simply how reluctant the justices were to decide about the reasonable expectation of privacy. The opinion expressly noted their reluctance: "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." Further, "[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior."13 Although Justice Scalia chided the Court for this discussion—saying "[t]he-times-they-are-a-changin' is a feeble excuse for a disregard of duty"14—even he would not have reached the reasonable expectation of privacy question.

There was one other Fourth Amendment decision in the Term. In Michigan v. Fisher,15 the Court summarily reversed the Michigan Court of Appeals, and found that officers who entered a home without a warrant were reasonable in doing so. In a per curiam opinion, the justices expanded on Brigham City v. Stuart,16 where officers had entered a home to assist an injured adult and stop a fight. In Fisher, police responded to a report of a disturbance. They found a pickup truck in the driveway with its front smashed, damaged fence posts, and three broken windows in the house. They saw some blood on the hood of the pickup and Fisher inside the home screaming and throwing things. When an officer entered the home, Fisher pointed a gun at him and was later charged for that act. Under the circumstances, the majority found, the police had an objectively reasonable basis for entering the home. Justice Stevens, joined by Justice Sotomayor, dissented. They pointed to the findings of the trial judge, who was not persuaded that the officer had an objectively reasonable basis for believing that entering the home was necessary to avoid serious injury.

11. 130 S.Ct. at 2628 (quoting O'Connor, 480 U.S. at 718).
12. 130 S.Ct. at 2634 (Scalia, J., concurring).
13. 130 S.Ct. at 2629.
14. 130 S.Ct. at 2635 (Scalia, J., concurring).
**FIFTH AMENDMENT**

The Court decided a trio of *Miranda* cases this term. Two of the three are modest holdings. *Florida v. Powell* and *Maryland v. Shatzer*—decided a day apart—addressed the adequacy of warnings and when an invocation of the right to counsel may cease to be effective. The third case, *Berghuis v. Thompkins*, is a blockbuster that may transform interrogation practices.

In *Powell*, officers advised the defendant that he had the right to talk with a lawyer “before answering” any questions and that he had “the right to use any of these rights at any time . . . during this interview.” He was not expressly told that he could have an attorney present throughout the interrogation, and so Powell claimed that the warning omitted a required admonition. Not so, said the Court, in a 7-2 decision authored by Justice Ginsburg. Citing *California v. Prysock* and *Duckworth v. Eagan*, the majority reiterated that the inquiry is simply whether the warnings reasonably convey the rights set out in *Miranda*, but there is no required formulation of those rights. The warnings given by Florida police were adequate. “In combination, the two warnings reasonably conveyed Powell’s right to have an attorney present, not only at the outset of interrogation, but at all times.” Justice Stevens, joined by Justice Breyer, dissented. They concluded that when the warnings were given their most natural reading, the catchall clause did not meaningfully convey Powell’s rights. Justice Stevens also would have found no jurisdiction to review the Florida Supreme Court’s decision (finding the warning inadequate), since that court also based its conclusion on state constitutional grounds.

*Shatzer* answered a longstanding question. In *Edwards v. Arizona*, the Court held that officers may not interrogate a suspect who has invoked the right to counsel unless the suspect initiates contact with police. But how long does an *Edwards* invocation last? As it turns out, not forever.

*Shatzer* was serving a sentence when he was questioned by a detective about an allegation that he had sexually abused his son. Shatzer asked for a lawyer, and the questioning ceased. Two and a half years later, a different detective learned more information and wanted to question Shatzer. He went to the prison and initiated questioning. This time Shatzer waived his rights. Shatzer made a statement that was introduced against him at trial. The Supreme Court unanimously upheld his conviction.

In an opinion written by Justice Scalia, the Court described *Edwards* and its progeny as “not a constitutional mandate, but judicially prescribed prophylaxis.” Such a rule applies where its benefits outweigh the costs. The benefits—preserving the integrity of a suspect’s choice and preventing badgering—“are measured by the number of coerced confessions it suppresses that otherwise would have been admitted.” Where a suspect has been released from pretrial custody and returned to his normal life for some time before the later attempted interrogation, an extension of *Edwards* “would not significantly increase the number of genuine coerced confessions excluded” but increases the costs by excluding voluntary confessions. After concluding that a break in custody may terminate the *Edwards* protections, the majority determined that it was appropriate to fix a specific period of time to give clear guidance to police. The Court set that period at 14 days. “That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.” In another part of the opinion, the Court determined that Shatzer’s release back into the general population was a break in *Miranda* custody. Justice Thomas concurred, but would not have extended the *Edwards* presumption for 14 days following a break in custody. Justice Stevens also concurred, although he suggested that courts should look to other concrete events or factors in addition to the passage of time, such as whether a suspect could actually seek legal advice or whether police honored a commitment to provide counsel.

*Berghuis v. Thompkins* completes the trio and overshadows the other two. Southfield, Michigan, police officers wanted to question Thompkins about a shooting. Thompkins was arrested in Ohio, and the officers traveled there to interrogate him. They handed Thompkins a form advising him of his rights, which he refused to sign. Thompkins remained largely silent for almost 3 hours of the interrogation. After about 2 hours and 45 minutes, he gave incriminating responses to questions about whether he believed in God and prayed to God to forgive him for shooting the victim. State courts reversed. The U.S. Court of Appeals determined that the ruling was contrary to clearly established federal law, and Thompkins should be granted relief. In a 5-4 decision, the Supreme Court reversed.

The majority opinion was written by Justice Kennedy. Although Michigan had primarily argued that the state court rulings were entitled to deference on federal habeas corpus review, the majority went further. Following the lead of *California v. Prysock*, who submitted an amicus brief, the Court instead extended the holding in *Davis v. United States*. In *Davis*, the defendant had initially waived his *Miranda* rights but subsequently made ambiguous statements indicating he might want counsel; these statements were insufficient to require police to cease questioning. *Tompkins* extended the unambiguous invocation rule of *Davis* to the right to remain silent as well as to the initial invocation or waiver stage of an interroga-
tion. The Court found “good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously,” noting that this avoids difficulties of proof and provides guidance to officers. 29 Thus, after a suspect is advised of his rights, he or she must unambiguously invoke either the right to remain silent or the right to counsel in order for officers to have a duty to cease questioning. 30 A suspect may not invoke the right to remain silent through silence, so Thompkins’ refusal to talk for almost 3 hours was insufficient to require police to curtail questioning.

The majority held that Thompkins’ silence was not an invocation, and that his later statements affirmatively established waiver. Relying upon North Carolina v . Butler 31 for the proposition that a waiver can be implied through conduct, the majority held that “a suspect who has received and understood the Miranda warnings, and has not invoked his Miranda rights, waives the right to remain silent by making an uncoerced statement to the police.” 32 Although a valid implied waiver requires that the suspect understand his rights, the Court essentially placed the burden on the defendant to show a lack of understanding. 33 The Court found that Thompkins understood his rights, and thus knew what he was doing when he spoke. “If Thompkins wanted to remain silent, he could have said nothing in response to [the detective’s] questions, or he could have unambiguously invoked his Miranda rights and ended the interrogation. The fact that Thompkins made a statement about three hours after receiving a Miranda warning does not overcome the fact that he engaged in a course of conduct indicating waiver.” 34

Justice Sotomayor wrote a lengthy dissent, in which she was joined by Justices Stevens, Ginsburg, and Breyer. She observed that the interrogation was very one-sided, nearly a monologue by the officers. Thompkins refused to sign a form and did not respond affirmatively to interrogation tactics, such as an invitation to tell his side of the story.

On these facts, she would not have found a course of conduct sufficient to carry the prosecution’s burden of establishing waiver. The dissenting justices also disagreed with the extension of Davis, noting a number of federal and state courts that have declined to apply a clear-statement rule when a suspect has not first given an express waiver of rights, and arguing that Davis

29. 130 S.Ct. at 2260.
32. 130 S.Ct. at 2264.
33. Id. at 2262.
34. Id. at 2263.
The Court ruled that where . . . the deportation consequences of a conviction are truly clear, there is a duty . . . to advise of those consequences.

should not be applied to the right to remain silent. The warnings themselves do not tell suspects that they need to use particular language to invoke the right to remain silent, and the dissenting justices cited a number of cases in which lower courts found no invocations under Davis even though suspects used fairly plain language. The dissenters asserted that the decision dilutes the prosecution’s burden of proof of waiver “to the bare fact that a suspect made inculpatory statements after Miranda warnings were given and understood.”

In my view, Berghuis v. Thompkins is the Court’s most significant Miranda ruling since Dickerson v. United States was announced a decade ago. Thompkins has enormous practical implications for policing. While many law-enforcement agencies have already trained police about implied waivers and many courts have upheld them, this case finds an implied waiver on an extreme set of facts: hours of nonstop questioning using a full range of interrogation tactics on a virtually non-responsive suspect. In the wake of this case, we may expect to see more agencies training officers on implied waivers and advising that they may safely forgo seeking express waivers, even when a suspect does not initially respond to the officers’ questions.

It is also worth noting what was not important to the Court in Thompkins. The majority did not discuss the effect of the officers’ interrogation tactics on Thompkins or his waiver—even though the underlying premise of Miranda is that these tactics create inherently compelling pressures—and Thompkins’s waiver was in the midst of the interrogation. The Court simply assumed that Thompkins made an unconstrained choice to speak after almost 3 hours of questioning. Perhaps this was because the majority conceived that “Miranda’s main protection lies in advising defendants of their rights.” Nor was the quality of the record a concern to the justices. The officers did not tape the interrogation, though recording equipment was available to them, and they did not take contemporaneous notes. Thus, the officers could remember very little about what was said during the interrogation until Thompkins gave his incriminating answers.

Finally, Thompkins leads to an important question: will an implied Miranda waiver also waive a suspect’s Sixth Amendment rights? One of the big cases of the 2008-2009 Term was Montejo v. Louisiana, which overruled Michigan v. Jackson and held that officers may approach and interrogate a suspect after his Sixth Amendment rights have attached. In Patterson v. Illinois, the Court found that Miranda warnings are sufficient to convey the gist of the Sixth Amendment right to counsel and Patterson’s express Miranda waiver also effectively waived his Sixth Amendment rights. But will an implied Miranda waiver also suffice? There may be reasons to find it does not—for example, if Miranda’s main protection is the advice of rights, the Sixth Amendment protects something altogether different and might deserve more stringent waiver rules—but the question remains open and courts may be beginning to address it.

SIXTH AMENDMENT

There were a number of important Sixth Amendment decisions this past Term, including rulings relating to various aspects of the rights to a jury trial, to counsel, and to be free from double jeopardy. One of the most significant developments was Padilla v. Kentucky, which established that defense counsel must in many circumstances also advise a client of the immigration consequences of a conviction.

Effective Assistance of Counsel & Immigration Consequences

Padilla was a lawful permanent resident of the United States for more than 40 years, and a Vietnam War veteran. After pleading guilty to transportation of a large amount of marijuana, he faced deportation to Honduras. Padilla sought to set aside his guilty plea, alleging that his lawyer not only failed to tell him of the immigration consequences of his plea but affirmatively misled him, saying that he “did not have to worry about immigration status” since he had been in the country for so long. The state court denied his post-conviction petition, determining that deportation (now called “removal”) is a collateral consequence of a conviction and thus that counsel’s erroneous advice could not provide a basis for relief. The Supreme Court reversed 7-2.

Writing for the majority, Justice Stevens rejected the state court’s distinction between direct and collateral consequences, saying that that distinction has never been applied to define the scope of constitutionally adequate representation under Strickland v. Washington. Justice Stevens reviewed the history of conviction-related deportations, and particularly the recent trend toward eliminating any discretion to grant relief from deportation. In 1990, for example, Congress did away with judicial recommendations against deportation, which formerly gave sentencing judges an ability to make effectively binding recommendations, and in 1996 Congress also eliminated the Attorney General’s ability to grant discretionary relief from removal. Currently, if a person has committed a removable offense, his or her deportation is practically inevitable, though there are some remnants of equitable discretion left with the Attorney General for some types of offenses (though not for offenses relating to drug trafficking). With these changes in our immigration laws,

35. Id. at 2272 (Sotomayor, J., dissenting).
38. 130 S.Ct. at 1113 (emphasis added).
43. 130 S.Ct. 1473 (2010).
44. Id. at 1478.

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said the majority; it is difficult to divorce the penalty of removal from the conviction itself even though removal is a civil and not a criminal sanction.

The Court ruled that where, as here, the deportation consequences of a conviction are truly clear, there is a duty on the part of defense counsel to advise of those consequences. Justice Stevens noted that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”46 However, immigration law can be complex and there will be many situations in which the consequences of a particular plea are unclear or uncertain, and there counsel’s duties are more limited. “When the law is not distinct and straightforward . . ., a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” The majority expressly rejected an argument urged by the Solicitor General to limit the decision to circumstances where counsel had affirmatively provided misadvice. The Court reversed and remanded for further proceedings to determine whether Padilla could demonstrate prejudice.

Concurring, Justice Alito and Chief Justice Roberts would have accepted the limitation rejected by the majority and held that an attorney may provide ineffective assistance by misleading a noncitizen client regarding the removal consequence of a conviction. However, they disagreed that an attorney has an affirmative obligation to advise her client of the consequences of a plea. In their view, an attorney must simply refrain from unreasonably providing incorrect advice, and counsel may tell the defendant that a criminal conviction may have adverse immigration consequences and that the client might consult with an immigration attorney. The concurrence also takes issue with the majority’s position that counsel has different duties depending upon whether the immigration consequences are clear or whether the law is not “distinct and straightforward.” It will not always be easy to tell whether a particular provision is consistent and clear.

Justice Scalia (joined by Justice Thomas) dissented, arguing that while in the best of all worlds defendants ought to be advised of serious collateral consequences of conviction, “[t]he Constitution . . . is not an all-purpose tool for judicial construction of a perfect world.”47 In their view, there is no textual support in the Sixth Amendment for a right to counsel to include consequences that are collateral to prosecution. Thus, the Sixth Amendment provides no basis even for such a claim even when counsel has affirmatively misadvised a defendant about the immigration consequences of conviction. Of course, such a defendant may still assert, if he or she can, that a guilty plea was not knowing and voluntary, which would be a claim under the Due Process Clause.

This is an enormously important decision. Whether or not it opens the floodgates for future litigation (a claim discounted by the majority), there is no doubt that the decision must lead public defender offices and private defense practitioners to increase their knowledge of immigration law and the immigration consequences of criminal convictions. Courts may also play a role here. Justice Alito’s concurrence notes that there are rules, plea forms, or statutes in 28 states and the District of Columbia requiring courts to advise criminal defendants of the possible immigration consequences of their guilty pleas. Perhaps there is room to inquire at change-of-plea hearings about whether the defendant has consulted with counsel about any immigration consequences of a conviction.

Jury-Trial Rights

The Term saw important decisions on the Sixth Amendment right to be tried by a jury drawn from sources that reflect a fair cross-section of the community and on the effect of pretrial publicity, as well as two summary reversals relating to jury selection and the right to a public voir dire.

In Berghuis v. Smith,48 the fair-cross-section case, Diapoli Smith was convicted of murder by an all-white jury in Kent County, Michigan. At the time of his trial, African-Americans were 7.28% of the county’s jury-eligible population, and 6% of the pool from which jurors could be drawn. The Michigan Supreme Court turned aside Smith’s Sixth Amendment challenge, but the U.S. Court of Appeals granted his federal habeas corpus petition. The U.S. Supreme Court reversed in a unanimous decision by Justice Ginsburg, with Justice Thomas concurring.

Under Duren v. Missouri,49 a defendant must satisfy a three-prong test to establish a prima facie violation of the fair-cross-section requirement: (1) the group alleged to have been excluded must be distinctive in the community; (2) the representation of this group in venires must not be fair and reasonable in relation to the number of persons in the group in the community; and (3) the underrepresentation must be due to the systematic exclusion of the group in the jury-selection process.50 The Court ruled that Smith could not prevail under the deferential standards applied in federal habeas corpus cases; the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) demands a showing that the state court’s decision involved an unreasonable application of “clearly established Federal law, as determined by the Supreme Court.”51

Smith could not show that the Michigan Supreme Court unreasonably applied the Duren test because the U.S. Supreme Court had not previously specified the method courts must use to measure distinct groups in jury pools. One possible test would measure absolute disparity, meaning the difference between the percentage of African-Americans in the local, jury-eligible population (7.28%) and the percentage in the jury pool

46. 130 S.Ct. at 1482
47. Id. at 1494 (Scalia, J., dissenting).
50. Id. at 364.
51. 130 S.Ct. 1388 (quoting 28 U.S.C. § 2254(d)(1)).
The defendant objected to the exclusion of a family member from the courtroom during voir dire. In a 7-2 per curiam decision, the Supreme Court summarily reversed.

Ruled that Smith had not shown that underrepresentation was due to systematic exclusion. Smith claimed that the county's method of assigning jurors, sending potential jurors to local courts first and making only the remaining jurors available for the more serious cases, siphoned off African-American jurors. But Smith failed to provide sufficient evidence that this method or other possible factors caused the underrepresentation. Justice Thomas concurred, indicating that in an appropriate case he would be willing to reconsider the precedents articulating the fair-cross-section requirement.

The pretrial publicity case was Skilling v. United States, which arose from the Enron Corporation debacle. (The decision also contains an important holding about "honest services" fraud, which is discussed later in this article). Skilling was a high-level executive at Enron, serving as CEO up until several months before the company went into bankruptcy. He was charged in federal court in Houston with conspiracy to commit honest-services wire fraud, among other charges. Skilling argued that, venue should have been changed due to massive publicity about Enron, and he asserted that he was denied his Sixth Amendment right to a fair trial. The trial judge made specific findings about the publicity that appeared equivocal.

The Supreme Court noted that each measure is imperfect, and even without the deferential habeas standards, the Court would not specify which method should be used. In addition, the Court ruled that Smith had not shown that underrepresentation was due to systematic exclusion. Smith claimed that the county’s method of assigning jurors, sending potential jurors to local courts first and making only the remaining jurors available for the more serious cases, siphoned off African-American jurors. Justice Alito concurred in the judgment but wrote separately to argue that there can be no violation of the Sixth Amendment guarantee of an impartial jury unless a biased juror is actually seated at trial. He would reject the argument that the Sixth Amendment can be abridged simply by the denial of a motion for change of venue due to adverse pretrial media coverage and community hostility.

Justice Sotomayor (joined by Justices Stevens and Breyer) dissented. They disputed the Court’s characterization of the pretrial publicity, finding that it was more voluminous and pervasive than reflected in the majority opinion. They conceded that the motion for a change of venue was properly denied (calling the question “close”), largely because of the size of Houston and the lack of a confession or smoking gun piece of evidence in the media coverage. However, they would have reversed for an inadequate voir dire, noting that the jury was selected in a process that took only five hours. Even under a deferential standard, in their view the trial judge gave short shrift to the mountainous evidence of public hostility, failed to pursue important lines of inquiry during voir dire, only rarely asked prospective jurors to describe personal interactions about the case or whether they could avoid discussing the case with others, and addressed topics in a cursory fashion. According to the dissenters, the judge also accepted on their face statements of impartiality that appeared equivocal.

52. Id. at 1393-94.
53. 130 S.Ct. 2896 (2010).
55. 130 S.Ct. at 2914 (discussing Estes v. Texas, 381 U.S. 332 (1965) and Sheppard v. Maxwell, 384 U.S. 333 (1966)).
56. Id. at 2921-22 (distinguishing Irvin v. Dowd, 366 U.S. 717 (1961)).
57. Id. at 2923 (quoting Mu'Min v. Virginia, 500 U.S. 415 (1991)).
58. Id. at 2941 (Alito, J., concurring).
59. Id. at 2942, 2952 (Sotomayor, dissenting).
The defendant in Thaler v. Haynes\textsuperscript{60} objected to a prosecutor’s exercise of a peremptory challenge. The judge, who had not overseen the voir dire, found a prima facie case under Batson v. Kentucky.\textsuperscript{61} The prosecutor offered an explanation for the challenge based on his observations of the juror’s demeanor, and the judge found that the explanation was race neutral. The defendant, who was convicted, eventually brought a federal habeas corpus petition. The court of appeals found that the state court’s ruling was an unreasonable application of clearly established federal law under AEDPA, as a trial judge who had not overseen the voir dire could not adjudicate a demeanor-based challenge as Batson requires. The Supreme Court granted the State’s petition for writ of certiorari and summarily reversed in a per curiam decision.

The justices ruled that the state court’s decision was not contrary to clearly established Supreme Court precedent. Batson noted the need for a trial judge to take into account all of the possible explanatory factors in assessing an offered reason for a peremptory challenge. Where the explanation is based on demeanor, the judge “should take into account any observations of the juror that the judge was able to make” during jury selection.\textsuperscript{62} But Batson “did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror’s demeanor.”\textsuperscript{63} Nor did Snyder v. Louisiana\textsuperscript{64} require that result.

Presley v. Georgia,\textsuperscript{65} another summary reversal, related to the right to have members of the public attend voir dire. The defendant objected to the exclusion of a family member from the courtroom during voir dire. On appeal, the Georgia Supreme Court affirmed the conviction and found that no abuse of discretion in excluding the family member, especially since the defendant did not present the trial judge with any alternatives to consider.

In a 7-2 per curiam decision, the Supreme Court summarily reversed. There are two lines of authority that provide the right to a public trial, the First and Sixth Amendments. The Court had previously ruled that in the First Amendment context, the right to a public trial in criminal cases includes the jury-selection phase and the voir dire of prospective jurors.\textsuperscript{66} While the justices had previously held only that the Sixth Amendment right to a public trial includes the actual proof at trial and pretrial suppression proceedings,\textsuperscript{67} the Presley Court found the extension of the Sixth Amendment right to voir dire was so well-settled that summary reversal was appropriate. Further, “there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has.”\textsuperscript{68} The trial court was required to consider alternatives to closure even when alternatives are not offered by the parties. “Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials.”\textsuperscript{69} While there are circumstances where a judge might conclude that safety concerns or threats of improper communications with jurors justify closing voir dire, those circumstances must be articulated along with specific findings. Justices Thomas and Scalia dissented, contending that the case should not have been decided summarily.\textsuperscript{70}

Double Jeopardy

The Court also issued a significant ruling on mistrials and the Double Jeopardy Clause. The defendant in Renico v. Lett\textsuperscript{71} was tried for first-degree murder in a Michigan court. The trial was short—just nine hours—and the jury’s deliberations were even shorter. The jury sent out a note, asking what would happen if jurors could not agree. The judge asked the foreperson if the jurors were going to reach a unanimous verdict, and he responded “no.” Without further inquiry or further findings, the trial judge declared a mistrial. Following a retrial, Lett was convicted of second-degree murder. He challenged his conviction on the grounds that there was no manifest necessity for declaring a mistrial and so his second trial should have been barred by the Double Jeopardy Clause. The Michigan Supreme Court determined that the trial court had not abused its discretion in granting the mistrial and affirmed. However, the U.S. District Court and Court of Appeals disagreed, and would have granted Lett’s federal habeas corpus petition. In a 6-3 decision authored by the Chief Justice, the Supreme Court reversed.

The Court first described AEDPA’s deferential standard. To grant relief, a federal court must find an unreasonable application of clearly established federal law as determined by the Supreme Court. The majority identified United States v. Perez\textsuperscript{72} as setting forth the “clearly established federal law.” Perez provides that a trial judge may declare a mistrial whenever under all of the circumstances there is a “manifest necessity” for doing so. Prior authority also established that the decision to declare a mistrial is afforded great deference by a reviewing court. The majority then pointed to other holdings in which the Court declined to require a mechanical application of a formula to decide whether a deadlock warranted a mistrial, and stating that a trial judge is not required to make explicit findings of manifest necessity nor articulate on the record the factors informing the exercise of discretion. Given these precedents, the Court held, the state court’s decision was not unreasonable under AEDPA.

60. 130 S.Ct. 1171 (2010).
62. 130 S.Ct. at 1174.
63. Id.
64. 552 U.S. 472 (2008).
65. 130 S.Ct. 721 (2010).
68. 130 S.Ct. at 724.
69. Id. at 725.
70. Id. at 725 (Scalia, J., dissenting).
71. 130 S.Ct. 1855 (2010).
72. 9 Wheat. 579, 6 L.Ed. 165 (1824).
The majority also faulted the Court of Appeals for relying upon its own precedents in determining that the state court’s ruling was unreasonable. Justice Stevens (joined by Justices Sotomayor and Breyer) dissented. He took issue with the majority’s characterization of the facts. The jury deliberated only 40 minutes the first day and only a few hours on the second. The jury’s note only asked what would happen if the jury could not agree; it did not indicate that the jury was already deadlocked. The judge also cut off the foreperson after asking whether the jury was hopelessly deadlocked. The entire exchange with the foreperson took only three minutes and the jury only deliberated for four hours. In addition to this haste, the judge did not poll jurors, give an instruction for further deliberations, ask defense counsel for input, or indicate on the record why a mistrial was necessary. Under these circumstances, the state court’s conclusion was unreasonable.  

EIGHTH AMENDMENT AND CAPITAL PUNISHMENT

The Term saw a very important Eighth Amendment ruling, *Graham v. Florida*, a challenge to juvenile life-without-parole sentences. The Court also handed down several decisions about defense counsel’s duties in the penalty phase of a capital case, including an unusual number of summary reversals.

**Juveniles and Life Without Parole**

*Graham* asked whether the Eighth Amendment prohibited juveniles from receiving life-without-parole sentences in non-homicide prosecutions. Graham was 16 when pled guilty to attempted burglary with assault or battery in a Florida court. Adjudication was originally withheld, and he was placed upon probation. Graham was later charged with violating probation by participating in a home-invasion robbery and other charges, and he was resentenced on the original offense. Though the prosecutor argued for a determinate sentence and the presentence report urged a sentence of no more than four years, the trial court imposed a life-without-parole sentence, telling Graham that “the only thing I can do now is to try and protect the community from your actions.” The sentence was upheld by the intermediate state appellate court, and the Florida Supreme Court denied review. The U.S. Supreme Court vacated the sentence in a 6-3 ruling.

Looking at evidence from a study supplemented by the Court’s own research, the justices located just 123 juvenile non-homicide offenders serving life without parole . . . .

73. *Id.* at 1866, 1873-74 (Stevens, J., dissenting). In another part of the dissent (not joined by the other justices), Justice Stevens contended that the circuit appropriately relied upon its own precedents.

74. 130 S.Ct. 2011 (2010).

75. *Id.* at 2020.
Writing for the majority, Justice Kennedy noted that the Court’s Eighth Amendment proportionality decisions have typically fallen into one of two classifications. One is challenges to the length of life or term-of-years sentences imposed in particular cases, such as in Harmelin v. Michigan76 (rejecting a proportionality challenge to a life-without-parole sentence for cocaine possession) and Ewing v. California77 (rejecting a challenge to a 25-years-to-life sentence for theft of golf clubs). The other type comprises categorical restrictions on the imposition of the death penalty. These may be restrictions related to the nature of the offender, as in Roper v. Simmons78 (no death penalty for commission of an offense by someone under the age of 18) and Atkins v. Virginia79 (no death penalty for persons with low intellectual functioning), or they may relate to the nature of the offense, as in Kennedy v. Louisiana80 (no death penalty for nonhomicidal child rape) and Cober v. Georgia81 (no death penalty for adult rape). In Graham, the Court decided for the first time to take a categorical approach to a non-capital sentence. As the majority held, the case-by-case proportionality approach “is suited for considering a gross proportionality challenge to a particular defendant’s sentence, but here a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes.”82

Taking this categorical approach, the Court then assessed whether there was evidence of a national consensus against the sentencing practice at issue in the case. The majority noted that 37 states, the District of Columbia, and the federal system permit life-without-parole sentences for some non-homicide juvenile offenders and 6 states permit such sentences for juveniles in homicide cases. But “an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use. Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent.”83 Looking at evidence from a study supplemented by the Court’s own research, the justices located just 123 juvenile non-homicide offenders serving life without parole, 77 of whom were in Florida and the remaining 46 spread among 10 states.

In addition to this consensus against juvenile life-without-parole sentences in non-homicide cases, the majority found that “none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification”84 for a life-without-parole sentence. Among other reasons, juveniles are not as culpable as adults, they are less susceptible to deterrence, and they will serve longer in prison than similarly situated adults (because the sentences are imposed on them at earlier ages). In sum, while “[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime . . ., [w]hat the State must do . . . is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”85 Of course, it is still possible that juveniles who commit non-homicide offenses will be incarcerated for the rest of their lives. But the Eighth Amendment “forbid[s] States from making the judgment at the outset that those offenders never will be fit to reenter society.”86

Chief Justice Roberts concurred. He would have applied the narrower proportionality framework that focuses on the specific facts of a case, the offender, and the sentence. Based on these facts and circumstances, Chief Justice Roberts would infer that Graham’s sentence was grossly disproportionate, an inference confirmed by intrajurisdictional and interjurisdictional comparisons of the sentence.87 But citing other cases with substantially more gruesome facts, the Chief Justice calls the majority’s categorical decision “as unnecessary as it is unwise.”88

Justices Thomas (joined by Justice Scalia and, in part, by Justice Alito) dissented. Justice Thomas restated an argument he has put forth before—that the Eighth Amendment applies to the method of punishment, and contains no proportionality principle—and also criticized the majority for eviscerating a distinction in approaches in capital and non-capital cases. He then argued that the majority erred in looking beyond the language of the states’ statutes to find a national consensus against life-without-parole sentences for non-homicide juvenile offenders. If one looks at the “overwhelming legislative evidence . . . [n]ot only is there no consensus against this penalty, there is a clear legislative consensus in favor of its availability.”89 Justice Thomas also disagreed with the majority’s analysis of whether juvenile life-without-parole sentences further the purposes of punishment, and he would not have struck down Graham’s sentence even under the Chief Justice’s narrower approach. Justice Alito additionally dissented and pointed out briefly that a sentence of a term of years, such as 40 years, would likely not be unconstitutional.90

Graham is significant in several respects. It applied a cate-

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78. 543 U.S. 551 (2005).
82. 130 S.Ct. at 2022-23.
83. Id. at 2033.
84. Id. at 2028 (citation omitted).
85. Id. at 2030.
86. Id.
87. Id. at 2037-41 (Roberts, C.J., concurring).
88. Id. at 2041.
89. Id. at 2049 (Thomas, J., dissenting). Justice Alito did not join the part of the dissent asserting that the Eighth Amendment applies only to the methods of punishment, and that it does not contain a proportionality principle.
90. Id. at 2058 (Alito, J., dissenting).
Ineffective Assistance of Counsel and Capital Sentencing

An argued case, Wood v. Allen, addressed whether a state court's denial of a post-conviction petition should be upheld under the deferential standard set forth under 28 U.S.C. section 2254(d)(2). An inexperienced lawyer represented the defendant in the penalty phase of his capital case. While the lawyer read a mental-health expert's report prepared for the guilt phase, he was told by a senior cocounsel that nothing in the report merited further investigation. At a post-conviction hearing in state court, the senior lawyer testified that evidence of the defendant's mental-health problems would have been presented at the penalty phase if he had been aware of it, and the junior lawyer in charge of the penalty phase testified that he did not recall considering the defendant's mental deficiencies.

In an opinion by Justice Sotomayor, the Court concluded that "the state court's finding that Wood's counsel made a strategic decision not to pursue or present evidence of Wood's mental deficiencies was not an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings." Much of the evidence, the justices found, speaks "not to whether counsel made a strategic decision, but rather to whether counsel's judgment was reasonable—a question we do not reach." The Court also declined to reach a question on which it granted review, whether 28 U.S.C. section 2254(e)(1) also requires proof by clear and convincing evidence to overcome a presumption that a state court's finding of fact was correct. Justice Stevens, joined by Justice Kennedy, dissented. He wrote that "the only reasonable factual conclusion" is that counsel's decision "to forgo investigating powerful mitigating evidence of Wood's mental deficits" was due to inattention and neglect, "the antithesis of a 'strategic' choice."

Through a series of summary reversals, the Supreme Court sought to provide greater guidance to courts, prosecutors, and defense attorneys about effective assistance of counsel in capital-sentencing proceedings.

In Bobby v. Van Hook, the Court granted certiorari and summarily reversed the Sixth Circuit, which had granted habeas corpus relief. In a per curiam decision, the justices held that the federal court of appeals erred by measuring counsel's performance by American Bar Association standards issued years after the trial, and emphasized that the standards are only guides as to what reasonably diligent attorneys should do. Moreover, counsel's mitigation investigation was not unreasonably limited, nor was the defendant prejudiced by any failure to dig deeper.

In Wong v. Belmontes, another per curiam summary reversal, the Court found that the trial lawyer's alleged failure to present additional mitigating evidence at the penalty phase did not prejudice the defendant in light of the facts of the crime and the mitigating evidence that was adduced for the jury. The defense lawyer had refrained from presenting certain mitigating evidence in an effort to prevent the prosecution from introducing powerful evidence of an additional homicide. The Court did not determine whether the lawyer's work had been deficient because—even assuming it was—the Court found no prejudice.

We can contrast these cases (and particularly Wong) with the summary reversals in Sears v. Upton and Porter v. McCollum. The petitioner in Sears was sentenced to death following a mitigating investigation that a state post-conviction court found to be inadequate. At the penalty phase, defense counsel relied upon a theory, which backfired, that portrayed the defendant as coming from a stable and loving household. The truth, which trial counsel never discovered, was quite to the contrary and it also turned out that the defendant was low-functioning due to brain damage and drug and alcohol abuse. The Supreme Court summarily reversed and remanded for the state court to make a proper determination of prejudice. Although the state court found that the trial lawyer presented some mitigation evidence, that does not foreclose an inquiry into whether counsel's failure to discover the additional evidence prejudiced the defendant. Likewise, in Porter, trial counsel had only one short meeting with the defendant about the penalty phase, did not obtain school medical or military records, and did not interview witnesses. This fell short of professional standards just as in an earlier case, Wiggins v. Smith. Contrary to the view of the Florida Supreme Court, counsel's failures undermined confidence in the outcome of the case, particularly in light of the moving evidence (which was not presented) of the defendant's combat experiences, childhood history, and limitations.

FIRST AMENDMENT

The Court struck down a federal criminal statute and overturned a conviction on First Amendment grounds. The defendant in United States v. Stevens was convicted of violating 18 U.S.C. section 48, which criminalizes the commercial creation,
sale, or possession of depictions of animal cruelty in interstate or foreign commerce. The legislation was aimed at the market for “crush videos,” though the videos involved in this case were of dogfighting (which is still outlawed throughout the United States).

In an opinion by Chief Justice Roberts, the justices first declined to hold that depictions of animal cruelty are categorically unprotected by the First Amendment. Though it noted some historic and traditional categories of unprotected speech—such as defamation, fraud, and speech integral to criminal conduct—the Court rejected the government’s suggestion that speech may be deemed categorically unprotected depending upon a balance of the value of the speech and societal costs. The Court then determined that section 48 was facially invalid because it was overbroad; the statute does not require that the depicted conduct be cruel. The justices also turned aside efforts to narrow the construction, such as by implying exceptions that would exempt from the prohibition depictions with certain religious, political, scientific, or other values. Finally, the Court was unconvinced by the government’s assurances that it would only prosecute for acts of extreme cruelty. Justice Alito was the sole dissenter. He would have remanded to decide whether the videos were constitutionally protected but, in any event, would not have found the statute to be overbroad.

**FEDERAL CRIMINAL LAW**

As usual, the Supreme Court decided a number of federal criminal cases last Term. While most may be of interest primarily to federal judges and practitioners, the “honest-services” fraud rulings may spark larger debates about what kinds of acts should be considered fraudulent.

The main honest-services fraud decision is Skilling v. United States.103 (The venue and jury selection issues in Skilling are discussed earlier in this article.) Skilling was convicted for conspiracy to commit honest-services wire fraud, among other counts. The federal mail- and wire-fraud statutes criminalize using the mails or wires in furtherance of “any scheme or artifice to defraud” as well as obtaining money by false or fraudulent pretenses, representations, or promises.104 A number of lower federal courts had interpreted these fraud statutes to permit conviction for the deprivation of intangible rights, without any financial loss to an individual or the public. In McNally v. United States,105 the Court limited the scope of these fraud statutes in a case where a public official received kickbacks for giving state business to an insurance agent but where there was no allegation that the kickbacks led to higher premiums or worse insurance for the state. Congress responded by enacting a new statute, 18 U.S.C. section 1346, that defined a “scheme or artifice to defraud” to include “any scheme or artifice to deprive another of the intangible right of honest services.” This was the statute challenged in Skilling. The justices unanimously reversed the Court of Appeals’ decision upholding Skilling’s conviction for conspiracy to commit honest-services wire fraud, though they split on whether section 1346 could be given a limiting construction.

Writing for six members of the Court, Justice Ginsburg first addressed the argument that section 1346 should be struck down as unconstitutionally vague. Although the statute was meant to reinstate the body of pre-McNally honest-services law and that law was in disarray, the vast majority of the pre-McNally honest-services cases involved offenses who participated in bribery or kickback schemes in violation of a fiduciary duty. While a broad reading of the statute would raise vagueness and due-process concerns, “there is no doubt that Congress intended [the statute] to reach at least bribes and kickbacks.”106 Instead of invalidating the statute in its entirety, the majority gave it a limiting construction. When limited to bribery and kickback schemes, section 1346 is not unconstitutionally vague. The majority vacated the court of appeals’ affirmance, and remanded to determine if the conspiracy conviction could be upheld on a different theory (as honest-services fraud was only one of three alleged objects of the conspiracy), and to assess whether a reversal on the conspiracy count would affect any of the other counts of conviction.

Justice Scalia (joined by Justices Thomas and Kennedy) concurred in the judgment, but would have struck down section 1346 as vague without providing a limiting construction. In their view, the majority’s efforts to pare down the statute were beyond judicial power. They contended that no court before McNally construed the deprivation of honest-services in such a limited way and that the majority was essentially rewriting the statute. These justices would simply have reversed Skilling’s conspiracy conviction on the grounds that section 1346 “provides no ‘ascertainable standard’ for the conduct it condemns.”107

Following the decision in Skilling, the Court vacated the court of appeals’ rulings in two other honest-services fraud cases (Black v. United States108 and Weyhrauch v. United States109) and remanded for further proceedings. In Black, the Court additionally determined that the defendant had not forfeited his objection to honest-services fraud instructions when he objected to the prosecution’s request for special verdicts; the special verdicts might have revealed whether the jury convicted on a theory of honest-services fraud.

**FEDERAL HABEAS CORPUS**

Two decisions on aspects of federal habeas corpus may be of broad interest.

A federal habeas corpus court will not review a claim rejected by a state court if the decision of the state court rests on a state-law ground that is independent of the federal question and adequate to support the judgment. The issue in Beard v. Kindler110 was whether a state procedural rule is automatically inadequate under this doctrine if the rule is discretionary and not manda-

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103. 130 S.Ct. 2896 (2010).
104. 18 U.S.C. §§ 1341, 1343.
106. Id. at 2931.
107. Id. at 2935, 2940 (Scalia, J., concurring) (quoting United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921)).
108. 130 S.Ct. 2963 (2010).
tory. Joseph Kindler was convicted of capital murder in Pennsylvania. He escaped from custody before his post-verdict motions could be heard and before he could be sentenced. Kindler was returned to Pennsylvania about seven years later. In the meanwhile, his motions were dismissed under a state rule that permits (but does not require) a court to find a claim to be forfeited when a defendant has become a fugitive. When the case got federal court, both the district court and the court of appeals determined that the fugitive-forfeiture rule did not provide an adequate basis to bar federal review. The U.S. Supreme Court reversed.

In a decision authored by Chief Justice Roberts, the Court held that “a discretionary rule can be ‘firmly established’ and ‘regularly followed’—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others.” The justices noted that a contrary holding might have the perverse effect of encouraging states to adopt mandatory rules rather than permit discretion to be exercised in appropriate cases.

The question in Magwood v. Patterson was whether a federal habeas corpus petition was “second or successive” under AEDPA. The defendant was convicted and sentenced to death. In a prior federal habeas corpus petition, he succeeded in overturning his sentence, though he was re-sentenced to death following a new penalty hearing. The state courts affirmed his new sentence and he brought another federal habeas corpus petition. The U.S. Court of Appeals for the Eleventh Circuit found that some of Magwood’s claims could have been brought in the first petition and, thus, those claims should be governed by 28 U.S.C. section 2244(b), which restricts “second or successive” habeas applications. A closely divided Supreme Court reversed.

In an opinion for the Court written by Justice Thomas, the majority found that the AEDPA provision applies “only to a ‘second or successive’ application challenging the same state-court judgment.” In previous decisions, the Court had made clear that the phrase does not apply to all petitions filed later in time; for example, some issues such as competency to be executed may not be ripe until some time after the first petition has been filed. The majority was persuaded that a habeas corpus application challenges a judgment of confinement and “the phrase ‘second or successive’ must be interpreted with respect to the judgment challenged.” This interpretation would also be most consistent with other parts of AEDPA, including the exceptions to dismissal for successive petitions.

Justice Kennedy (joined by Chief Justice Roberts, and Justices Ginsburg and Alito) dissented. They would read the language of the statute differently and would incorporate pre-AEDPA abuse-of-the-writ doctrine. Under their reading of the statute, a second-in-time application would be barred as successive if it sought to raise a claim that the petitioner had a full and fair opportunity to raise previously, and a “mixed” petition would be treated as “second or successive.” The dissenters were particularly concerned that the majority’s construction of the statute would encourage abuse of the writ when a petitioner has succeeded on even the most minor and discrete issue relating to his sentencing.

A LOOK AHEAD

An early look at the October 2010 Term reveals some notable cases though, as of this writing, perhaps none to rival the blockbusters of this past year.

Two civil-rights cases present important questions. One is a challenge to a three-judge panel’s order to reduce prison overcrowding in California. Another asks whether a prosecutor’s office can be liable for failure to train prosecutors about their obligations.

The Fourth Amendment and the Sixth Amendment Confrontation Clause are back on the menu. The Court is slated to decide if evidence is excluded under the Fourth Amendment when officers act in good-faith reliance on a judicial decision that is later overturned; the question has vexed courts since the justices decided Arizona v. Gant and revised the principles of automobile searches incident to arrest. Another Fourth Amendment case asks whether officers can—through their own conduct—create an exigency that may excuse them from obtaining a warrant. Two Confrontation Clause cases posit whether statements by a wounded crime victim are testimonial and whether the report of one lab analyst may be introduced through the testimony of a supervisor or other analyst. And the Court will return once more to Miranda, addressing whether courts should consider a juvenile’s age in deciding if he is in custody for Miranda purposes.

There are certain to be significant rulings and some surprises.

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111. Id. at 618 (citation omitted).
112. 130 S.Ct. 2788 (2010).
113. Id. at 2796.
114. Id. at 2797.
115. Justice Breyer (joined by Justices Stevens and Sotomayor) concurred to point out that the decision also fits comfortably with Panetti v. Quarterman, 551 U.S. 930 (2007).
117. Connick v. Thompson, No. 09-571.
118. Davis v. United States, No. 09-11328.
120. Kentucky v. King, No. 09-1272.
121. Michigan v. Bryant, No. 09-479.
122. Bullcoming v. New Mexico, No. 09-10876.
The Debate over the Selection and Retention of Judges: How Judges Can Ride the Wave

Mary A. Celeste

There is a surge in the debate in the U.S. over the methods of judicial selection and retention, with some rallying for merit-selection plans, others continuing to support judicial elections, and virtually no one proposing lifetime appointments. The impetus for this surge may be related to three recent U.S. Supreme Court cases, Republican Party of Minnesota v. White,1 Citizens United v. Federal Election Commission,2 and Caperton v. A.T. Massey Coal Co.,3 and to the exploding amount of campaign funds raised in judicial elections. These factors seem to have once again brought to the forefront the judicial election method and consequently revitalized the merit method, which had been dormant for three decades. Whether this boost in the debate is tantamount to a new movement, a continuation of an old movement, a blip on the radar screen, a wave, or a full-fledged tsunami, remains to be seen. But one thing is clear: since the United States' inception, there have been periodic movements to change the method of selecting and retaining judges, and the methods have often been complex and convoluted.

There were essentially three major movements in the U.S.,4 which I will refer to as the “Original Lifetime Appointment Movement,” the “Jackson Democracy Movement,” and the “Progressive Reform Movement.” Not unlike the present debate, political, legal, social, and cultural factors have all served as the catalysts for these movements. Although there have been some slight variations, these movements essentially involve four different selection methods: lifetime appointment, partisan election, nonpartisan election, and merit selection and retention. These movements have been in a constant state of flux, with many states using constitutional amendments, legislative acts, ballot initiatives, and executive orders to both move in and out of the methods, and to make modifications short of complete overhauls. For example, 9 of 16 states that initially only used the appointment method switched to judicial elections for some level of their judiciary,5 14 states changed from partisan to nonpartisan elections,6 and 15 states have changed from partisan or nonpartisan elections to some form of the merit method.7 When all is said and done, over the last 234 years, this activity has resulted in 39 states deviating substantially from their initial selection method. Notwithstanding these major changes, there have been far more slight modifications and failed attempts, than an actual change in judicial-selection methods. There were approximately 358 method modifications, including but not limited to, the creation of commissions, change in term lengths and periods, change in the mandatory retirement age, and change in the appointing authority.8 Additionally, there have been approximately 66 failed attempts to change methods.9

With the exception of some novel intermittent arguments, the debate over which method is best has remained fundamentally the same. While the parties taking up the various causes have changed over time, including former U.S. Supreme Court Justice Ruttledge of the National Center for State Courts; Professor Kristen Shirley Abrahamson; Mary McQueen, David Rottman, and Jesse Zide, Gayle Nachtigal, and Gary Cohen; Wisconsin Chief Justice Shirley Abrahamson; Mary McQueen, David Rottman, and Jesse Rutledge of the National Center for State Courts; Professor Kristen Miccio of the Denver Sturm College of Law; Cynthia Gray of the American Judicature Society; and lawyer Joe Vanlandingham.

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Footnotes
2. 130 S. Ct. 876 (2010).
6. Arkansas, California, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, North Carolina, Oklahoma, Oregon, South Dakota, and Washington. Id.
8. See American Judicature Society, History of Reform Efforts: Formal Changes Since Inception, supra note 5.
Court Justice Sandra Day O’Connor, judges remain at the center of the debate. Within a historical context, this Paper will identify and discuss these movements and methods along with their catalysts. It will also set forth a snapshot of the methods currently used in each state, as well as state proposals and measures that could potentially affect these methods. In light of the recent Supreme Court cases, the Paper will discuss the impact that these methods may have on a judge’s conduct. Finally, the Paper will specify and restate the arguments both supporting and criticizing these methods and will review the various proposals for stopgap measures. The goal of this Paper is to identify some of the new challenges and pitfalls for judges operating within every method of retention and selection given the recent Supreme Court jurisprudence, and to educate judges about how these methods of selection and retention ebb and flow over time. Armed with this knowledge, and an understanding that change requires respect for the cultural differences of each method, judges should be able to take a leadership role in the debate.

I. MOVEMENTS AND METHODS

A. The Original Lifetime Appointment Movement

The first movement was very much influenced by the United States’ independence from England. In the American colonies, the “king had absolute control over the appointment and removal of Judges.” Because the founders were concerned about how judges in England were controlled by the king, they established in the Constitution lifetime appointments for all federal judges based on the advice and consent of the Senate. The U.S. Constitution was modeled after the Massachusetts State constitution, which was drafted by John Adams. Adams wrote that judges “should not be dependent upon any man or body of men. To these ends, they should hold estates for life in their offices; or, in other words, their commissions should be during good behavior . . . .” The original states followed suit with lifetime appointments, but the method of appointment varied, as “seven states selected their judges by the legislature and five states had the governor appoint judges who would then be approved by a special council appointed by the legislatures.” Another proponent of this movement was Alexander Hamilton, who believed that if a judge engaged in judicial elections, it would affect judicial independence and hence the judiciary itself. The lifetime appointment method is still used today for federal judges, U.S. Supreme Court Justices, and the state of Rhode Island. Massachusetts and New Hampshire both have unlimited judicial terms, but set a mandatory retirement age at seventy.

B. The Jackson Democracy Movement

The appointment method came under attack during the presidency of Andrew Jackson (1829–1837) when the sentiment of the country was that “governmental office holders should be accountable to the voters and, therefore, elected.” This movement ultimately became the largest of the three, as the decades following Jackson’s presidency saw 21 of 30 states adopt the popular election method. Like many other political movements, this movement was at first considered radical, a measure “intended to break judicial power through an infusion of popular will and majority control.” These “radicals” believed that popular election would remove the selection of judges from party leaders. Scholars have attributed this move from judicial appointments to judicial elections to several factors, including “the belief that judges at the local level should be more responsive to their communities,” and that judicial appointments were being meted out as political patronage. This movement began in the early 1800s and continued through the civil war to the annexation of Alaska in 1959.
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The first wave was between 1846 and 1860 when state constitutions were rolled out across the U.S. The debate between appointment and judicial elections played out at the constitutional conventions with some states giving the debate more attention than others. One scholar attributes this movement to a desire for greater judicial independence:

In addition to direct limits on legislative power, most of these conventions adopted judicial elections. Many delegates stated that their purpose was to strengthen the separation of powers and empower courts to use judicial review. The reformers got results: elected judges in the 1850s struck down many more state laws than their appointed predecessors had in any other decade. These elected judges played a role in the shift from active state involvement in economic growth to laissez-faire constitutionalism.

The reform focused on the appellate and inferior courts, with the states of Vermont, Indiana, and Georgia as the first three states permitting local governments the option to elect trial court judges. This trend was followed by Mississippi in 1832 and New York in 1846. By 1850, 7 more states also permitted elections and by the time of the Civil War, 24 states had an elected judiciary.

At the turn of the century there was a new round of debates between the appointment method and the election method proponents. Roscoe Pound, noted legal scholar, in a well known speech before the ABA in 1906, stated that "putting courts into politics, and compelling judges to become politicians in many jurisdictions has almost destroyed the traditional respect for the bench." As a result, there was another reform of sorts with the creation of nonpartisan elections in an attempt to remove national partisan interests from state and local elections and to clean up the patronage and cronymism.

In 1927, 12 states employed nonpartisan elections, and three other states "had already tried and rejected nonpartisan elections." By the end of the movement, every state that entered the Union from 1846 to 1958 used either partisan or nonpartisan elections to select some or all of their judges.

C. The Progressive Reform Movement

The merit selection method was proposed for the purpose of removing judges from the pressures of running for political office. Merit-selection plans usually select judges through a nominating commission with gubernatorial or legislative appointment. After a specified term the judge stands for retention with no party affiliation or opponent and must receive a certain vote percentage to be retained. Some states use performance evaluations through commissions prior to the retention election, while others use non-elective means of retention, like reappointment. Although the merit selection and retention method, also known as the "Missouri Plan," was developed in 1913 as a compromise that combined the best features of appointment and election, it did not become a full-fledged movement until the 1950s and 1960s. In 1914, it was the American Judicature Society that first pushed for retention elections through its new director Albert M. Kales, who offered a nonpartisan court plan that featured the basic elements of nomination, appointment, and elective-tenure. Later, in
1926, Harold Laski first suggested that judicial commissions do the nominating.\textsuperscript{46}

California adopted a version of this plan in 1934.\textsuperscript{47} Soon thereafter Missouri adopted the most familiar version hence called “the Missouri Plan.”\textsuperscript{48} It is interesting to note that Louisiana, in 1921, may have been the first state to consider the merit-selection method and has since rejected countless proposals to adopt that method, as “at least one proposed constitutional amendment calling for merit selection has been introduced in all but one legislative session” since 1978.\textsuperscript{49} Similarly, Texas has rejected proposals to adopt the merit selection method numerous times, with ten rejections.\textsuperscript{50} Several factors, however, largely unrelated to judicial performance, converged to halt the spread of the merit-selection method. These factors included fractious constitutional conventions, a decline in public confidence in both public and private institutions, disenchantment with the merit method, and opposition to change.\textsuperscript{51} By the mid-1980s, “these factors essentially halted the trend to merit selection.”\textsuperscript{52}

II. THE SNAPSHOT

A. Current State Judicial-Selection Methods

All four of the judicial-selection methods just discussed are currently in use in various states. Sometimes states will even use some combination of several methods.\textsuperscript{53} As a result, appeals court judges, trial court judges, and county or municipal judges, may be selected or retained using different methods within the same state. Generally, 5 states use gubernatorial or legislative merit appointments without commissions.\textsuperscript{54} 14 states and the District of Columbia use merit selection through nominating commissions.\textsuperscript{55} 9 states use merit selection combined with other methods,\textsuperscript{56} 8 states use a partisan election system,\textsuperscript{57} and 14 states use a nonpartisan election system.\textsuperscript{58} In the 19 states that either use merit selection or appointments, judges are usually appointed by either the governor or the legislature,\textsuperscript{59} and then face either a retention election,\textsuperscript{60} or a reappointment process by lawmakers.

While there is no mandatory retirement age for either U.S. Supreme Court Justices or federal judges, with the exception of one lifetime appointment state, Rhode Island,\textsuperscript{61} the remaining states have a variety of mandatory retirement ages ranging from 70–75 years,\textsuperscript{62} or mandatory retirement with conditional provisions,\textsuperscript{63} or no mandatory retirement age at all.\textsuperscript{64} In 1991, two Missouri state court judges challenged the mandatory retire-

\textsuperscript{46} Id.
\textsuperscript{47} In 1934, California voters adopted a merit-like retention system for appellate judges but left the decision regarding superior court judges to the counties, which still have not adopted the retention system. American Judicature Society, History of Reform Efforts: Formal Changes Since Inception, supra note 5. California’s plan is unique in that the governor makes appointments subject to confirmation by a judicial commission, as opposed to the usual merit-selection plan where a judicial commission provides a list of nominees. See KILEY, supra note 42, at 2–3, 3 n.20. Illinois and Pennsylvania also use this method. See id. at 3 n.20.
\textsuperscript{48} RUNNING FOR JUDGE, supra note 17, at 11.
\textsuperscript{49} American Judicature Society, History of Reform Efforts: Unsuccessful Reform Efforts, supra note 9.
\textsuperscript{50} Id.
\textsuperscript{52} Id. at 78.
\textsuperscript{54} California, Maine, New Jersey, South Carolina, and Virginia. See American Judicature Society, Methods of Judicial Selection: Selection of Judges, supra note 7.
\textsuperscript{55} Alaska, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Rhode Island, Utah, Vermont, and Wyoming. See id.
\textsuperscript{56} Arizona, Florida, Indiana, Kansas, Missouri, New York, Oklahoma, South Dakota, and Tennessee. See id.
\textsuperscript{57} Alabama, Illinois, Louisiana, New Mexico, Ohio, Pennsylvania, Texas, and West Virginia. See id. Ohio presents somewhat of a hybrid situation by using partisan primary elections and nonpartisan general elections. Id. Also, several states that use the election method fill interim vacancies through a merit-selection process. E.g., American Judicature Society, Methods of Judicial Selection: New Mexico, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=NM (last visited Nov. 30, 2010).
\textsuperscript{59} Only Virginia and South Carolina are selected by the legislature. Id.
\textsuperscript{60} Hon. B. Michael Dann & Randall M. Hansen, Judicial Retention Elections, 34 LOY. L.A. L. REV. 1429, 1429 (2001) (“Judicial retention elections have been part of the selection and retention process in many states for over thirty years. Twenty states use some form of judicial retention election for appellate court judges and justices, and twelve states use retention elections for at least some of their trial court judges.”).
\textsuperscript{61} R.I. CONST. art. X, § 5.
\textsuperscript{62} E.g., COLO. CONST. art. VI, § 23 (age 72); MASS. CONST. pt. 2, ch. III, art. I (age 70); N.H. CONST. pt. 2, art. 73, 78 (age 70); OHIO CONST. art. IV, § 6 (age 70); see also Vermont Legislative Research Shop, The University of Vermont, Mandatory Retirement Age of Judges (Apr. 5, 2000), http://www.uvm.edu/~vlrs/doc/mandatory_retirement_age_of_judg.htm.
\textsuperscript{63} Alabama, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, New Mexico, North Dakota, Oregon, Vermont, Virginia, Washington. See Vermont Legislative Research Shop, supra note 62.
\textsuperscript{64} California, Illinois, Kentucky, Maine, Missouri, Montana, Nebraska, New Jersey, North Carolina, Oklahoma, Rhode Island, Tennessee, Utah, West Virginia, and Wisconsin. See id.
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B. The Catalysts for the Current Debate

The current momentum for the debate may be attributed to several factors. First, there has been a profusion of cases brought by judges across the country regarding judicial campaign activity, culminating in two U.S. Supreme Court decisions: *Republican Party of Minnesota v. White* and *Caperton v. A.T. Massey Coal Co.* Further, the U.S. Supreme Court recently decided *Citizens United v. Federal Election Commission*, which may impact judicial campaign contributions. Lastly, the current debate may also be attributed to the rising rate of judicial campaign contributions and polls indicating public dissatisfaction with the judiciary as a whole.

1. RECENT UNITED STATES SUPREME COURT CASES

a. Republican Party of Minnesota v. White

The question presented in *White* was whether the First Amendment permitted the Minnesota Supreme Court to prohibit candidates for judicial election “from announcing their views on disputed legal and political issues.” The judge in question, in the course of his nonpartisan campaign, “distributed literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion.”

Minnesota’s Code of Judicial Conduct, Canon 5(A)(3)(d)(i), featured an “announce clause,” restricting a candidate for judicial office from announcing his or her views on disputed legal issues. This Minnesota code provision was based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct. The U.S. Supreme Court concluded that the provision infringed on a judge's right to free speech. As a result of the *White* decision, elected judges, unlike appointed and merit-selected judges, have brought a myriad of First Amendment free speech challenges related to campaign activity, some finding success, while others did not. The *White* decision also had implications outside the context of announce clauses. For example, the U.S. District Court for the District of North Dakota struck down a clause restricting judges from making pledges or promises regarding certain legal issues, relying on *White*.

But even in the years prior to *White*, judges were challenging disciplinary actions and bringing lawsuits related to judicial campaign activity with varying outcomes. These judges argued First Amendment free speech violations mostly related to judicial campaigns under the 1990 ABA Model Code of Judicial Conduct, preventing a judicial candidate from making “pledges, promises, or commitments” with respect to cases, controversies, or issues likely to come before the court. The actions ranged from a successful challenge to Florida’s Canon 7B(1)(c), which prohibited discussion of “disputed legal or political issues,” to an unsuccessful challenge to Kentucky’s Canon 7B(1)(c), where the Kentucky Supreme Court held that “there is a compelling state interest in so limiting a judicial candidate's speech, because the making of campaign commitments on issues likely to come before the Court tends to undermine the fundamental fairness and impartiality of the legal system.” These two decisions dealt with similar issues but reached opposite results. Several First Amendment challenges also arose outside of the context of commenting on legal issues likely to come before the court. These challenges covered issues such as: statements relating to conduct in office, candidate questionnaires, and the accuracy of campaign statements. These types of challenges also had varying outcomes. In the federal arena, courts have tended to strike down restrictions on both
campaign statements and a judge’s ability to respond to questionnaires, relying on First Amendment grounds.82

The repercussions from the White decision took several forms: states repealed their announce clauses,83 issued advisory opinions,84 or declared that White did not affect their codes;85 judicial ethics commissions dismissed proceedings against judges;86 and judges commenced constitutional challenges.87 As evidenced by the extensive commentary regarding White,88 the Supreme Court’s decision has done little to settle what is and what is not protected judicial campaign speech. Ethics advisory committees and disciplinary bodies continue to enforce restrictions on judicial speech as long as the restrictions are narrowly tailored and differ from the restrictions struck down in White.89 The 2007 ABA Model Code of Judicial Conduct (“2007 Code”) takes a similar approach.90 As a result of White, the ABA added five comments to Rule 4.1 in the 2007 Code (paragraphs 11 through 15) that discuss the distinctions between various “announce clauses.”91 Although the 2007 Code offers a better definition of acceptable campaign speech, not all of the states have adopted the Code in toto.92 While the White decision addressed a candidate’s political speech during his or her own judicial campaign, it did not address free speech regarding a judge’s personal involvement in political activities outside of their own judicial campaign. Thus, it is quite possible that the White decision will spark a flurry of new cases.93 However, according to some scholars, the fear that the White decision would result in “rancorous free-for-alls” has not been realized.94

b. Citizens United v. Federal Election Commission

Another important U.S. Supreme Court case involving free speech is Citizens United v. Federal Election Commission.95

While the issue in White related to judges’ freedom of speech, the issue in Citizens United related to the free speech of a campaign supporter in a presidential election. In January 2008, appellant Citizens United, a nonprofit corporation, released a documentary critical of then-Senator Hillary Clinton, a candidate for her party’s presidential nomination.96 Citizens United was poised to pay a cable television company to carry the documentary through video-on-demand during the 30 days prior to primary elections.97 There was a concern, however, that such action would violate the Bipartisan Campaign Reform Act (BCRA), which prohibits corporations from spending general treasury funds on “electioneering communications”—defined as “any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office and is made within 30 days of a primary or 60 days of a general election.”98 Thus, Citizens United sought declaratory and injunctive relief against the Federal Election Commission.99

The U.S. Supreme Court, in a controversial 5 to 4 decision, overruled Austin v. Michigan Chamber of Commerce, holding that the “Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”100 The Court struck down the portion of the BCRA that prohibited all corporations, both for-profit and not-for-profit, and unions from broadcasting electioneering communications, and thus also overruled a portion

82. Alfini et al., supra note 77, at 11-13.
84. Ohio. Id.
85. Kentucky, Florida, and Georgia. Id.
86. California. Id.
87. E.g., Wersal v. Sexton, 613 F.3d 821, 826 (8th Cir. 2010) (“[Plaintiff] now maintains that the amendments to [Minnesota’s] solicitation clause do not cure its invasion of his First Amendment rights, and that the endorsement clause improperly restricts expression protected by the First Amendment.”); see also Alfini et al., supra note 77, at 11-18 (“Unfortunately, the Court’s decision in White . . . has spawned a number of conflicting lower Court decisions and widely divergent attempts to conform state judicial ethics provisions to White.”).
88. See Alfini et al., supra note 77, at 11-18 n. 95 (collecting various sources).
90. Alfini et al., supra note 77, at 11-18.
92. As of June 18, 2009, 33 states plus the District of Columbia created committees to review the 2007 Code; 8 of those states adopted the Code in whole or in part, 7 states merely made revisions to their existing codes, and the committees in the other 18 states plus the District of Columbia had yet to complete their reviews. Report to the Court of Appeals of Maryland of the Maryland Committee to Review the 2007 Code of Judicial Conduct Proposed by the American Bar Association 3 (June 18, 2009), available at http://www.courts.state.md.us/publications/pdfs/aba-report.pdf.
93. E.g., In re Hecht, 213 S.W.3d 547 (Tex. Spec. Ct. Rev. 2006). For a comprehensive discussion on similar cases brought both prior to and subsequent to the White decision, see Alfini et al., supra note 77, at ch. 11. See also Nevada Standing Committee on Judicial Ethics and Election Practices, Advisory Op. JE10-005 (Aug. 2, 2010) (discussing the propriety of a judge conducting an event for another political candidate in his own home), available at http://judicial.state.nv.us/Je10-005.pdf.
95. 130 S. Ct. 876 (2010).
96. Id. at 887.
97. Id. at 887–88.
98. Id.
99. Id. at 888.
100. Id. at 886.
Caperton will have a more direct effect. In a recent ruling, however, a state court required the group to register as a political committee which means that they can only begin a campaign unless there is “active opposition.”

106. See, e.g., ALASKA CODE OF JUDICIAL CONDUCT Canon 5C(2); COLO. CODE OF JUDICIAL CONDUCT Canon 7B(2); IOWA CODE OF JUDICIAL CONDUCT Canon 7B(2).


108. Colo. Judicial Ethics Advisory Bd., Opinion 2010-03 (Sept. 29, 2010). These two judges were ousted. Pamela Dickman, Larimer Judges’ Ouster Nearly Unprecedented: Public Campaign Against

any campaign efforts. There was also a recent, successful effort in Larimer County, Colorado to oust two state court judges for their actions as former prosecutors, where the judges received an advisory opinion allowing them to publicly respond to the opposition. The most recent attempt to oust merit-selected judges occurred in Iowa, where the National Organization for Marriage spent $230,000 on television ads criticizing three state supreme court justices for their ruling in a same sex marriage case. Consider what would happen if a group seeking to oust a merit-selected judge or justice received a large corporate donation and waited until immediately prior to the retention vote to usher in a tremendous statewide campaign? The judge or justice will be ill-prepared, unfunded, and without an advisory opinion permitting response; in other words, they will be “sitting ducks.” In this sense, Caperton may have an affect on retention elections in merit-selection states.


While Citizens United may indirectly impact all judicial campaigns, Caperton will have a more direct effect. In Caperton, the United States Supreme Court held that a justice’s failure to recuse himself when a campaign contributor appeared in his court violated the Due Process Clause of the 14th Amendment. Prior to this case, contributions by persons or groups who represented a particular point of view, such as opposition to abortion or to capital punishment, were not precluded from making donations to judicial campaigns, but there was always a concern that significant public attention would lead to perceptions of favoritism. Caperton held that such perceived favoritism might be so great as to require mandatory judicial recusal based on constitutional concerns. Although the circumstances in Caperton involved judicial campaign contributions, this case has implications for any type of perceived judicial favoritism.

In December 2009, “Michigan’s Supreme Court issued new rules making it harder for justices to hear cases involving major campaign supporters,” and “Wisconsin became the third state to provide public financing for appellate court races,


so that judicial candidates would not have to seek money from those appearing before them in court.”114 In contrast, the next month, the Wisconsin Supreme Court was seeking to finalize a proposed order that said judicial campaign contributions do not require judges to step aside from hearing cases involving a supporter.115

d. Collective Implications of White, Citizens United and Caperton

When one begins to apply these three cases collectively to a judicial campaign and election, things become convoluted. Consider a scenario where a judge receives a campaign contribution from an oil and gas corporation or an anti-abortion nonprofit corporation by virtue of a cable advertisement for the judge or against his opponent. Under Citizens United, in those states without contribution limits, the corporation may now expend an unlimited amount of advertising funds on behalf of a judge. Additionally, that judge, under his exercise of free speech rights as enunciated in White, may now openly state his opposition to the use of alternative energy or abortion. But one obstacle standing in the way of perceived or real judicial partiality is Caperton. Under these circumstances a Caperton argument would most likely result in the judge’s recusal from the case. But what happens under the same scenario when a different corporation with the exact same views as the contributing corporation comes before the judge? While the judge may recuse on the basis of a perceived partiality, there is no mandate for him to do so under Caperton. There is now a concern over the influence of politics in judicial elections as a result of White, which permits judicial candidates to discuss their positions on various legal issues while campaigning, including issues that may come before them for decision.116 In response to White, the Missouri Supreme Court repealed their announce clause, stating that “[r]ecusal, or other remedial action, may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct.”117

### 2. INCREASED EXPENDITURES IN JUDICIAL ELECTIONS

Even before Citizens United, private contributions to judicial campaigns were beginning to skyrocket and were playing a major role in the success or defeat of a judge running for a seat on the bench: “In the 2000, 2002 and 2004 election cycles, candidates raised $123 million compared with only $73.5 million in the preceding three cycles.”118 In a particularly astounding example, a group in West Virginia “raised at least $3.6 million to successfully beat an incumbent.”119 Similarly, the 2004 contest between Lloyd Karmeier and Gordon Maag, two Illinois Supreme Court candidates, raised almost $9.4 million, nearly double the previous national record.120 That amount topped the money raised in 18 of 34 U.S. Senate races decided that year.121 One could foresee these situations giving rise to backlash against a corporation for funding a judicial candidate, not unlike those typical to political campaigns. For example, in Minnesota, Target Corporation’s donation to a group that supported the gubernatorial candidate Tom Emmer has received harsh press from a variety of groups.122

Fortunately, there are some small restrictions in the judicial campaign arena under both the 1990 and 2007 ABA Codes. Judicial candidates may promote their campaigns through advertisements under Canon 5C(1)(b)(ii) of the 1990 Code and Rule 4.2(B)(2) of the 2007 Code, with some restrictions related to the content.123 A judge engaged in judicial campaigns may also accept contributions. The financing of a judicial campaign is governed by Canon 5C(2) of the 1990 Code, which requires a candidate to create campaign committees, and Rule 4.1(A)(8) of the 2007 Code, which does not.124 Who may be on those committees and who may chair those committees varies from state to state.125 There are also constraints on the solicita-
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3. PUBLIC DISSATISFACTION WITH THE JUDICIARY

Polling data that includes voters, business leaders, and judges themselves demonstrates the concern over the potential impact on the courts from special interest money. For example, 78% are very or somewhat concerned that judicial candidates must, among other things, raise more money and 79% of business leaders believe that contributions made to judicial campaigns have some influence on judges’ decisions. Further, more than 90% of the individuals polled believe that “judges should not hear cases involving individuals or groups that contributed to their campaign.” All of the public dissatisfaction with the judiciary, however, is not based solely on the conduct of judges in judicial elections. For example, even in merit-selection states, where there are no campaigns or campaign contributions, “the national trends in political trust of the judiciary in the last two decades are found to be reflected in the trends in the reported declines in the affirmative retention vote.” The American Judges Association White Paper entitled Procedural Fairness: A Key Ingredient in Public Dissatisfaction stated that “Americans are highly sensitive to the processes of procedural fairness. It is no surprise, then, that the perception of unfair or unequal treatment ‘is the single most important source of popular dissatisfaction with the American legal system.’”

III. THE DEBATE

As one scholar noted, “it is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the last 50 years as the subject of judicial selection.” There has been a continuum of associations, organizations, and individuals involved in the debate, all supporting various selection methods. In the past, these entities have included the League of Women Voters, Democracy South, the Institute on Money in State Politics, and the American Judicature Society—as the initiator of the merit method and its ardent supporter. Today, the American Judicature Society is still active in the debate, and is joined by the Brennan Center, the ABA, the Justice at Stake Campaign, a few state supreme court justices from around the country, and the Institute for Advancement of the American Legal System, lead by Justice O’Connor. Although the Conference of Chief Justices recognized the “hazards” of partisan judicial elections, it ultimately labeled partisan elections a “reasonable, constitutionally defensible method.” The National Center for State Courts has remained neutral on the matter. Various academics and commentators are divided, with some supporting judicial elections, allowing each constituent the opportunity to exercise his or her democratic vote, while others back a merit selection process, contending it insulates judges from politics.

The basis for three of the major movements and methods has lived on as part of the debate, as the proponents of judicial elections continue to argue that elections hold judges accountable to the public. The arguments, in their most basic terms, break down to “judicial accountability” through the election process, and “judicial independence” via merit-based selection. Electing judges is seen as consistent with our democratic ideals; allowing voters to decide maintains the independence of the judicial branch by taking appointment influence away from the other two branches. If the voters feel a particular judge is not doing his or her job properly, they can vote the judge out at the next election or, in some states, request a

126. Id. at 11-50.
127. Id.
130. Id.
136. Id. (internal citations omitted).
137. Statement of Jesse Rutledge from the National Center for State Courts (May 21, 2010).
138. F. Andrew Hessen, The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges, 28 J. LEGAL STUD. 205, 211 (1999) (noting that “when Americans want to make their judges independent they appoint them and when they wish instead to make them accountable they elect them.”).
recall election.\textsuperscript{140} Supporters of the election system maintain that election allows for less partisanship than appointment.\textsuperscript{141} Selecting judges through elections, however, requires candidates to campaign, ultimately involving speeches, debates, and raising campaign funds, making judicial elections more like legislative elections.\textsuperscript{142} Opponents of judicial elections note that large donations from certain special interests or even other lawyers can lower public confidence in the judiciary and potentially improperly influence a judge’s impartiality in his or her decisions.\textsuperscript{143} Elections are also viewed as part of a political process, while judges are expected to be insulated from politics. The basic idea behind elections—government by the people—conflicts with the notion that judges are not supposed to be influenced by the public’s will.\textsuperscript{144}

On the other hand, supporters of merit-selection systems emphasize how this model creates judicial independence.\textsuperscript{145} Merit-based appointments separate the judicial branch from politics and other possible outside influences.\textsuperscript{146} Backers of merit-based selection assert that the process ensures that the most qualified and competent candidates are selected.\textsuperscript{147} Generally, candidates are evaluated by lawyers, rather than the public, who are arguably better suited to assess a candidate’s relevant qualifications.\textsuperscript{148} Many states that use merit selection also have evaluation systems or retention elections in place to assure accountability.\textsuperscript{149} Additionally, merit-selection proponents purport that this mode of selection increases the number of minorities serving as judges and resolves the problem of voter apathy.\textsuperscript{150} But Chris Bonneau, a noted expert in judicial selection, suggests that voters are not apathetic, that they do indeed turn out for competitive judicial elections and that they are able to distinguish between candidates with prior judicial experience and those without prior judicial experience.\textsuperscript{151}

Supporters of the merit method also argue that judges who must campaign will be influenced by a campaign contributor’s ideology. Some scholars, however, believe that an apolitical selection process is fiction and that judges are not mere technocrats.\textsuperscript{152} In other words, they believe that the merit process is still politicized.\textsuperscript{153} They maintain that the merit method may lead to appointments that further the interests of the elected official’s political party since a politically elected figure, whether it is the governor or legislator, ultimately selects the judicial candidate.\textsuperscript{154} For example, New Jersey’s Republican Governor Chris Christie recently decided not to reappoint a Democrat to New Jersey’s highest court.\textsuperscript{155} Additionally, merit selection arguably erodes judicial accountability, making the appointed judges only answerable to fellow bar members or other community or political persons who helped to select them. Some even argue that most nominating commissions are attorney “centric,” which further removes the public from the judicial selection process. Various other challenges have been raised against the merit selection sys-

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140. E.g., CAL. CONST. art. II, \$ 14(b) (“Signatures to recall ... judges of courts of appeal and trial courts must equal in number 20 per-


142. See Selection of State Judges Symposium Transcripts, supra note 139, at 289.

143. See Mears, supra note 10 (noting Ohio Chief Justice Thomas Moyer’s opinion that campaign fundraising can diminish public confidence in the courts). In response to the possibility of improper influence, and the Supreme Court’s ruling in Caperton v. A.T. Massey Coal Co., the American Bar Association and the states have debated different standards for when judges are required to recuse themselves. See John Gibeaut, Caperton Capers, A.B.A. J., Aug. 2009, at 21.

144. See Chisom v. Roemer, 501 U.S. 380, 400–01 (1991) (“The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.”).


146. See Hanssen, supra note 138, at 211 (noting the “long-standing consensus that appointive procedures protect state judges from political influence more effectively than elective procedures”).


150. Maute, supra note 147, at 1209.

151. Bartels, supra note 94.

152. Id.

153. See Peter D. Webster, Selection and Retention of Judges: Is There One “Best” Method?, 23 FLA. ST. U. L. REV. 1, 32 (1995) (“The forum for such political considerations has merely been shifted from the electoral arena to the commissions and the governor’s mansion.” (citations omitted)).

154. Id. at 32 n.218. (“While ‘merit’ systems limit the discretion of the governor regarding the choice of judges, the decision is still frequently based upon partisan political considerations because the individual appointed tends to be a member of the governor’s party.”).

155. See Terrence Dopp, Christie May Be Blocked in Replacing New Jersey Justice Wallace, BLOOMBERG BUSINESSWEEK, May 3, 2010, http://www.businessweek.com/news/2010-05-03/christie-may-be-blocked-in-replacing-new-jersey-justice-wallace.html. Christie, the first Republican elected New Jersey governor since 1997, said he believes the panel has a history of “legislating from the bench,” but declined to reference any specific decisions from the justice who was not reappointed. Id. The governor said he made the move to begin reshaping the seven-member court, which was made up of four Democrats, two Republicans and an Independent. Id.
Some scholars believe that elective and appointive systems do not differ much in their actual operation.

In that case, the plaintiffs argued that because 3 of the 7 members of Alaska’s nominating commission “are appointed by the Alaska bar association’s Board of Governors, and because Alaska lawyers have a greater voice in the selection of the Board of Governors than non-lawyers, the state’s non-lawyers are impermissibly denied an ‘equal voice’ in the selection of state court judges.”

Further, special interest groups can still play a role in merit-based selection if they have influence over members of the nominating commission or the judicial performance commissions who are typically political appointees. These commissions change with party politics and may influence whether a retention recommendation is given to a judge. Ten states use judicial performance commissions, which survey individuals who have interacted with the judge to evaluate the judge’s legal ability, integrity, communication skills, temperament, and administrative capacity. One could imagine, however, scenarios where the data used in those commission surveys becomes misleading or flawed. Hypothetically, a judge may receive a “do not retain” recommendation from a commission with only five negative responses to a survey, where there were only ten total responses from a specific category of respondents, i.e. law enforcement. The commission may then state that 50% of that respondent category—law enforcement in this example—recommends that the judge not be retained. As a result, a mere five individuals may have the power to affect a judge’s career. This is particularly troublesome in those states that have a mandatory threshold percentage to actually receive a “retain” recommendation from a commission. Additionally, there may be a disproportionate amount of responses in a given category that may also affect the judge’s ratings. For example, if a judge is perceived to be defense oriented and he or she receives 100 responses from the general category of attorneys, only 20 of whom are defense attorneys and 80 of whom are prosecutors, the judge is unfairly penalized because the responses were not weighted.

While the debate over merit selection versus election ensues; no one seems to be proposing lifetime appointments as a method of judicial selection. But given the fact that the federal government and three states appoint judges without term limits, and the fact that judicial elections garner much disfavor due to judicial campaign activity, the appointment method is now certainly worthy of entering the debate. This approach would be consistent with how judges were first selected in the U.S. and it would eliminate some of the concerns raised by the United States Supreme Court’s decisions in White, Caperton, and Citizens United, in that it would extricate judges from all judicial campaign activity. The proponents of lifetime appointments argue that when judges are insulated from political activity, they become more impartial. Opponents would argue that, similar to merit-based systems, unlimited tenure would diminish the democratic process by taking away the public’s ability to vote in judicial elections. The opponents would also argue that, even worse than the merit-selection and retention system, unlimited tenure denies the public the chance to evaluate judges whatsoever—there would be no electoral mechanism for the removal of a judge, and thus judges would become less accountable to the public. Despite these concerns, every judge at every level in every state is always subject to a removal mechanism for cause.

The scholars, political scientists, experts in judicial selection, and professors in academia, take differing views on the subject. Some scholars believe that elective and appointive systems do not differ much in their actual operation. This is due in part to the fact that “most incumbent judges are rarely opposed for reelection, and the overwhelming majority of judges who face the voters retain their seats.” But retention vote percentages have been diminishing over time. Bonneau and Melinda Gann Hall, who are experts in the areas of judicial selection and politics, have empirically assessed and attempted to debunk many of the “reformers” arguments in their newly released book entitled In Defense of Judicial Elections. These scholars believe that those promoting the merit method use only normative information in their arguments; contrastingly, these scholars use empirical information in an attempt “to elevate the discussion of judicial selection

159. See DEBOW ET AL., supra note 148; MAUZE, supra note 147, at 1209–10.
161. Mears, supra note 10; Rizo, supra note 10.
162. See, e.g., CROLEY, supra note 41, at 747 (stating that lifetime tenure can help avoid the “the biased administration of day-to-day justice. Judges who never have to seek or preserve electoral support have no incentive to please supporters”).
164. Id.
165. See, e.g., Charles Roos, Editorial, Voter Distrust of Judges Goes Well Beyond Hufnagel, ROCKY MTN. NEWS, Nov. 16, 1996, at 68A.
166. Bartels, supra note 94.
beyond the hyperbolic rhetoric.” They conclude that elections are the best way to select judges, though they acknowledge this method is not without its problems.

IV. CURRENT PROPOSALS FOR METHOD CHANGES AND WHY THEY FAIL

Kansas, Ohio, Minnesota, Nevada, West Virginia, and Texas have either tendered a proposal or are considering changing from the election system to the merit selection and retention system, or vice versa. Ironically, in Missouri, a state whose name is synonymous with merit selection—i.e. “the Missouri Plan”—there was an unsuccessful proposal to move from the traditional merit selection plan, through a nominating commission, to selection directly by the governor subject to confirmation by the senate.

Some scholars, coined the “standard account” scholars, believe that the selection methods are chosen based upon society’s responses to popular ideas at different historical periods. But other scholars believe that methods are changed and modified based upon the bargaining processes among relevant political actors, which include their preferences at the moment and their future political circumstances. For example, which method prevails is directly related to whether the political actors believe that they will remain in power and have an obliged judiciary. These scholars would also argue that the Jackson Democracy Movement was due to the nation’s lawyers seeking prestige as potential judges and not because of societal sentiment. These scholars have supported their position with empirical data.

The reason proposals for changes in these methods fail or succeed is influenced by cultural and socio-political considerations. According to sociologist Ann Swidler, culture is like a “tool kit” that people may use “to solve different kinds of problems.” A change in method could create “culture shock,” which “grows out of the difficulties in assimilating the new culture, causing difficulty in knowing what is appropriate and what is not.” Consider as an example if the judges, lawyers, and the electorate in Colorado, a merit-selection state, or Louisiana, an election state, were suddenly required to switch to the other method. This would be tantamount to telling those judges and others that they now have to speak Chinese without having taken a course in the language. These judges are indoctrinated and inculcated into their state’s existing selection method. Thomas Kuhn, in The Structure of Scientific Revolutions, argued “that people are unlikely to jettison an unworkable paradigm, despite many indications that the paradigm is not functioning properly, until a better paradigm can be presented.” If a better paradigm is presented and a change is accepted, the next step

167. Id.
168. Id.
173. West Virginia Governor Joe Manchin introduced two judicial reform bills in 2010, “the first of the two bills is a public financing pilot project for the two state Supreme Court seats up for grabs in the 2012 election. The second bill would create a judicial advisory committee to aid the governor in the selection of judges for circuit court vacancies.” Chris Dickerson, Manchin Has Two Judicial Reform Bills, LEGALNEWSLINE.COM, January 14, 2010, http://www.legalnewsline.com/news/224992-manchin-has-two-judicial-reform-bills.
175. The Missouri Bar, History of Merit Selection, supra note 45.
177. EPESTEIN ET AL., supra note 4, at 4.
178. Id.
179. Id.
180. Id. at 9.
181. Id. at 20.
would be to implement a change management component. 183

V. INTERIM REMEDIES

A. Campaign Finance and Public Finance Laws

Prior to Citizens United, 24 states had laws banning or severely limiting corporate electioneering, 186 and 16 states either limited or completely banned corporate contributions to candidates. 187 The Supreme Court’s decision in Citizens United will effect the removal of these corporate expenditure limits or bans. The

National Institute on Money in State Politics noted the effect of the Court’s decision:

The “Citizens United v FEC” ruling by the U.S. Supreme Court has no effect on campaign limits in place at the state and federal levels but may effectively overturn laws in 24 states that ban or restrict corporations from funding [advocacy] for or against state candidates. In the 22 states that prohibit contributions from giving to candidates, individuals contributed about half of the money raised by candidates and non-individuals provided less than one-fourth. The reverse is true in the 28 states that allow corporate giving. 188

Elected judges are generally subject to the same state cam-


190. Alaska, Idaho, Kansas, Missouri, Ohio, Texas, and Wisconsin. Id.
193. Office of the New Mexico Secretary of State, Voter Action Act, http://www.sos.state.nm.us/temp.htm (last visited Dec. 8, 2010); see also N.M. STAT. ANN. § 1-19A-2, 3 (making public funding available to any “covered office,” which is defined as “any office of the judicial department subject to statewide election”).
198. Posting of Zachary Proulx to the Brennan Center for Justice blog, Also a Winner: Public Funding, http://www.brennancenter.org/blog/archives/also_a_winner_public_funding/ (Nov. 10, 2008).
cases challenging it on First Amendment grounds. In a notable example, the United States Supreme Court recently granted certiorari over a First Amendment challenge to Arizona’s public financing statute in Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett. In the meantime, however, Citizens United may pave the way for unbridled corporate contributions to judicial campaigns in states where there are no limits on corporate contributions to elections. But all of the concerns over campaign contributions to judicial campaigns may take a backseat if judges consistently perform well. As Judge Kevin Burke put it “the best anectode or vaccine to all of the problems with the methods is consistently good performance by the courts. If there is public satisfaction with the 100 million cases heard each year, even Bill Gates won’t be able to buy a judge.”

B. Oversight Commissions

There has been a continuing call for the creation of judicial oversight commissions. The oversight performed by such commissions ranges from judicial education programs to an examination of judicial codes. For example, in 2006, the Kentucky Judicial Campaign Conduct Committee was formed, an unofficial, non-partisan organization. The Committee’s objectives include educating the public “about the important differences between judicial campaigns and campaigns for partisan political office,” helping candidates “campaign in an ethical and dignified manner,” monitoring advertising “to detect and deter improper campaigning,” and investigating complaints “about unfair campaign tactics and [issuing] public statements about such tactics.” The committee also asks judicial candidates to sign a campaign pledge, which states that the candidate will conduct their campaigns in accordance with the Kentucky Code of Judicial Conduct. The pledge further states that candidates will not engage in false or misleading advertising and will not make accusations that “impugn the integrity of the judicial system, the integrity of a candidate, or erode public trust and confidence in the independence and impartiality of the judiciary.” The National Center for State Courts recently added an Internet resource to aid those states that are contemplating the establishment of an oversight committee. The ABA House of Delegates has also recommended campaign conduct committees.

C. Mandatory Qualifications

While the merit method has minimum qualifications in place for judicial appointments by nomination commissions, elective states sometimes have little or no minimum qualifications for a judicial candidate. This might result in a new attorney without any legal experience running against an incumbent judge. Those states that have election methods should consider creating or strengthening judicial qualifications. Another approach is to establish statewide systems of independent judicial qualification commissions who will be charged with identifying and encouraging potential candidates to run for judicial office. These commissions would evaluate the candidates to ensure that whoever is on the ballot is indeed qualified.

D. Better Voter Education and Awareness

There are some scholars who believe that the most important agent for change lies in educating the public about the work of judges. To this end judges can increase their interaction with citizens and educate them about the judicial branch and the duties and obligations of a judge. But these outreach efforts need not be limited to judges. For example, “in Arizona and Missouri new 501(C)(3) organizations will work

200. 2010 WL 3267528, at *1 (U.S. Nov. 29, 2010).
201. Statement of Judge Kevin S. Burke, Hennepin County District Court Judge, Minnesota.
205. Id.
207. Schotland, supra note 135, at 1103.
208. For example, North Carolina, which elects its judges at every level, merely requires a candidate to be licensed to practice law. American Judicature Society, Methods of Judicial Selection: Selection of Judges, supra note 7.
The presupposition of the debate is that everyone, including the judges themselves, want a judge to be a “good” judge, and each method claims to produce the best judges. However, merit selection and retention method. For the election method, a lengthier term means less campaigning and fundraising and therefore less pitfalls for judicial conduct violations. It also allows the judge to focus on the bench matters as opposed to election matters. In all systems, a lengthier term would make the position more appealing to potential judicial candidates and support more judicial independence.

F. Randomly Selected Citizen Commissions, Independent Paid Evaluators, Threshold Responses, Weighted Measurements, and Appeals Processes

The judicial-election method is not alone in needing some stopgap measures. There are inherent concerns with the merit-selection method: the risk that appointments to nominating commissions may be politicized, the attorney-centric composition of these commissions, and the potentially flawed methodology these commissions use to compile data on judges. To avoid the concern that politics and the bar influence commissions too greatly, states could form commissions in part by randomly selecting citizens from the rolls of registered voters from each congressional district. The remaining commission seats could be filled out with political appointments from categories such as higher education, labor, and of course, the law. This is the process used by the Washington Citizens’ Commission on Salaries for Elected Officials, which oversees judges’ salaries. To address the data-compilation problem, a state might follow the lead of Alaska, which has a court-watcher program to evaluate judges.

VI. WHAT MAKES A GOOD JUDGE

The presupposition of the debate is that everyone, including the judges themselves, want a judge to be a “good” judge, and each method claims to produce the best judges. Measuring judicial quality has been researched and addressed by many. Which method produces the greatest judicial quality has been examined through the lenses of judicial discipline, sentencing practices, tort awards, frequency of litigation, frequency of discrimination suits, number of women and minority judges, and independence versus accountability. The question might also be tackled by asking what individual char-

211. Schotland, supra note 135, at 1100.
212. Alaska and Colorado (merit selection and retention); California, Oregon, North Carolina, Washington, and New York City (election). Id. at 1101.
213. Id. at 1100.
214. Id.
215. Id.
218. For example, Colorado permits complaints about district commissions to the overarching state commission, but there is no further process other than litigation. See Colo. Rev. Stat. § 13-5.5-103(1)(p) (stating the “the state commission shall not have the power or duty to review actual determinations made by the district commissions”).
219. For an extensive report on the subject of judicial quality and judicial discipline, see reddick, supra note 195. The report suggests that the merit method may produce fewer unfit judges than judicial elections. Id. at 6. Another scholar found a “sharp distinction” between discipline rates of judges initially appointed and those who are elected, with more disciplinary actions regarding elected judges in at least three states. See Schotland, supra note 135, at 1087-88.
220. For a collection of sources regarding the affect of judicial selection on sentencing practices, tort awards, frequency of litigation, and frequency of discrimination suits, see Schotland, supra note 135, at 1087 n.36.
221. See M.L. Henry, JR. ET AL., THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS (1985) (determining that findings indicate that appointment and merit-selection systems increase minority judicial representation to a greater extent than elective systems); see also Kevin M. Esterling & Seth S. Andersen, Diversity and the Judicial Merit Selection Process: A Statistical Report, in Research on Judicial Selection 7 (Am. Judicature Soc’y ed. 1999). But see Webster, supra note 153, at 33 (“Some conclude that the method of selection has little effect upon the number of women and minorities reaching the bench. Others conclude that, while contested elections result in fewer women and minorities reaching the bench than do other systems, women and minorities generally fare better under appointive systems than under ‘merit’ systems. Still others insist that ‘merit’ systems bring the greatest number of women and minorities to the bench. The answer to this apparent conundrum may lie in the scope of, and methods used in, the various studies.” (footnotes omitted)).
characteristics or qualities are desirable in a judge. In 1984, the ABA set forth the favored personal characteristics for a judge as integrity, legal knowledge and ability, professional experience, judicial temperament, diligence, health, financial responsibility, and public service. John Adams, in Thoughts on Government, stated that judges “should be always men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men.” Given this quote, it seems the merit-selection method may have an edge because it is easier for nominating commissions to ensure the presence of these qualifications, while at the same time judges will not be dependent on a “body of men.” But one should bear in mind that either method of selection—merit or election—has the potential to produce good judges. If the electorate is educated and the qualifications to run for office are high, the judge that is selected through the election method may also possess these desired traits. On the other hand, one must also remember that these desired qualities and characteristics are dynamic, not static—a judge selected through the merit method may ultimately become a “bad” judge. And even if the backgrounds and characteristics of judges are carefully scrutinized under both methods, a “stellar resume does not necessarily indicate an excellent analytical mind or first-class judicial craftsmanship.”

**VII. CONCLUSION**

The various methods currently used for selecting judges have their roots in U.S. history. What began as the lifetime appointments method morphed into the three methods that can be seen in action in the states today: appointment, election, and merit selection. Movements involving politicians, organizations, and the electorate precipitated the development and popularity of each method. These methods have become more complex over time, with the states either modifying them or toggling between them. This complexity is now compounded by the Supreme Court’s decisions in White, Citizens United, and Caperton, which have all advanced issues related to judicial elections and campaigns, including free speech and campaign finance. These three cases impact almost all judges, regardless of how they are selected. Merit-selected judges may face the prospect of campaigning during retention elections, and thus, like their elected counterparts, may be affected by the ruling in Citizens United. It is only the lifetime appointed judges that need not concern themselves with the implication of that case.

But even though merit-selected and appointed judges may be able to elude the potential pitfalls of judicial campaigns, they must remain cognizant of the propriety of commenting on controversial issues that may come before the court—such comments now seem constitutionally sanctioned after the Supreme Court’s decision in White. Although a judge up for retention may not be as obliged to comment or announce their views as often as their elected colleagues who are conducting a campaign, they may still make statements on controversial issues that will be impacted by White. While the White case opens the door to judicial speech on controversial matters, the adoption and implementation of the 2007 ABA Code will hopefully clarify where the outer bounds of White’s implications lie.

Because Caperton intimated that judges might have to recuse themselves for perceived favoritism or partiality, this case may also impact both merit-selected and appointed judges. Despite the free speech protections in White, these judges might still face recusal or disqualification under Caperton if they comment or announce their views on a matter that later appears before them. Additionally, considering Caperton alongside Citizens United and the resulting clamor over funds being raised in judicial elections, judges need to be aware of who is contributing to their campaigns and the amount of funds given, and whether those two factors may create a perceived or actual bias with respect to any parties appearing before them. Collectively, these recent Supreme Court cases affecting the judiciary still leave much to be resolved.

These three cases, along with the ever-increasing funds raised in judicial campaigns and the continued dissatisfaction with the judiciary as a whole, have reignited the two-century old debate about which method of judicial selection is the best. Asking what method is “best” begs the question of what method produces the “best” judges. The answer depends upon which lens you are looking through. But even then, one must remember that a judge’s behavior and conduct may be dynamic, not static.

From the inauguration of the U.S., there have been many arguments for and against the varying methods of selecting judges. Although the election method may appear to be in dire straits, no one method is free from controversy, no one method is perfect, and there is no silver bullet for attaining perfection. What history tells us is that what a particular method claims to accomplish and what the evidence suggests that it accomplishes are sometimes different. More importantly, history tells

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us that the debate may go on forever without any true resolution. While this Paper did not attempt to construct a hypothetical, perfect method, it did present some interim remedies. In the context of judicial elections, these measures include campaign finance reform, public financing of judicial campaigns, oversight commissions, mandatory qualifications, extended term lengths, and improved voter education and awareness. In the context of the merit method, these measures include randomly selected citizen nominating commissions, independent court evaluators, and improved court evaluation data through threshold responses, weighted measurements, and an appeals process for negative evaluations.

Although judges’ behavior and actions may be unfairly influenced by the judicial selection method used in their state, there are several means for keeping this undesirable consequence in check, including case law, advisory opinions, and judicial codes of conduct. But these factors should only serve as a baseline for what is acceptable conduct for a judge—it is not enough for judges to merely seek technical compliance with the fluctuating methods of selection and retention or the mechanics of judicial directives and mandates. Judges should take a leadership role and become visionaries. In this role, judges may encourage those individuals and organizations engaging in the judicial-selection debate to consider using their energy, talent, and capital to collaborate across the ideological divides and explore a selection method that both accentuates the positive and eliminates the negative aspects of the existing methods. This exploration must include sensitivity to the inculcated cultural and socio-political differences between all judges and all methods. It is not enough to substitute one method for another. To do so would be akin to replacing an engine in a car that has electrical problems in the hope that it would run more efficiently.

Building upon the extensive literature, the dearth of studies, and the numerous prior national and statewide summits and symposia on the subject matter, judges could harness and capitalize on the new fervor in the debate and seek to reframe it. To this end, the American Judges Association could build upon its previous White Paper on fairness, and continue to enhance the credibility of judges, by proposing and hosting a think tank, summit, or symposium on this subject. This approach should not only include judges, scholars, organizations, and lawmakers, as was done in the past to some degree, but should also include a missing component: the socio-cultural experts. This addition could address the difficulty with paradigm shifts, cultural change, and change management. This approach will forge relationships, advance the discussions, and hopefully create a new blueprint for judicial selection. We as judges need to look outside ourselves, think outside the box, shift the paradigm, and consider creating a selection method that recognizes and reinforces the true objective of selecting and retaining judges, that is, impartiality, independence, and accountability. The citizenry needs to trust that when judges are given a choice between impartiality and bias, honesty and dishonesty, and reason and capriciousness, judges will invariably choose the more honorable of these concepts.

Judge Mary A. Celeste is president of the American Judges Association. She is the Presiding Judge of the Denver County Court; she was appointed a member of that court in 2000. Celeste is a graduate of San Diego State University and California Western School of Law, where she was the editor-in-chief of the law journal and the recipient of scholarships, fellowships, and awards. While practicing law, she was a member of the Colorado Bar Association Board of Governors, the Career Service Authority, the Personnel Board for the City and County of Denver, the Denver Bar Association’s Conciliation Panel, and the Board of Directors of the Colorado Women’s Bar Association, and she is currently the president of the Women’s Bar Association Foundation. She has published several articles and has been an adjunct professor of law at the University of Denver College of Law. Celeste has received the Judicial Excellence Award from the Denver Bar Association, the Judicial Excellence Award from the Colorado Women’s Bar Association, the American Association of University Women’s Trailblazer Award, and the Colorado Humanities Award. She presently sits on the Colorado Advisory Committee for the U.S. Civil Rights Commission.

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<th>STATE</th>
<th>START/END METHOD (YEARS)</th>
<th># OF PROCEDURAL MODIFICATIONS (e.g. Creation of Commissions, Terms, Retirement Age) (YEARS)</th>
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<td>(10) 1776, 1790, 1838, 1850, 1874, 1895, 1913, 1921, 1964, 1968</td>
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* This appendix was compiled from information found on the American Judicature Society website, http://www.judicialselection.us/ (last visited Dec. 14, 2010).
Evidence obtained by remote-electronic traffic devices is taking on increasing importance as evidenced by the struggle over restrictions on the devices as well as the Supreme Court’s recent unusual step of linking to a video featuring footage from a police officer chasing after a speeding driver. As law enforcement officials rely more and more on this type of evidence to issue citations and defend against criminal proceedings, courts must grapple with the admissibility of photographic and video evidence obtained from red-light cameras, speeding cameras, and black boxes or cameras on a police car.

This article focuses on the rationales of evidence exclusion and notes that as an intrinsic rule, or a rule focused on the pursuit of truth, when determining whether to admit the evidence one must consider the three foundational factors of (1) materiality and relevance, (2) authenticity, and (3) competence. On balance, in civil cases, courts should almost always admit the evidence unless it is clear that it is fabricated or flawed. They should also follow the approaches of caselaw and err on the side of admitting the evidence but allow the defendant to argue issues as to authenticity when determining the weight of the evidence. However, the balance changes in criminal cases, which usually involve a jury and therefore also implicate jury risks. In these circumstances, courts should still almost always admit the evidence, but they should recognize the potential prejudice of videotaped evidence in particular and take steps to mitigate it, such as reviewing the evidence early in the proceeding to make sure the evidence is not especially prejudicial.

In the special case of summary judgment or other instances where the court takes the decision out of the hands of the jury, the court should be especially careful to preserve its legitimacy. Before discussing the admissibility of evidence obtained by remote-electronic devices, one must first understand evidence law’s underlying goals. Rules of evidence are divided into two categories: intrinsic and extrinsic rules. Intrinsic rules are concerned with facilitating the pursuit of truth. In contrast, extrinsic rules are concerned with advancing other policies as exemplified by the rules regarding privilege. The rules governing admissions of evidence obtained from remote-electronic traffic devices are intrinsic rules because they focus on the pursuit of truth.

I. BACKGROUND: INTRINSIC RULES AND THE FOUNDATION REQUIREMENTS OF MATERIALITY AND RELEVANCE, AUTHENTICITY, AND COMPETENCE

Before discussing the admissibility of evidence obtained by remote-electronic devices, one must first understand evidence law’s underlying goals. Rules of evidence are divided into two categories: intrinsic and extrinsic rules. Intrinsic rules are concerned with facilitating the pursuit of truth. In contrast, extrinsic rules are concerned with advancing other policies as exemplified by the rules regarding privilege. The rules governing admissions of evidence obtained from remote-electronic traffic devices are intrinsic rules because they focus on the pursuit of truth.

Footnotes
tape of acceptable quality; the essential concern about the authenticity of the evidence remains.

Given that evidence obtained by remote-electronic traffic devices are governed by intrinsic rules, judges consider foundational requirements that are focused on the pursuit of truth when determining whether to admit the evidence. These three factors are (1) materiality and relevance, (2) authenticity, and (3) competence. Materiality and relevance are closely tied because evidence cannot be relevant without being material. Material evidence must relate to a substantive issue in the case or, in other words, be “material to the question in controversy.”9 Relevant evidence is “evidence having any tendency to make the existence of [a material fact] more probable or less probable than it would be without the evidence.”10 Authenticity relates to whether the evidence itself is authentic. Finally, competence refers to whether the evidence violates “any legislative or evidentiary exclusionary policy” which in this context primarily focuses on Federal Rule of Evidence 403 and parallel state rules regarding exclusion of evidence based on undue prejudice to the defendant.11 Against this backdrop, this article now turns to assessing the admissibility of evidence obtained by remote-electronic traffic devices in civil and criminal cases.

II. PROPOSAL: COURTS SHOULD ALMOST ALWAYS ADMIT EVIDENCE OBTAINED BY REMOTE ELECTRONIC TRAFFIC DEVICES

When considering the three foundational factors, it becomes clear that courts should almost always admit evidence obtained by remote-electronic traffic devices in civil contexts. However, courts should allow questions as to the authenticity of the evidence that go toward the weight of the evidence even after admitting it. In the criminal context, the weighing of the three foundational factors changes because video is more likely to be introduced, thereby increasing the prejudicial effects on the defendant. However, on balance, the evidence should still be admissible because of procedural safeguards mitigating this risk as well as the great probative value of the evidence. Jury risks do not necessitate the exclusion of the evidence, either; indeed, current caselaw supports this conclusion as well as suggesting guidelines like routinely reviewing the evidence before admitting it. Finally, when faced with a summary-judgment case involving this type of evidence, courts should be very cognizant of the rationales behind why juries are in place. To preserve legitimacy, courts should do a mental check or engage in judicial humility to be careful to word their opinion neutrally so that they credit the viewpoints of the driver and potential jurors as well as being careful to avoid falling prey to undue reliance on the video evidence and essentially adopting a sensorial jurisprudence.

A. Civil-Law Context

In civil cases, courts should almost always admit evidence obtained by remote-electronic traffic devices. Indeed, the only time that the court should not be admitting the evidence is if it is clearly fabricated, which is highly unlikely.12 If there are minor disputes as to the authenticity of the evidence, the court should err on the side of admitting it but allow the defendant to raise those arguments at trial to dispute the weight of the evidence.

At the outset, it is important to understand that traffic citations are infractions and thus will usually be heard in traffic court or the lowest-level state court. While there are some variations among the states in their treatment of the citations, it is safe to assume that the case will be heard in front of one judge.13 Thus, because juries are not implicated in these civil cases, the balance struck will differ from that of criminal cases.

i. Evidence obtained by remote-electronic devices almost always satisfies the three foundational factors of materiality and relevance, authenticity, and competence

When considering the three factors of materiality and relevance, authenticity, and competence, it becomes clear that evidence obtained by remote-electronic traffic devices should almost always be admitted.

First, this type of evidence easily satisfies the materiality and relevance factors because the photos or videos are contemporaneous depictions of the moment the violation occurred. The evidence is thus material to the legal issue, and also relevant because the photograph or video’s existence makes it more probable that the violation occurred.

Evidence obtained by remote-electronic traffic devices also satisfies the authenticity test. First of all, this type of evidence is contemporaneous direct evidence, which is evidence that records the moment in controversy and proves an ultimate fact in the case without needing intermediate inferences.14 Thus, they are in essence “silent witnesses”15 and courts can almost always safely admit the evidence when the government verifies the fairness and accuracy. The government can easily do so through showing that the video was not altered while going through a known chain-of-custody, bringing in a photographic or video expert who can testify that nothing was altered or faked,16 or even just citing which speed camera was used, as

7. See id.
8. See Gruber, supra note 3, at § 4.
9. Id. at § 54.
10. Id. (quoting Fed. R. Evid. 401).
11. Id.
12. It is difficult to imagine officers purposefully manipulating images even if techniques are available to do so.
14. Gruber, supra note 3, at § 44.
15. Most courts support the silent-witness theory now and have abandoned prior requirements such as a seven-prong test. See id. at §§ 59-60.
16. See id. at § 60. For example, studies show that red-light cameras are usually very accurate. See generally Christina M. Mulligan, Perfect Enforcement of Law: When to Limit and When to Use Technology, 14 RICH J.L. & TECH. 13 (2008).
Current caselaw... overwhelmingly supports admitting evidence obtained by remote-electronic traffic devices.

one state has recently required in an effort to address authenticity concerns.\textsuperscript{17}

Finally, when considering competence, the probative value of the evidence outweighs the potential prejudice against the defendant. As discussed earlier, photos or videos are contemporaneous direct evidence, so they have a very strong probative value.\textsuperscript{18} Weighed against this is the potential prejudice against the defendant. Here, it is unlikely that the defendant would be unfairly prejudiced by the admission of the evidence. Although it is true that videos in particular may cause viewers to overvalue the evidence,\textsuperscript{19} the fact remains that in civil matters, such biases are not as prevalent because these cases deal with small traffic infractions. It is difficult to imagine that a photo or video of a car driving through a red light can cause too much sensationalism in the viewer. Moreover, the concern about bias is not as relevant with traffic-court judges who have some experience after regularly dealing with these types of cases. Indeed, one study even found that magistrate judges seemed to dismiss the charges with great frequency,\textsuperscript{20} and so although there have been very few studies on the bias of individual judges, it is probably safe to assume that it seems unlikely that admitting the evidence would unfairly prejudice the defendant. Moreover, while the concern may take on greater weight with appeals courts where judges may not be as experienced with traffic matters, it is probably safe to assume that most cases end in traffic court and it would thus be illogical to exclude the evidence just because there is a slight chance that an appeals judge would be prejudiced against the defendant. Because contemporaneous direct evidence is extremely probative and the potential for unfair prejudice is not very salient, evidence obtained by remote-electronic traffic devices satisfies all three foundational requirements and thus should almost always be admitted into evidence in civil cases.

\textbf{ii. Current caselaw supports admitting evidence obtained by remote-electronic traffic devices and suggests that minor authenticity disputes should only go toward the weight of the evidence instead of its admissibility}

Current caselaw also overwhelmingly supports admitting evidence obtained by remote-electronic traffic devices. In state after state, courts generally admit the evidence.\textsuperscript{21} Although there is some variance in how much each state has relaxed its authentication requirements, with some still requiring a proof of the chain-of-custody for instance,\textsuperscript{22} the government usually easily fulfills these requirements and so courts consistently continue to admit the evidence.

These cases also give some guidance for how courts should be treating minor challenges to the evidence's authenticity. In general, courts would do better to admit the evidence and then have the parties raise points about the authenticity in court instead of excluding the evidence altogether. Indeed, appellate courts have shown a “great reluctance”\textsuperscript{23} to limit the trial court’s discretion, particularly because of the subjective nature of the weighing. Moreover, appellate courts frequently affirm a lower court’s decision to find a violation even when the defendant protested the admission and reliability of the evidence, such as a defendant’s protestation over the admission of results from a photo-speed recorder\textsuperscript{24} or an objection that a particular device was being used for the first time.\textsuperscript{25} In contrast, appellate courts are more likely to reverse when the trial court finds the evidence insufficient,\textsuperscript{26} as exemplified by one appellate court that reversed the trial court’s finding that the dispute about the technician’s response regarding calibration of the device was enough to find no violation.\textsuperscript{27} The same pattern rises when looking at cases involving videotapes with courts often finding that minor disputes as to authenticity should not go toward admissibility. Indeed, many cases involving videotaped evidence have found that even when the tape is edited, it should still be admitted with the determinations as to the authenticity going toward the weight or credibility of the evidence.\textsuperscript{28} By analogy, although the government should certainly try to avoid editing the photo or video, these principles should also be applied to this context. Overall, caselaw dealing with both evidence obtained from remote-electronic traffic devices as well as cases just dealing with videotape evidence both support the proposition that courts should admit this type of evidence, but allow defendants to raise minor disputes about the authenticity at trial.

\textbf{B. Criminal-Law Context}

The balance struck in civil cases involving evidence obtained from remote-electronic traffic devices changes in criminal cases because a jury is often introduced into the equation. In this situation, courts should still admit the evidence, again allowing defendants to dispute authenticity issues in trial. However, in cases where the court takes some portion of the decision away from the jury, the court should take special care when giving its opinion to avoid losing legitimacy.

\textsuperscript{17} Florida’s recent rule requires officers to list the type and serial number of the speed-measuring device in citations. See Thomas A. Cobitz, Annual Reports of Florida Bar Committees, 82 Fla. B.J. 34, 76 (2008).

\textsuperscript{18} See Gruber, supra note 3, at § 62.

\textsuperscript{19} Part II.B. discusses the powerful effects of videos in greater depth.

\textsuperscript{20} See Note, supra note 13, at 864-68 (finding that magistrate judges regularly dismissed citations due to personal and political pressures because they were elected officials).

\textsuperscript{21} See Gruber, supra note 3, at § 62.

\textsuperscript{22} See id.

\textsuperscript{23} See id. at § 53.


\textsuperscript{26} See Gruber, supra note 3, at § 53.


\textsuperscript{28} See Gruber, supra note 3, at § 53.
i. Evidence obtained by remote-electronic devices almost always satisfies the three factors of materiality and relevance, authenticity, and competence, although admittedly the balance does alter slightly when evaluating competence

In criminal-law cases, the same three foundational requirements of materiality and relevance, authenticity, and competence must still be satisfied. Materiality and relevance as well as authenticity are still easily satisfied as discussed in Part II.A. However, while overall the competence factor still weighs in favor of admission, introducing a jury will give more weight to concern about the prejudicial effects on the defendant, particularly in the case of videotaped evidence obtained from a remote-electronic traffic device.

As discussed earlier, videotape evidence is by its nature "extremely persuasive, vivid, and unforgettable." However, while civil cases typically involve non-sensationalist evidence such as photos of a car running a red light, criminal cases are more likely to involve videos of a car chase or other potentially provocative images. Studies show that viewers are generally likely to accept the contents of the video as truth. In addition, there have been startling studies that demonstrate that viewers are more likely to see a confession as more voluntary and correspondingly that the defendant is more guilty when the video shows only the defendant as opposed to when it shows both the defendant and the police officer eliciting the confession. While no such similar studies have been done with car chases for instance, it may well be possible that a view from the dashboard of a police car will cause viewers to be more likely to view the defendant as the one voluntarily beginning the car chase and therefore more at fault, which may impact related civil cases in which a private party seeks damages based on a claim that officers used excessive force and the jury must determine the relative culpability of the parties. However, a critical difference between videotaped confessions and video obtained from remote-electronic traffic devices is that law enforcement cannot significantly alter the placement of the camera. Thus, even if there were a bias in car chase or arrest scenarios, there seems to be little that can be done to avoid it. Such instances are more spontaneous, and it obviously is not feasible to pause the chase in order to have a police car drive to the side of both vehicles or to have a helicopter flying overhead in order to get a wider view and avoid the potential bias that may result from a limited perspective. Even if the concerns about bias have greater strength because the viewer is a lay juror instead of the more experienced judges in traffic court, the party will have the opportunity to counteract this bias through giving his or her version of events at trial with the added benefit that he or she will be much more likely to tell the truth because of the admission of this evidence. In the end, as contemporaneous direct evidence, these videos hold great probative weight, and as such, courts should continue to admit them into evidence when balancing it against its prejudicial effects. Thus, while the potential prejudicial effect of the evidence has greater weight in the criminal context, overall, the evidence should still be introduced because it satisfies the foundational requirements.

ii. Exclusion of evidence as a form of jury control

With the introduction of a jury, it becomes necessary to also discuss the risks attendant with that jury and why such risks do not necessitate the exclusion of evidence obtained from remote-electronic traffic devices. Indeed, although evidence law can be explained through a combination of theories, the jury-oriented one is the most orthodox and indeed the most relevant concern, particularly in exclusion-of-evidence contexts. In general, there are three risks associated with juries: (1) bias, (2) lawlessness, and (3) adjudicative incompetence. Bias is the concern that jurors have preexisting biases because of their backgrounds and that these biases will influence their judgment. Lawlessness is the concern that juries in their discretion may sometimes flout the law. Finally, adjudicative incompetence is the concern that as lay people, jurors will misunderstand the value of the evidence or fail to understand the legal instructions and therefore come to the wrong conclusion. All of these risks could and indeed should be counteracted if the court follows certain procedures and thus they do not necessitate that the evidence obtained from remote-electronic traffic devices be excluded. First, bias is often dealt with in the jury-selection process. In fact, one could even show the evidence, particularly if it is videotape evidence, to the potential jurors in voir dire to determine whether some jurors have particularly strong biases toward the video. However, jurors probably would not have an especially strong prejudicial reaction solely due to a photo of a car running through a red light. The same likely holds true even if the evidence is a video of a car chase because again, prior biases would likely be uncovered in the normal jury-selection process, and it seems unlikely that a juror would have such a strong individualized reaction to seeing the video that he or she should be individually removed through the challenge-for-cause process. Thus, the normal jury-selection process should probably be enough to counter bias concerns even in this context.

29. Id. at § 74.
32. See George M. Dery III, The Needless “Slosh” Through the “Morass of Reasonableness”: The Supreme Court’s Usurpation of Fact Finding

Powers in Assessing Reasonable Force in Scott v. Harris, 18 GEO. MASON U. CIV. RTS. L.J. 417, 444 (2008) (discussing Scott v. Harris and noting that viewing the scene from the cop’s point of view may cause viewers to identify with the cop).
33. See Dufraimont, supra note 4, at 220-21.
34. See id. at 214-13.
35. See Gruber, supra note 3, at § 74.
Second is the concern about lawlessness, which again is dealt with through jury-control processes. To make sure juries follow the law, jurors swear an oath to do so and legal instructions will instruct them on what to do.\textsuperscript{36} In conjunction with this is the negative control of not telling juries about their power to potentially ignore law,\textsuperscript{37} and instead leaving the decision up to them.\textsuperscript{38} Although these controls are somewhat weak, this is all that can be done to prevent jury lawlessness because the jury system itself is ambivalent about the jury's power. That is, although lawlessness can be seen as a negative risk, it can also sometimes work as a positive factor or a defensive safeguard when the law itself may be unjust, which is why there cannot be excessive controls to stifle jury lawlessness.\textsuperscript{39}

Finally, there is the concern about adjudicative incompetence. To begin, one must have a point of comparison—namely, what standard of competence are we comparing the jury's to? Some might frame the issue by comparing jurors to a competent individual judge such as perhaps those in the traffic court.\textsuperscript{40} However, a better starting point is to recognize that all jurors and judges have some biases or frailties in reasoning that might lead them to make faulty decisions,\textsuperscript{41} and thus, any decision to admit or exclude evidence on this basis must be justified because it will truly be effective in eliminating or substantially reducing these problems.

In the context of evidence obtained by remote-electronic traffic devices, photos do not seem to be the type of evidence that is difficult to evaluate and might cause either jurors or judges to make a faulty decision. However, videotaped evidence is of greater concern because of its more persuasive effect as discussed earlier in this article. Nevertheless, there are procedural safeguards in place to address this problem such as allowing the party to raise arguments about the weight of the evidence, which in turn should ideally make it easier for jurors to evaluate that evidence. Moreover, judges have the power to overturn a verdict if they truly believe the jury has erred. These and other procedural safeguards are enough to counter this potential risk, and given the great probative value of the evidence, it should still be admitted. In sum, although the introduction of juries into the criminal context has also introduced the three attendant risks of bias, lawlessness, and adjudicative incompetence, steps can be taken to reduce these risks and therefore they do not necessitate an exclusion of evidence obtained by remote-electronic traffic devices.

iii. Current caselaw: A trend in admitting evidence and a source of guidance for ways to counter the bias effect

As in civil cases, courts also generally admit evidence obtained by remote-electronic traffic devices in the criminal context.\textsuperscript{42} More importantly though, cases dealing with videotape evidence have recognized the bias effect of the video and have taken steps to counteract it, thereby giving guidance to how courts should respond in this context. These solutions can easily be applied to videotape evidence obtained from remote-electronic traffic devices, and particularly videotaped evidence obtained from a police car dashboard such as when the police officer is chasing after a car\textsuperscript{43} or even arresting a person during a traffic stop,\textsuperscript{44} where the concerns about bias are most salient.

Courts should take several steps to deal with videotaped evidence in criminal contexts. First, they should do a preliminary review of the evidence to avoid exposing jurors to potentially inadmissible videotape evidence.\textsuperscript{45} Indeed, such a review has become a common procedure followed by many courts\textsuperscript{46} and should always take place if the opposing party has made an objection to the evidence\textsuperscript{47} or made a request for in-camera review.\textsuperscript{48} Such review can take place either before the trial, at the very beginning of the trial if the party makes a motion in limine, or during the trial but before the time the jury will view the video.\textsuperscript{49} Obviously, earlier in the trial is better both to give parties time to prepare and to conduct any editing if necessary.\textsuperscript{50} Courts should also conduct the review under the same conditions that the jury will view the evidence,\textsuperscript{51} so in other words, if the jury is only able to view the video once, then the court should do the same. Ideally though, both the judge and the jury should be able to view the evidence as many times as needed, particularly during deliberations, so that initial impressions of a high-speed chase, for example, do not overwhelm the viewer and cloud his or her judgment. Indeed, courts often do such preliminary reviews already\textsuperscript{52} and while the caselaw suggests that it is not reversible error when a court does not review the video before playing it back for the jury,\textsuperscript{53} particularly if it

\begin{thebibliography}{9}
\bibitem{1} See Dufrainmont, supra note 4, at 217.
\bibitem{3} See, e.g., Sparf v. United States, 156 U.S. 51 (1895).
\bibitem{4} See Dufrainmont, supra note 4, at 217.
\bibitem{5} For more detailed discussions about the point of comparison, see Dufrainmont, supra note 4, at 227-29.
\bibitem{8} See, e.g., Harris, 350 U.S. 372.
\bibitem{9} See, e.g., Buckley, 292 Fed. Appx. 791 (11th Cir. 2008) (considering video taken from police's car of person refusing to obey the police's orders at a roadside stop and being tasered by cop).
\bibitem{10} See Gruber, supra note 3, at § 74.
\bibitem{11} See McCormick on Evidence § 214 (3d ed. 1984).
\bibitem{12} See Lee v. State, 526 N.E.2d 963 (Ind. 1988).
\bibitem{13} See Bailey v. Valtec Hydraulics, Inc., 748 S.W.2d 805 (Mo. App. 1988).
\bibitem{14} See Gruber, supra note 3, at § 74.
\bibitem{15} See id.
\bibitem{16} See id.
\bibitem{17} See 3 Charles C. Scott, Photographic Evidence § 1299 n. 54.5 (2d ed. 1991) (citing cases).
\bibitem{18} See State v. Burdgess, 434 So. 2d 1062 (La. 1983).
\end{thebibliography}
would have been admissible regardless, the preliminary review is the better and recommended option for courts.

Overall, even in the criminal context, caselaw shows that courts are admitting evidence obtained from remote-electronic traffic devices, and like in the civil context courts should also allow defendants to raise questions as to the authenticity of the video. However, with the introduction of the jury, they should follow the steps courts have taken in other videotape cases and do a preliminary review under the same viewing circumstances that the jury would have in order to limit the potential prejudicial effects of introducing the video into evidence.

iv. Summary judgment and its implications

This article would not be complete without discussing Scott v. Harris, a Supreme Court case where the justices entered summary judgment in favor of the defendant officer but relied heavily on a video from the perspective of the police officer who chased after the speeding driver and eventually rammed his police car into the driver’s car. This case demonstrates the power of video evidence and indeed provides many important lessons about how judges should approach summary-judgment cases involving videos taken from remote-electronic traffic devices. Before getting to that, however, this article will first generally discuss the rationales for having a jury and the dangers of admitting a video into evidence and subsequently relying too much on it when taking a decision out of the hands of the jury.

1. BACKGROUND: THE RATIONALES FOR HAVING A JURY

At the outset, it is important to understand why the criminal system has a jury in the first place because it is only through understanding the jury’s function that one can understand what will be lost when a court takes a decision away from the jury. While there are several rationales for having a jury, this article will only discuss three of them: (1) they are good fact-finders, (2) they temper the law on behalf of the community, and (3) they legitimize the legal system. The first rationale is a controversial one, and while there has been an endless debate over whether jurors are in fact good fact-finders, this article will assume that they are fairly good fact-finders primarily because they have advantages as a group. For instance, group deliberation encourages more thorough analysis and accurate verdicts: collectively, they remember more of the evidence, and then cancel out in deliberations. These biases stilllinger even after careful jury selection and can be important, as demonstrated by one study, which determined that when viewing a videotape of evidence taken from a police dashboard camera during a chase of a speeding party, African-Americans, low-income workers, Democrats, and residents of the Northeast were significantly more likely to favor the party being chased by the cop. Jury deliberation allows jurors to air their view.

2. PROBLEMS WITH ADMISSION OF EVIDENCE IN SUMMARY-JUDGMENT CONTEXTS

Applying these rationales to the problem of summary judgment, it is clear that by admitting evidence, particularly videotaped evidence, and then bypassing the procedural safeguards or rationales for having a jury, new problems emerge because the evidence may now unduly influence the judges such that they come to an incorrect or biased decision or a decision at odds with what the local community might have ruled. At the heart of all of this is the central concern that the court’s decision will lack legitimacy.

If the jury as a group is a good fact-finder, by extension, many of the group benefits are lost with summary judgment. This in turn means that the biases of the judges will be magnified, which can be problematic given the power of video evidence, and potentially lead judges to make an incorrect or biased decision. Recall that one of the most important advantages of a group is that individual preexisting biases can be canceled out in deliberations. These biases still linger even after careful jury selection and can be important, as demonstrated by one study, which determined that when viewing a videotape of evidence taken from a police dashboard camera during a chase of a speeding party, African-Americans, low-income workers, Democrats, and residents of the Northeast were significantly more likely to favor the party being chased by the cop. Jury deliberation allows jurors to air their view.

54. See Brandt v. French, 638 F.2d 209 (10th Cir. 1981).
57. Dufrainmont, supra note 4, at 210-13. Another common rationale is that juries educate the public because jury service is a form of political participation where the public can learn about the justice system. See id. However, again, this article will not discuss this and other rationales because they are not very relevant to this context.
58. For more detailed analysis of this debate, see generally JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898). However, this debate is beyond the scope of this article.
60. See Dufrainmont, supra note 4, at 211.
61. See id.

[B]ypassing the procedural safeguards or rationales for having a jury, new problems emerge because the evidence may now unduly influence the judges . . . .
[J]udges faced with videotape evidence should be aware of the potential biases and differing viewpoints that prospective jurors might have.

words, the judge's individual preexisting bias may become magnified in summary-judgment contexts.

Summary judgment involving videotape evidence is also problematic with regards to the second rationale for juries, that the jury tempers the law on behalf of the community. For instance, perhaps residents of a southern state might have different views than the judges on an appeals court or other higher court, particularly when judges may have more privileged backgrounds than the local community and thus view the video differently. Thus, admission of the video into evidence can potentially cause a difference in the verdict a jury or a judge might give.

Finally, summary judgment involving videotape evidence is problematic when considering the last rationale for juries, that they provide legitimacy to the system. As mentioned earlier, the public believes a decision to be more legitimate when members of its group deliver a verdict, particularly because even if jurors have differing viewpoints, the prevailing jurors are obliged to listen during the critical moment of jury deliberations to those who have different views; this helps to allow the losing party to accept the verdict without experiencing a sense of domination or subjugation. However, when a court gives a verdict or a view of the evidence that the public may not credit, the decision arguably loses legitimacy because differing viewpoints are not expressed through the jury process. By bypassing the jury through summary judgment, the admission of the evidence obtained by the remote-electronic traffic device becomes a much bigger concern, and courts must be cautious when dealing with this situation or risk losing legitimacy.

3. SCOTT V. HARRIS AND ITS LESSONS: WHAT APPROACH COURTS SHOULD FOLLOW

Given that admitting videotape evidence obtained from a remote-electronic traffic device can cause many problems in the summary judgment context, what is the best solution? Excluding the evidence is not ideal for all the reasons discussed earlier in this article. However, taking a closer look at the Scott v. Harris case can provide many lessons for what to do and what not to do for any court facing this dilemma.

In Scott v. Harris, a police officer filmed a high-speed chase from a camera on his dashboard and subsequently bumped the escaping driver's car in the rear and caused the car to crash. The driver became a quadriplegic as a result of the incident and sued the police officer under 42 U.S.C. section 1983 alleging that using deadly force to terminate the chase was an unreasonable seizure under the Fourth Amendment. In an opinion that seemed to give great weight to the evidence obtained from the remote traffic device as exemplified by such statements as “we are happy to allow the videotape to speak for itself” and even providing a link to the video with the invitation to “see for yourself,” the Supreme Court reversed the lower courts' findings denying summary judgment.

Scott v. Harris gives several important lessons on what judges should and should not do when faced with a summary-judgment case involving evidence obtained from a remote-electronic traffic device. Although this article will not delve into the intricacies of all of the alternatives that the Court might have chosen, it will extrapolate some general principles for courts facing summary-judgment cases involving videotaped evidence.

First, judges faced with videotape evidence should be aware of the potential biases and differing viewpoints that prospective jurors might have. As one study suggests, the Court in Scott v. Harris was prone to naïve realism, which means that people are good at detecting group commitments or biases animating other people's beliefs, but correspondingly naive or poor at detecting this in themselves. To counteract this problem, judges should perform a judicial humility mental check, or ask themselves to imagine who might disagree with their viewpoint. If the other views are mere outliers, then summary judgment is appropriate. However, in more borderline cases where summary judgment may still have been appropriate as it arguably might have been in Harris (one study demonstrated that lay people did indeed come to the same conclusion as the judges), judges still should be careful in their opinion to moderate their language. Perhaps phrases such as “no reasonable jury could conclude otherwise” might have been avoided. In addition, perhaps more deference should have been given to the speeding driver's point of view instead of hinting that the video told only one set truth—such language indicates it is the judge's view of the video that is being imposed onto the parties in this case. Again, this is undesirable because it undermines the legitimacy of the opinion itself.

Second, judges facing this situation should avoid sensorial jurisprudence. In other words, they should not accord exces-

63. See Scott v. Harris, 550 U.S. 372, 389 (2007) (Stevens, J., dissenting) (“Eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are.”).
64. See Kahan, supra note 62, at 885-86.
65. See Scott v. Harris, 550 U.S. at 374-76 (majority opinion).
66. Id. at 378, n.3.
68. See id. at 895.
69. See id. at 898-900.
70. See id.
71. The debate about whether the case should indeed have been decided the way it was decided is beyond the scope of this article.

For further reading, see id. at 887-94.
sive weight to evidence and use such strong phrases as “[t]he videotape tells quite a different story,” or repeated repetitions of what “we see” and describing the chase as a “Hollywood-style car chase of the most frightening sort.” These phrases indicate the judge may have indeed fallen prey to the inherent biasing effects of the video that again undermines legitimacy. While arguably appellate judges can constrain trial judges, there is nowhere left to go for further review once the case reaches the Supreme Court, and so higher courts in particular should be careful about placing too much weight on a video, especially because video evidence is known to be particularly powerful.

Scott v. Harris provides important lessons for any court faced with a summary-judgment case. Regardless of why a court decides to take a decision outside of the hands of the jury, it must be careful to avoid writing an opinion that detracts from its own legitimacy. Courts should take steps to be more neutral in their writing, to give credence to the differing viewpoints of the parties as well as the viewpoints that the evidence might elicit in jurors, and to avoid language that hints that the judges themselves have fallen prey to the inherent biasing effects of a video. Such measures would be a good start to preserving legitimacy when the court bypasses the jury and its attendant justifications. Indeed, these lessons apply to any case involving evidence obtained by remote-electronic traffic devices in which a judge may be asked to take the decision out of the hands of the jury.

CONCLUSION

Like it or not, evidence obtained from remote-electronic traffic devices is here to stay and courts should be responsive to concerns about its admissibility. Although it seems fairly simple to conclude that courts should almost always admit such evidence in civil cases while allowing issues of authenticity to go toward the weight of the evidence, the arguments for admissibility change significantly in the criminal context, which features juries. Nevertheless, even there courts should almost always admit such evidence. Although the weighing of the three foundational factors alters slightly in the criminal context, procedural safeguards as well as the great probative value of the evidence still weigh in favor admission. Moreover, the risks that come with the introduction of a jury can be mitigated through other means and are not enough to justify exclusion of the evidence. Caselaw supports the conclusion that the evidence should be admitted while simultaneously providing guidelines for future courts. Finally, with summary judgment, the recent Supreme Court case of Scott v. Harris perhaps serves as a cautionary tale of how such evidence may lead judges to make potentially inflammatory comments that seemed to give little credence to the driver’s or potential jurors’ points of view and indeed seemed to suggest that the judges themselves had fallen prey to the inherent biasing effects of the video. Courts facing a situation where they are bypassing the jury, and therefore bypassing the attendant rationales for a jury, should instead engage in a mental check of judicial humility to be sure that they are not themselves being unduly influenced by the evidence and thus undermining their own legitimacy.

Evidence obtained from remote-electronic traffic devices will only continue to take on greater importance in the coming years. While courts should continue to admit the evidence, they should also be highly cognizant of setting limits and guidelines for its use.

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73. Id. at 379-80.
The Resource Page

CONFERENCES

CTC 2011
Court Technology Conference
Long Beach, California
October 4-6, 2011

The National Center for State Courts sponsors a court-technology conference very other year, and October 2011 in Long Beach, California, is the next stop. The 2009 conference featured 125 exhibitors, 50 educational sessions, and more than 1,000 attendees to share notes with. While the 2011 program isn't set yet, programs last time around included things like: how to use an electronic trial-notes system; using social-networking tools to serve the public; providing cost-effective but high-quality computer networking at remote judicial sites; remote, centralized language interpreting; how to get eCourt project funding; court technology on a tight budget; and tips for improving court websites.

As the 2011 program takes shape, you'll find information about it at the website noted above.

Fourth National Symposium on Court Management
Sponsored by the State Justice Institute, the Bureau of Justice Assistance, and the National Center for State Courts.

In times of tight budgets, it's hard to get a chance to attend a national conference that has good speakers who are exploring new ideas. But you can catch whatever portions you'd like on video from the National Symposium on Court Management held October 27-28, 2010. The first of these periodic symposia was convened in 1981. The 2010 gathering focused on managing courts in times of budget challenge, discussing key questions like: What are the essential functions of courts? How can courts best organize themselves to achieve those functions?

Several of the presentations would be of interest to most judges, and many would be of interest to judges who have administrative responsibilities:

- Dr. John Martin of the Center for Public Policy Studies in Boulder, Colorado, addressed trends that are shaping the state courts from 2000 to 2020.
- Dan Hall, vice president of the National Center for State Courts, reviewed the key principles of judicial administration that should guide presiding judges, trial-court administrators, and state-court administrators.
- Administrators and judges from Arizona, Minnesota, and Vermont explained changes that are being made to “reengineer” the delivery of justice in rural, suburban, and urban settings.
- Chief justices or state-court administrators from Ohio, Texas, and Utah, as well as court administrators and presiding judges from five other states, discussed a new set of principles for court governance.

All of the presentations, along with papers and some PowerPoint slides, are available to you on the web. Also included on the website are the results of a survey of 1,766 members of 11 national organizations—including the American Judges Association—regarding the well-being and growth of the state courts. Take a look to see what folks like us had to say about how courts should be governed, how well courts are doing, and what the future holds for us.

PUBLICATIONS

Special Issue on Judicial Selection
The Advocate (Litigation Section, State Bar of Texas)

If you've read the overview Mary Celeste has provided in the latest AJA White Paper (page 82), your next stop for the latest thoughts on judicial selection can be found in a special issue of the publication of the Litigation Section of the State Bar of Texas, which is just out and available on the web. The articles are mostly short and easy to read; they give a great overview both of judicial-selection reforms and questions raised about them.

Many of the nation's top experts are represented. For example, Prof. Charles Gardner Geyh, an expert on judicial ethics, provides a few thoughts about White, Caperton, and Citizens United. David Rottman, a researcher at the National Center for State Courts who has closely followed the work of judicial campaign oversight committees, explains how such committees might be used to that pressure judicial candidates not to stray too far from accepted norms. Prof. Anthony Champagne, a political scientist, provides a perspective of judicial elections based on empirical research.

Other article topics include whether campaign contributions are compromising judicial independence, how judicial-selection reform may impact minority voters, whether partisan elections are the best means to hold judges accountable, how federal judicial selection really works, and how other nations pick judges. In all, there are 16 articles. If you're interested in this subject at all, you'll find this special issue of interest.