

Foreword: Achieving Impartiality in State Courts

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It has been very gratifying to see one of the finest law schools in the nation conclude that state courts, and specifically the California Supreme Court, deserve closer study because of the significant position they occupy in the legal fabric of the United States. I propose here to touch upon the broad significance of the role of the judicial branch—at every level—in our governmental structure, and to highlight some of the tensions underlying the role of impartial state judicial systems in the governance of our nation.

The judicial branch in California has a very different profile from that which it had only thirteen years ago. At that time, trial courts were funded primarily by the Board of Supervisors of the county in which they were located; two levels of trial courts existed, and statewide guidance—except for basic rules of court—was neither well-established nor very effective.

In the ensuing years, the judiciary—with the assistance of the legislative and executive branches and support from many other entities—succeeded in bringing about two fundamental structural changes. First, funding for the courts became a state responsibility,¹ and second, the trial courts were merged into a

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[†] Chief Justice of California. These Remarks originated as an address given at the Conference on the California Supreme Court held at the University of California, Berkeley, School of Law (Boalt Hall) on November 14, 2008. On behalf of the California Supreme Court, I again wish to express my appreciation to Dean Christopher Edley and the faculty of Berkeley Law for conceiving the idea for the conference, and for so successfully bringing it to fruition. In addition, I wish to acknowledge the invaluable contributions of my colleagues on the Supreme Court, who led many of the panel discussions, and of the many panelists and speakers who generously lent their time and expertise. In particular, I wish to give special recognition to Christine Durham, Thomas Moyer, and Thomas Phillips, each of whom has served as an outstanding Supreme Court Chief Justice in their respective states of Utah, Ohio, and Texas, as well as serving as a sterling leader of the Conference of Chief Justices. I also deeply appreciate the invaluable assistance of my principal attorney Beth J. Jay, aided by extern Holly Carmichael, in preparing this article. Ms. Jay's contributions helped me and other individuals bring about the structural reforms and innovative programs discussed here.

1. Lockyer-Isenberg Trial Court Funding Act of 1997, 1997 Cal. Stat. ch. 850, § 46 (codified as amended at CAL. GOV'T CODE § 77200 (2005)) (providing that the "state shall assume

single level, combining 220 separate municipal and superior courts into fifty-eight superior courts, one in each county of the state.² As a result, resources and priorities for development now can be undertaken on a statewide level and allocated where needed.

The judicial branch presently is engaged in a third sea change—the transfer of ownership of court facilities from the counties to the state, a process managed by the Judicial Council.³ The California Constitution entrusts the Judicial Council with the statewide administration of justice.⁴ As Chief Justice, I head the Council, which is assisted in carrying out its policies by its staff arm, the Administrative Office of the Courts.⁵ Following the conclusion of last year's legislative session, the Governor signed into law the Judicial Council's top legislative priority—a \$5 billion courthouse construction and renovation revenue-bond measure.⁶ By the end of 2008, 466 of the 528 existing court facilities had been transferred to state ownership, and the remainder are expected to transfer by the end of 2009. The Council is authorized to begin planning and site acquisition for forty-one of the most urgently needed facilities.

Through these structural changes, the judicial branch has evolved from a loose confederation of locally oriented courts into an organized, statewide presence that speaks for the state court system as a whole and is dedicated to improving the fair and accessible administration of justice for all Californians. Administering justice on a statewide basis is both complex and necessary. California's counties range in population from about ten million individuals in Los Angeles to approximately twelve hundred in Alpine.⁷ One size clearly does

sole responsibility for the funding of court operations" commencing in the 1997–98 fiscal year). See JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, FACT SHEET: TRANSFER OF COURT FACILITIES (2009), available at <http://www.courtinfo.ca.gov/reference/documents/factsheets/factrans.pdf>.

2. Article VI, section 1 of the California Constitution previously vested judicial power in the "Supreme Court, courts of appeal, superior courts, and municipal courts." Proposition 220, effective June 3, 1998, amended article VI, section 5 by providing that the courts in each county could elect to unify into a single superior court upon a majority of votes by the judges of both the superior courts and the municipal courts. Other changes throughout article VI reflected the potential reorganization of the trial courts. By February 2001, courts in all counties were unified. Proposition 48, effective November 6, 2002, deleted references to municipal courts throughout article VI, made other conforming changes to the constitution, and repealed the provision of article VI, section 5 inserted by Proposition 220, which permitted unification votes by the judges in each county.

3. See News Release, Admin. Office of the Courts, Record Number of Courthouses Transfer to State Governance (Jan. 14, 2009), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR03-09.pdf>.

4. CAL. CONST. art. VI, § 6.

5. *Id.*

6. On September 26, 2008, Governor Schwarzenegger signed Senate Bill 1407. 2008 Cal. Stat. ch. 311, § 5 (codified as amended at CAL. GOV'T CODE § 70371.5 (2003)). Among its many provisions, the bill added section 70371.5 of the California Government Code, which established an Immediate and Critical Needs Account of the State Court Facilities Construction Fund "up to five billion dollars."

7. CAL. DEP'T OF FIN., CALIFORNIA COUNTY POPULATION ESTIMATES (2008),

not fit all, but setting common goals and policies—and making information about best practices and effective processes available—have helped us to improve and render more consistent the administration of justice in the various parts of our heterogeneous state.

The judicial branch has made major advances in responding to the growing and increasingly diverse population we serve and to the varied needs of the public, but many difficult challenges remain. In order to expand and improve the services provided by the courts, we have had to refashion the structure of our statewide judicial system and enhance its fiscal stability. At the same time, we have been faced with developments that require us to examine carefully the fundamental role occupied by state courts in the governance of our state and our nation, and in our commitment to uphold the rule of law.

I

Despite the pervasiveness of the actions of state courts in law-related matters affecting individuals as well as institutions, traditionally most academic studies and courses of instruction discussing the role of the judiciary and of impartial courts have focused on the federal court system.⁸ This may reflect the circumstance that federal courts are entrusted with the resolution of disputes involving laws of nationwide application. Nevertheless, state courts decide close to 98 percent of the legal disputes filed in our nation's courts.⁹ State courts also are the tribunals with which individuals are most likely to come in contact, whether as a party, witness, juror, or victim; to pay a traffic ticket; or to obtain a copy of an official document. California's court system alone, the largest law-trained judicial system in the world, has twice the number of judges as the federal Article III judiciary¹⁰ and a budget of four billion dollars.¹¹

<http://www.csac.counties.org/images/users/1/2008population.pdf> (calculating population data as of January 2008).

8. See, e.g., Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004) (measuring productivity, opinion quality, and judicial independence of active federal circuit court judges).

9. AM. BAR ASS'N, ABA FAMILY LEGAL GUIDE: HOW THE LEGAL SYSTEM WORKS (2004), <http://public.findlaw.com/abafllg/flg-2-2a-4.html>.

10. California has more than 1600 general-jurisdiction judges, 105 court of appeal justices, and seven justices of the California Supreme Court. JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, FACT SHEET: CALIFORNIA JUDICIAL BRANCH (2009), available at http://www.courtinfo.ca.gov/reference/documents/factsheets/Calif_Judicial_Branch.pdf. The federal system authorizes approximately 860 Article III judgeships. Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1015 (2007).

11. The proposed California Judicial Branch budget for the 2009–10 fiscal year is \$4,033,441. See Welcome to California's Governor's Budget 2009–10, Judicial Branch, <http://www.ebudget.ca.gov/StateAgencyBudgets/0010/0250/department.html> (last visited Feb. 26, 2009).

The focus on the federal courts in part results from the existence of fifty separate state-court systems. The judges in these systems are selected in various ways¹² and develop much of their jurisprudence using state-specific statutes and state constitutional provisions, with federal constitutional principles providing only the outer limits for state-court action.

Nevertheless, although substantial variances exist among state courts and the court systems in which they function, an understanding of the administration of justice in our nation is facilitated not only by an understanding of the several individual systems but also an appreciation of the interaction among the various state-court systems. Through organizations such as the Conference of Chief Justices—which is comprised of the highest judicial officer of each state, territory, and commonwealth—state courts are made aware of trends and programs in sister jurisdictions and work closely together to develop best practices in administering justice.¹³ Comparable organizations of state court administrators, justices of intermediate appellate courts, trial judges, and local court executives—all assisted by the National Center for State Courts—perform similar functions.¹⁴

State courts also frequently look to their counterparts across the nation when resolving novel issues of law. In 2007, the *UC Davis Law Review* published a study developed by our court's chief supervising attorney, Jake Dear, and the court's reporter of decisions, Edward Jessen, that measured the influence of respective state courts on each other. The study considered the number of times a case was "followed" by other courts, as that term is employed by Shepard's Citations Service.¹⁵ Over the years, the California Supreme Court has ranked highest in this national study.¹⁶ Lest it appear self-congratulatory on the part of California's present-day court, one of the findings of the study is that the influence of a decision germinates and must be measured over a significant span of time, and thus the study cannot fully measure the

12. See Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1084–86 (2007) (cataloging states' judicial selection processes). Although the details of appointment and retention vary, more than eighty-nine percent of state judges face some kind of election—nonpartisan contested elections, partisan contested elections, retention elections, or a combination thereof. *Id.* at 1105.

13. See Conference of Chief Justices, About CCJ, <http://ccj.ncsc.dni.us/about.html> (last visited Feb. 25, 2009) (describing the objectives of the Conference of Chief Justices); National Center for State Courts, Mission, http://www.ncsconline.org/D_About/index.htm (last visited Feb. 25, 2009) (describing the mission of the National Center for State Courts, which is accomplished through research, consulting, publication, education, and dissemination of information to state-court leaders).

14. *Id.*

15. Jake Dear & Edward W. Jessen, Essay, "Followed Rates" and Leading State Cases, 1940–2005, 41 U.C. DAVIS L. REV. 683 (2007) [hereinafter Dear & Jessen, *Followed Rates*]; see also Jake Dear and Edward W. Jessen, Addendum, *Measuring the Comparative Influence of State Supreme Courts: Comments on Our "Followed Rates" Essay*, 41 U.C. DAVIS L. REV. 1665 (2008).

16. Dear & Jessen, *Followed Rates*, *supra* note 15, at 695, 697.

influence of today's court¹⁷—although the trends do show that the present-day court seems to compare favorably with the court of past decades.¹⁸

This study led to a flurry of interest within state-court systems and among academics, both because the rankings of many states were surprising and also because an objective and novel tool, Shepard's Citations Service, was employed in measuring the impact of state-high-court decisions.¹⁹ The time, then, is ripe to undertake greater examination of state courts as improved technology and multi-jurisdictional practice make the flow of information and influence across state lines more commonplace and more amenable to measurement and analysis. The influence of California's courts has spread not only through the decisions they render, but also through the adoption of the previously described structural reforms and a wide range of innovative programs designed to better serve the public.²⁰

Even as we move toward greater structural soundness and an improved administration of justice, there are worrisome trends we cannot ignore. Ultimately these trends pose threats to the ability of all courts—and to state courts in particular—to perform their functions in a stable and impartial manner. It has become clear that some individuals and institutions view the courts as simply another political player, and believe that judges should be selected on the basis of whether they will advance a preferred social, economic, or political agenda.²¹

17. *Id.* at 698–99 (identifying a typical twenty-five-year gestation period before a substantial number of state courts follow the decision of another jurisdiction).

18. *Id.* at 702–03 (“Indications are that the current court is on track with the California Supreme Court's historic rates.”).

19. A *New York Times* article describing the study helped to spark mainstream interest concerning the influence of state courts. See Adam Liptak, *Around the U.S., High Courts Follow California's Lead*, N.Y. TIMES, Mar. 11, 2008, at A12. See also Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Which States Have the Best (and Worst) High Courts?* (Univ. of Chicago, John M. Olin Program in Law & Econ. Working Paper Series, Paper No. 405 (2d ser.); Univ. of Chicago, Pub. Law & Legal Theory Working Paper Series, Paper No. 217, 2008), available at <http://ssrn.com/abstract=1130358>; Pamela A. MacLean, *Calif. Up, N.Y. Down In Study Gauging Influence*, NAT'L L.J., Mar. 3, 2008, at 6.

20. A brief tour of the California courts' Web site demonstrates the judicial branch's commitment to innovation and outreach. See California Courts, Welcome to the California Judicial Branch, <http://www.courtinfo.ca.gov/> (last visited Feb. 26, 2009) (containing information about the various advisory committees, task forces, and commissions assisting the Judicial Council, as well as an award-winning self-help site that includes links to standardized legal forms; sources of low-cost legal help; self-help guidance; resources for victims of domestic violence; and directions for proceeding in areas such as landlord-tenant issues, conservatorships, and name changes). In addition, through measures such as the development of “plain language” jury instructions, the placement of self-help kiosks at courthouses, and the creation of the Center for Families, Children, and the Courts, California's judicial branch has taken affirmative steps to make its courts more responsive to the public's needs.

21. The Brennan Center for Justice at New York University School of Law, for example, tracks numerous instances of the politicization of judicial elections and decision making resulting from the activities of political parties, special interest groups, and others who bring pressure to

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Federal judges enjoy lifetime tenure and a constitutional setting in which discussions of the roles and relationships among the three branches of government can draw upon a rich history of discourse. Even federal courts, however, are not immune from partisan and other pressures; to some individuals and groups, the appointment of federal judges is now a focal point for advancing particular agendas.²² Moreover, decisions by federal judges have led to threats to restrict their courts' jurisdiction, or to impeach individual judges for particular rulings.²³ The resulting discussions of the proper role of the federal courts often reflect differing views of the appropriate balance among the three branches of government—a balance that warrants close examination.

Although I am confident that the basic civics framework in which the ongoing debate occurs is familiar to the readers of this essay, that assumption should not necessarily be extended to the public at large. One poll revealed that less than one-half of the responding adult population in this nation could identify the three branches of government.²⁴ Nearly three-quarters of the same polled group could, however, name the Three Stooges.²⁵ To the extent, then, that our discussions about the function of an impartial court and its value to society are premised upon a shared public understanding of the roles of each branch of government, we may be assuming too much, particularly insofar as these values affect state judiciaries. The increasingly purposeful politicization of judicial elections demonstrates that we cannot rely upon universal knowledge and agreement among members of the public concerning the fundamental nature and function of the judicial role.

bear in order to influence court decisions. See Brennan Center for Justice, Fair Courts, http://www.brennancenter.org/content/section/category/fair_courts/ (last visited Feb. 26, 2009).

22. See, e.g., Robert A. Levy, *Judicial Appointments: What's on Tap from Obama or McCain?*, FINDLAW, Oct. 2, 2008, http://writ.news.findlaw.com/commentary/20081002_levy.html (discussing various issues and possible judicial appointments to be made by the presidential candidates in order to further their own policies).

23. Retired U.S. Supreme Court Justice Sandra Day O'Connor has recounted her own childhood memories of "Impeach Earl Warren" signs. Maggie Baron, *O'Connor & Breyer on Judicial Independence*, BRENNAN CTR. BLOG, Apr. 9, 2008, http://www.brennancenter.org/blog/archives/oconnor_breyer_on_judicial_independence/. Those memories, combined with more recent examples, have inspired her current campaign to maintain an independent judiciary. See *id.*; see also American Judicature Society, *Judges Under Fire*, http://www.ajs.org/cji/cji_fire.asp (describing various threats made to federal and state courts because of decisions they have rendered) (last visited Dec. 19, 2009).

24. ZOGBY INT'L, POLL OF NATIONWIDE ADULTS 7/21/06 THRU 7/27/06 MOE +/- 2.9 PERCENTAGE POINTS 3, Question 8, available at <http://www.zogby.com/wf-AOL%20National.pdf> (last visited Feb. 26, 2009); see also NAT'L CTR. FOR STATE COURTS, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS, A SURVEY OF THE PUBLIC AND ATTORNEYS 19–20 (2005), available at http://www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf; PUB. AGENDA & DOBLE RESEARCH, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS, PUBLIC COURT USERS AND JUDICIAL BRANCH MEMBERS TALK ABOUT THE CALIFORNIA COURTS 31–36 (2006), available at http://www.courtinfo.ca.gov/reference/documents/Calif_Courts_Book_rev6.pdf.

25. ZOGBY INT'L, *supra* note 24, at 2, Question 7.

For example, James Bopp, Jr., who serves as the president of the James Madison Center for Free Speech, strongly supports the right of candidates for judicial office to speak about issues during judicial election campaigns. He successfully argued before the U.S. Supreme Court in *Republican Party of Minnesota v. White* that a Minnesota judicial canon prohibiting judges from announcing their views on issues violated the First Amendment.²⁶ He subsequently has brought numerous cases in state and federal courts challenging the “pledges and promises” clauses of ethics codes, which preclude judicial candidates from making promises or pledges that commit them to a particular position on an issue likely to come before the court,²⁷ and impose other restrictions on judicial-election conduct. An article in the American Bar Association Journal, describing Mr. Bopp’s efforts to make judicial campaign speech more open and similar to that existing in the other branches of government, observed: “He wants judges and candidates to say what they think, especially about abortion, assisted suicide and same-sex marriage.”²⁸

If one takes the position that the judicial branch essentially should be treated like just another political arm of government, it may reasonably seem to follow that judicial elections should be used to select state judges on a partisan or other political basis. I disagree with both premises. It has been argued that candidates for judicial office must make their substantive views known in order to inform the voters of matters relevant when casting their ballots.²⁹ According to this view, the First Amendment rights of the candidates to voice those views—and of voters to hear them—severely restrict the ability of those states that choose to have judicial elections to restrain candidates’ speech. The desire to impose such restraints in the interest of preserving the impartiality of the courts—impartiality not only in fact, but also in appearance—is not considered sufficient justification. This approach suggests that once a state chooses to have judicial elections, it must allow the candidates to speak freely on all subjects.

26. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

27. Subsequent to *White*, Mr. Bopp has challenged similar or related provisions in several state judicial codes. *See, e.g.*, *Kansas Judicial Review v. Stout*, 519 F.3d 1107 (10th Cir. 2008); *Indiana Right to Life v. Shepard*, 507 F.3d 545 (7th Cir. 2007); *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840 (9th Cir. 2007); *Pa. Family Inst. v. Black*, 489 F.3d 156 (3rd Cir. 2007); *Family Trust Found. of Ky. v. Ky. Judicial Conduct Comm’n*, 388 F.3d 224 (6th Cir. 2004); *Wersal v. Sexton*, No. 08-613 (D. Minn. Feb. 4, 2009); *Carey v. Wonitzek*, No. 3:06-36-KKC (E.D. Ky. Oct. 15, 2008); *Pa. Family Inst. v. Celluci*, 521 F. Supp. 2d 351 (E.D. Pa. 2007); *Kan. Jud. Watch v. Stout*, 440 F. Supp. 2d 1209 (D. Kan. 2006); *N.D. Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005); *Family Trust Found. of Ky. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004).

28. Terry Carter, *The Big Bopper*, 92 A.B.A. J. 31, 32 (2006).

29. *See id.* at 33 (“[Mr. Bopp’s] clients want to know a candidate’s personal values on issues such as abortion [T]heir personal values cannot help but influence them in [making common law]. . . . ‘Judges have discretion. Their personal opinions matter and their views matter.’”).

In the wake of the high court's decision in the *White* case and the many subsequent opinions rendered in the federal district and circuit courts that have subsequently struck down other limitations on judicial candidates' speech,³⁰ one may wonder whether state judicial systems must be viewed as performing a function that differs in kind from that of the federal courts. If resort to the electoral process to select and retain judges deprives states of the ability to circumscribe judicial speech with the objective of preserving the reality and appearance of neutrality, what kind of justice can we expect to receive from our state courts?

The majority opinion in *White* suggested that a judicial candidate's announcement of his or her personal views does not run afoul of the concept of judicial impartiality in any meaningful way.³¹ First, the opinion suggests, a statement of a judge's view on a legal issue does not reflect bias against a party who urges the opposite view, because *any* party taking that opposite view would be just as likely to lose.³² Second, the majority in *White* reasons, there is no compelling state interest in guaranteeing a lack of preconception concerning a particular legal view; in fact, it would be far from desirable even to expect judges to come to their role as adjudicators without having acquired some predispositions concerning the law.³³ Third, the majority in *White* concludes, although "open-mindedness" or a willingness to entertain views different from one's own and be receptive to persuasion may be desirable in judges, those attributes do not need to be considered by the high court in its decision, because they were not relied upon by the Minnesota high court in formulating the judicial canon in question.³⁴

In my view, however, although each judge brings his or her own experience and views to the bench, the practice of airing those views in order to enable the electorate to employ that information as the basis for deciding how to vote among candidates for judicial office not only may have a chilling effect on the judicial decision-making process itself, but also seems to lead to the perception that a judge's stated personal views on an issue inevitably reflect how he or she will decide cases involving that issue. In effect, the *White* majority appears to assume that the views expressed by a candidate for judicial

30. See, e.g., *Family Trust Found. of Ky.*, 388 F.3d 224 (declining to stay an injunction barring enforcement of "pledge or promises" clause in Kentucky Code of Judicial Conduct); *Carey*, No. 3:06-36-KKC (declaring five provisions of the Kentucky Code of Judicial Conduct unconstitutional); *Duwe v. Alexander*, 490 F. Supp. 968 (W.D. Wisc. 2007) (finding Wisconsin restrictions on judicial candidates unconstitutional); *Kan. Judicial Watch*, 455 F. Supp. 2d 1258 (D. Kan. 2006) (holding that Kansas's provisions prohibiting judicial candidates from speaking violate their free speech rights); *Smith v. Phillips*, No. A-02 CV 111 (W.D. Tex. Aug. 6, 2002) (striking down Canon 5(1) of the Texas Code of Judicial Conduct as unconstitutional in light of *White*).

31. *White*, 536 U.S. at 775–80.

32. *Id.* at 775–76.

33. *Id.* at 777–78.

34. *Id.* at 778–79.

office on an issue in the course of an election campaign, even if couched in terms of personal preference, will be an accurate reflection of the elected judge's views on the law. Thus these publicly espoused views will serve as a useful and reliable indicator for the electorate in predicting how the judge will rule once on the bench.

In contrast, I suggest that a good judge is one who attempts to be aware of his or her own preconceptions, but nevertheless remains dedicated to precedent and to the rule of law such that he or she will be willing and able to render a decision *contrary* to his or her personal preferences or preconceptions, when the law so demands. Under this approach, a judge who personally opposes the death penalty nevertheless will impose a judgment of death if required by the law to do so, and a judge will follow the strictures imposed by an initiative or referendum, even if he or she personally voted against its passage. Encouraging voters to view a statement of a judge's personal views as an indication of how he or she will decide a future case is a practice that in the final analysis may devalue, if not entirely destroy, the very idea of the judge as a neutral arbiter bound by the rule of law.

Thus, when a candidate for judicial office speaks during an election campaign about his or her views on issues that may come before the court, voters reasonably will anticipate that he or she will render decisions in accordance with those personal views—as voters expect in an election for an executive or legislative branch position. Voters rightly may focus on whether the performance of an elected official serving in one of our sister branches has conformed to the official's views as described during the campaign for office. In those elections, voters are expected to vote based on views and goals shared and expressed by the candidate—and the voters may measure the candidate's performance by his or her fidelity to those positions. In a judicial election, voting with these same expectations for a candidate who shares one's views and goals functionally renders irrelevant adherence to the rule of law as a ground for evaluating a judge's conduct.

If instead we desire to promote the principle that judges are to be guided by the law and not by their personal views, it may well be misleading for candidates for judicial office to provide information concerning their individual views during a campaign, because doing so in such a context suggests that the judge will conform to those views regardless of the state of the law. If judges are to be guided by the law, and not by their personal views, those personal views largely are irrelevant to the question of whether the individual will or will not perform well as a judge. Focus on those views may instead undermine the very essence of judging because it elevates, in the public's perception, the judge's personal beliefs to the first and foremost factor in the decision-making process.

The inclusion of a judge's personal views among the criteria for judicial election encourages a process of adjudication that is neither independent nor impartial. Instead, the process is transformed into an exercise in conforming to the views expressed during a campaign for judicial office; after all, the successful state judicial candidate likely will face a future campaign to retain his or her seat on the bench. But do we want judicial performance to be measured by the incumbent judge's fidelity to his or her personal views, as stated in the context of a campaign? I argue that we do not.

Additionally, politicizing the judicial branch affects judicial campaign financing. Following the high court's decision in *White*, the cost of election campaigns for judicial positions has increased enormously,³⁵ all too often accompanied by an apparent lowering and distortion of the standards used by the electorate in selecting judges. The recent focus on candidates' views on issues of importance has gone hand in hand with the increased pressures exerted by political and special interests, often expressed in the form of monetary contributions. A case that the U.S. Supreme Court decided during the last term vividly presents one of the troubling questions that can arise once a campaign is over and the successful candidate assumes the bench: at what point do contributions to a judicial election campaign become the basis for disqualification of the judge? Similarly, is there some point under the Due Process Clause at which the judge's stated views concerning particular issues should disqualify him or her from deciding a case raising those issues?³⁶

Ultimately, it does not matter whether the views voiced by the judicial candidate arise out of competing claims that may be characterized as Republican versus Democratic, labor union versus management, or plaintiffs' attorneys versus business interests. The result is the same: the increasingly partisan nature of judicial elections may well become a major obstacle to the public's acceptance of the decisions rendered by our courts. And if recusal becomes the preferred means of avoiding the appearance of bias resulting from a judicial candidate's expression of views during an election campaign, what are the consequences of such recusals for the courts and their ability to preside

35. See JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS* 2006, at 3 (2007), available at http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf (showing average spending on television advertisements for state supreme court candidates at an all-time high).

36. In *Caperton v. Massey Coal Co.*, the U.S. Supreme Court held that due process required recusal of a West Virginia Supreme Court justice in a matter in which the chief executive officer of a corporation, against whom a jury rendered a \$50 million verdict, contributed \$3 million in a successful effort to defeat a sitting justice of the West Virginia Supreme Court. The successful judicial candidate who opposed the sitting justice cast the deciding vote on appeal in setting aside the verdict. The Court held that the candidate who benefited from the CEO's contributions in defeating the incumbent must be recused under these circumstances without requiring a showing of actual prejudice, but taking into account the disproportionate amount contributed by the CEO and the timing of the contributions, the election, and the anticipated review of the underlying judgment. *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

over the cases brought before them?

III

California's judicial branch has made major advances in its ability to provide meaningful access and the impartial administration of justice for the rapidly growing and diverse society we serve.³⁷ Nevertheless, we are keenly aware that California's courts, like those of other states, are vulnerable to external forces that focus not on impartiality, but on whether judicial candidates appear to be receptive to particular majoritarian, political, or special-interest preferences. These disturbing influences may lead candidates to heed the will of the majority or the call of their own preferences instead of the mandate of the rule of law.

Public opinion surveys have shown that the outcome of a case is not the sole—or even the most important—determinant of whether a litigant believes his or her experience with the court was fair.³⁸ Having the opportunity to present one's case, and concluding that there was a fair hearing, rank very high.³⁹ In short, participation in a process that appears to have been impartial and accessible has a substantial impact on an individual's comfort with the outcome and confidence in the judicial system.⁴⁰

Other surveys have shown that three-quarters of the public believes money and special interests play a significant role in how judicial decisions are made.⁴¹ In Texas, where partisan and expensive judicial campaigns have been part of the electoral landscape for some time, a study of judges, lawyers, and the public showed that a substantial number of each, 48, 79, and 85 percent, respectively, believe that campaign contributions had an effect on judicial decisions. In response to those findings, U.S. Supreme Court Justice Anthony Kennedy observed: "This is serious because the law commands allegiance only if it commands respect."⁴² A recent study of Michigan, Nevada, and Texas judges reveals that these perceptions may not be unfounded; the paper concludes that campaign contributions have an impact on judicial decisions in states with partisan election of judges.⁴³ How can we confidently proclaim that

37. See, e.g., *supra* note 20.

38. PUB. AGENDA & DOBLE RESEARCH, *supra* note 24.

39. *Id.*

40. *Id.*

41. Memorandum from Stan Greenberg, Chairman and CEO, Greenberg Quinlan Rosner Research and Linda A. DiVall, President, Am. Viewpoint, to Geri Palast, Executive Dir., Justice at Stake Campaign (Feb. 14, 2002), available at <http://www.gavelgrab.org/wp-content/resources/polls/PollingsummaryFINAL.pdf>.

42. Pete Slover, *Lawsuit Challenges Texas' System of Electing Judges*, DALLAS MORNING NEWS, Apr. 4, 2000, at 21A.

43. See Chris W. Bonneau & Damon M. Cann, *The Effect of Campaign Contributions on Judicial Decisionmaking* (Feb. 4, 2009) (unpublished manuscript, available at <http://ssrn.com/abstract=1337668>) (describing study of Michigan, Texas, and Nevada judges).

our democratic system of justice is a model for the world when members of our own public—and even many individuals who hold judicial office—doubt its impartiality?

Is the role of the state courts—in the balance of powers among the three branches of government—different from that of the courts in the federal system of government? What kind of impartiality do we expect and desire from our state courts? As I have noted, most of us are likely to assume that the public shares our belief in the value of impartial state courts; yet that assumption bears examination in light of some of the trends I have described. To further the examination of these issues, I have appointed a Commission on Impartial Courts, chaired by my colleague, Associate Justice Ming Chin, to study various aspects of the effort to preserve state-court impartiality. The Commission's report and recommendations are expected later this year.⁴⁴

Most, if not all, judges would squarely align themselves with those who believe the goal of our judicial system should be to administer justice in a manner that is fair and impartial, and to decide cases based upon the law and the facts presented in the proceedings before the court. Although some of the potential effects of the increased politicization of the judicial-election process discussed here may sound extreme, the relaxation of the limits on judicial campaign speech already signals a growing negative impact on the public's perception of the fairness of the courts. Most troubling is that this development perhaps is not merely a perception, but represents an actual diminution of the fairness of the courts.⁴⁵

The definition of justice and the role of the courts in its administration are at stake. Are judges to be bound by the applicable law and the facts, or are they to accord primary attention to the views they have publicly espoused and the views of those institutions and persons who have supported them? Undoubtedly there are judges who may arrive at the conclusion they wish to reach, and then work backwards to find a rationale. But the possibility that some judges may do so provides no basis for discarding the fundamental principle and aspiration that judges should strive to apply the law fairly, and not rely upon their personal predilections in reaching their decisions.

We thus are called upon to engage in further exploration of the critical issue of judicial impartiality in the face of the argument that the electorate properly is interested in, and deserving of information concerning, the views of candidates for judicial office on issues that will come before the courts. It may seem axiomatic, but we must be able to explain and support the view that impartiality—real and perceived—is critical to the functioning of fair decision making in our state courts.

44. See News Release, Admin. Office of the Courts, Chief Justice George Names Statewide Commission for Impartial Courts (Sept. 4, 2007), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR50-07.PDF>.

45. See, e.g., Editorial, *Tainted Justice*, N.Y. TIMES, Nov. 13, 2008, at A36.

The new and more concrete identity of the judicial branch we have fostered in California is just that: a *branch* of government coequal with the legislative and executive branches. The judicial branch is recognized as not merely coequal in name or in theory, but also in function and reality. Our success in achieving this goal has enabled us to approach the task of providing meaningful access to justice in creative and unprecedented ways. But even as we have improved access, we have also focused on the necessity of protecting the courts from the vagaries of changes in public attitudes. These attitudes often are based upon the outcome of the latest case featured on the front page, frequently presented with minimal legal analysis explaining how the court reached its result.

On more than one occasion, threats of potential retaliation have been voiced because of disagreement with a judicial decision. Our branch's hard-won structural integrity, along with the rule of law, may well be undermined if candidates for judicial office are expected to express their views during election campaigns and similarly to conform to those views, no matter the state of the law, once they take the bench. Moreover, the occasional threat to the judicial branch budget, based upon the outcome of individual cases, may well become easier to carry out if such pressure is considered to be simply another aspect of the act of promoting political compliance.

I have attempted here to raise issues that go to the very heart of the role occupied by state courts in our national system of justice. One major challenge is to develop an appropriate and generally agreed-upon measure to define and guide impartial judicial decision making, free of improper political and other influences.

Avoiding political and other inappropriate pressures on the judicial decision-making process is a battle being fought on a continuing basis in judicial elections and court cases across the nation, and sometimes in legislative halls as well. All of us, whether scholars, public officials, lawyers, judges, students, or individuals interested in the workings of government, must seek to ensure that state-court systems continue to serve our society as sources of justice grounded in the rule of law, providing venues in which all persons may vindicate their rights and have their disputes fairly and impartially heard and resolved.

