# Shedding (Empirical) Light on Judicial Selection

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## I. INTRODUCTION

Relative to commentators at Political Science and Economics meetings, the discussants at law conferences are generally quite kind, genteel even. They almost always say, "This is a really wonderful set of papers" – even if the papers are not so wonderful – or that they really learned a lot from the papers – even if they didn't. Happily, with regard to the three papers the organizers asked me to discuss,[1] I need not stretch the truth for purposes of collegiality. I really do think they are a wonderful set of papers and really did learn a lot.

## II. OVERLAPPING CONCERNS

That's not all they have in common. To greater or lesser extents, all the authors would agree with the sentiment of a Texas chief justice: "No judicial selection system is worth a damn."[2] Or, to put it somewhat less colloquially, all judicial selection systems – whether in the United States or abroad – may have their comparative advantages, but they all have significant drawbacks as well.

How to deal with shortcomings of state election systems – and especially with the "problem" (or not) of organized interests – also moves to the fore in all three. Professor Schotland analyzes a number of important issues, but of particular concern to me – and probably to many of us in light of *Caperton v. A.T. Massey Coal Company*[3] – are his recommendations on the "thorny" issue of recusal.[4] Professor Schotland suggests that judges consult with a

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1. Roy A. Schotland, *A Plea for Reality*, 74 MO. L. REV. 507 (2009); Michael R. Dimino, *We Have Met the Special Interests, and We Are They*, 74 MO. L. REV. 495 (2009); Michael E. Solimine & Rafael Gely, *Federal and State Judicial Selection in an Interest Group Perspective*, 74 MO. L. REV. 531 (2009).

2. Schotland, *supra* note 1, at 508.

3. 129 S. Ct. 2252 (2009).

4. Schotland, *supra* note 1. Professor Schotland wrote his conference paper before the Supreme Court handed down *Caperton*. Of course, he was well aware of the case and offered numerous interesting insights.

panel of "wise" members of the legal community in deciding whether to grant recusal motions.[5]

Professor Dimino also makes some very interesting points in his paper. I was especially intrigued by his proposal that the states should allow interest groups to participate in the initial selection of judges but that they should not subject their judges to any form of retention.[6] Instead, the states should institute lengthy non-renewable terms for their judges.[7]

Professors Solimine and Gely's paper,[8] a more positive analysis of organized interests, takes its motivation from Landes and Posner's famous article, *The Independent Judiciary in an Interest-Group Perspective*.[9] As Solimine and Gely note, Landes and Posner focused on the role of groups ex ante in creating judicial selection systems,[10] but Landes and Posner did not elaborate on the role of groups in the ex post operation of those systems.[11] One reason for the omission is that (with some exceptions here and there) interest groups were not much of a presence until after the Landes and Posner paper appeared in print. Now, some thirty years later, organized interests are omnipresent. At the same time, the selection processes for state and federal judges have become more visible and, well, nastier, leading Professors Solimine and Gely to wonder, naturally enough, about the role of groups in politicizing both.[12]

## III. THE ROLE OF EMPIRICAL ANALYSIS IN ILLUMINATING THE IDEAS

These ideas, suggestions, and proposals are quite interesting and quite plausible. But to my mind they would all benefit considerably from empirical interrogation – whether conducted by the authors in subsequent papers or others attempting to follow up on the their claims.

### *A. Schotland,* A Plea for Reality[13]

Let me start with Professor Schotland's paper and the issue of recusal. Without doubt, his proposal that judges consult with a panel of "wise souls"[14] has the twin virtues of being smart and sensible, criteria not always met in law and social science work. On the other hand, I do wonder about the wis-

5. Schotland, *supra* note 1, at 520-21.

6. *See* Dimino, *supra* note 1.

7. *Id.* at 500.

8. Solimine & Gely, *supra* note 1.

9. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

10. Solimine & Gely, *supra* note 1, at 542.

11. *Id.*

12. *Id.*

13. *See* Schotland, *supra* note 1.

14. *Id.* at 521.

dom of adopting any approach to recusal – whether Professor Schotland's or those advocated by the lawyers and their amici in *Caperton* or even (perhaps especially) by the *Caperton* majority – in the absence of empirical evidence.[15]

To provide one example, consider the *Caperton* briefs. While some make causal claims (or assumptions) about the effect of campaign contributions on the judges' future decisions, as far as I can tell not one cites any rigorously and systematically developed social science evidence making the link.[16] Frankly, it would be surprising if they did because such evidence does not seem to exist.[17]

What the briefs cite instead are studies by organized interests (e.g., Texas for Public Justice), investigations by *The New York Times*,[18] and a controversial (to say the least) article appearing in a student-edited law review (with no offense intended to the editors of this Symposium issue).[19]

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15. *See* Ronald D. Rotunda, *A Preliminary Empirical Inquiry into the Connection Between Decision Making and Campaign Contributions to Judicial Candidates*, 14 PROF. LAW 16, 16 (2003) (making a similar point about the need for empirical data to test the assumption that "campaign contributions have a corrosive, corrupting affect [sic] on judicial decision making.").

16. For example, a study that adheres to the rules of inference, uses high quality data, deploys appropriate methods, and has passed muster under peer review.

17. I will not rehearse the existing literature and its problems here; Bonneau and Cann do it for me in a recent paper. 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_id=1337668; *see also* Rotunda, *supra* note 15, at 16 (reviewing some of the analyses conducted by organizations and reporters and concluding that "[t]hus far, studies of several states do not support a statistical conclusion that judicial campaign contributions may be corrosive."). Bonneau and Cann neglect a new study to be published in a law review, Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623 (2009). Shepherd's analysis, as well as Bonneau and Cann's, is quite interesting, though neither has been judged by a jury of his or her peers. For my views on peer review, see Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 125-129 (2002).

18. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct.1, 2006, at A1.

19. Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291, 1292 (2008) ("[C]ampaign donors enjoy a favored status among litigants appearing before the justices[of the Louisiana Supreme Court.]"). After a "critique" of the article uncovered errors in the dataset, the dean of the Tulane University Law School sent a letter of apology to the Louisiana Supreme Court justices (available at http://www.lasc.org/press_room/press_releases /2008/AR-TU_APOLOGY_LETTER.pdf), and the Law Review issued an erratum (the bottom of http://www.law.tulane.edu/tlsjournals/lawreview/index.aspx?id =2560&ekmensel=2a0cb046_160_0_2560_1). For the various critiques, see Kevin R. Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of the Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 281 (2009), and

The backgrounds and motives of the researchers and their (non-peer-reviewed) outlets may be particularly consequential here because the study I envision is especially hard to do. The problem centers on the inherent difficulty of performing causal inference. In the ideal study, we would randomly select a judge, assign her a campaign contribution from Party *A*, and have her decide Party *A*'s case. We would then reverse history and have the same judge decide the same case under the precisely same circumstances, but this time with no contribution from Party *A*. If the judge decided in Party *A*'s favor only when she received the contribution, we might conclude that the money had a causal effect on her decision. (We also would want to repeat this study across a range of judges to determine the overall impact of contributions.)

Of course we can't reverse history,[20] nor is it likely that we can conduct a proper experiment – the next best course of action. And these facts of research life substantially complicate the inferential task. Once we move from the laboratory to the real world we must, for example, deal with the very real possibility that firms, parties, and interest groups contribute to judges who agree with them on the relevant points of law. In that case, a vote for the defendant (or the plaintiff) is evidence of nothing more than a judge voting in accord with her judgment about the correct answer and not as a result of a campaign contribution. No one would accuse Justice Ruth Bader Ginsburg of voting in favor of positions advocated by the Women's Rights Project (WRP) in its briefs because she once worked there; they would say she once worked there because presumably she agrees with many of the WRP's positions, and so it is unsurprising that she often adopts its positions in her opinions. Simply put, the old adage holds: correlation is not causation.

Surmounting this obstacle, among others, requires sophisticated statistical methods, high quality data, and thoughtful researchers, but it can be done. Many social scientists have conducted empirical research on campaign contributions' effect on legislators' behavior,[21] a similar, though perhaps even

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Robert Newman, Janet Speyrer & Dek Terrell, *A Methodological Critique of the Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 307 (2009). I have been informed that Palmer and Levendis stand by their basic results, but I cannot find documentation to that effect.

20. This is known as the "fundamental problem of causal inference." *See* Epstein & King, *supra* note 17, at 37. For more technical discussions (including problems with conventional solutions), see Daniel E. Ho, Kosuke Imai, Gary King & Elizabeth A. Stuart, *Matching as Nonparametric Preprocessing for Reducing Model Dependence in Parametric Causal Inference*, 15 POL. ANALYSIS 199 (2007), and Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005).

21. The literature is vast. Examples include John Wright, *Campaign Contributions and Congressional Voting on Tobacco Policy, 1980-2000*, BUS. & POL., Dec. 2004, at 1; Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 J.L. & ECON. 345 (2002); Steven Le-

more challenging, problem.[22] I have no doubt that if these and other social scientists set their sites on judicial behavior they would be able to develop the evidence that is now so noticeably lacking.

This is not to say, I hasten to note, that claims about the connection between contributions and judicial decisions are incorrect; they may well be right. It is only to say that sophisticated assessments of the actual – rather than assumed – risk that campaign contributions pose to judicial independence would inform discussions of the circumstances under which recusal is warranted and what standards to adopt.

## *B. Dimino*, We Have Met the Special Interests, and We Are They[23]

Professor Dimino, recall, recommends non-renewable terms for state judges. A central argument in favor of this proposal is that it promotes judicial independence in two ways.[24] First, by removing the requirement that judges face the electorate to retain their jobs, it lowers the opportunity costs for judges to act in accord with their own sincerely held preferences (rather than in line with their constituents' desires). Second, non-renewable terms may sustain judicial independence in the long run by preserving the legitimacy of the court on which the judge serves. The argument here is that when courts undergo periodic turnover – such that many of the judges share the preferences of the regime that appointed them – they are less susceptible to

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vitt, *Are PACs Trying to Influence Politicians or Voters?*, 10 ECON. & POL. 19 (1998); Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder, Jr., *Why is There so Little Money in U.S. Politics?*, J. ECON. PERSP., Winter 2003, at 105; Kevin M. Esterling, *Buying Expertise: Campaign Contributions and Attention to Policy Analysis in Congressional Committees*, 101 AM. POL. SCI. REV. 93 (2007).

22. As E. Joshua Rosenkranz notes, contributions potentially influence not just legislators' votes, which are readily measurable, but also decisions that are more difficult to detect. E. Joshua Rosenkranz, *Faulty Assumptions in "*Faulty Assumptions*": A Response to Professor Smith's Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 876-79 (1998). Inaction – declining to introduce legislation, for example – can be as powerful as a vote, and even votes are tricky to decipher because a bill may contain a wide range of legislation, obscuring individual influences. *Id.* at 877-78. Judicial behavior, by contrast, may be easier to capture because the judges' most significant actions are their observable decisions (e.g., to grant motions for dismissal, to deny certiorari, to affirm, and so on), which resemble the legislative vote. On the other hand, researchers of judicial behavior must account for variations across state court systems – for example, difference in term length, whether elections are partisan or nonpartisan, and variations in court procedures. *See* Bonneau & Cann, *supra* note 17.

23. *See* Dimino, *supra* note 1.

24. I define judicial independence as the ability of judges to behave sincerely, that is, in line with their sincerely held preferences (whatever they may be). *See* Lee Epstein, Jack Knight & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 29 (2001).

public and political attacks.[25] Seen in this way, non-renewable terms might strike a balance between judicial accountability and judicial independence, two goals that often seem in tension.

For these reasons, I not only like Professor Dimino's suggestion; I must confess that I too have proposed non-renewable terms for both state and federal justices.[26]

I also must confess that I advocated non-renewable terms without a lot of empirical support. Some is needed, I think, before Professor Dimino or I press the point further. A central problem is that we both leave ourselves open to a critique Professor Dimino has noted before: non-renewable terms are unlikely to eliminate all potential influences on judges' decision-making.[27] For example, even if terms were lengthy, say fifteen years, many judges would still want to work after they departed from the bench. If a judge were elected at forty-five, she would be only sixty at retirement time. Assuming she desired to work for another fifteen years (or thirty if you're Justice John Paul Stevens), she might pursue her post-judicial career ambitions a bit prematurely – that is, while still on the bench. Judges thinking about a political career might begin to vote in ways that would please their future constituents and contributors and not in accord with what they believed the law demanded. Similarly, a judge who is interested in joining a particular law firm or lobbying group might be tempted to consider that organization's interests when ruling on particular kinds of cases. Either way, the judge would be acting in a sophisticated (i.e., not sincere) fashion over the course of her judicial career to maximize her chances of pursuing another.

Surely, if non-renewable terms led to these and other forms of careerism, their costs would begin to outweigh any perceived benefits. And that's why we need data. Empirical analyses would help us understand how well non-renewable terms would support judicial independence in light of their potential downsides. As a starting point, researchers could gather data on state judges to determine the likelihood of career-advancing behavior. Relevant information would include the judges' ages at initial selection and at the end of their term, the number of years they served, and what positions, if any, they took after leaving the court. If post-bench careers appear to be sufficiently common to warrant concern, scholars could analyze whether the judges' future employment influenced their decisions while on the bench.

Comparative analyses might also generate useful insights. Many European countries have adopted non-renewable terms for their constitutional

25. We develop these claims more fully in Epstein, Knight & Shvestova, *supra* note 24. Similar arguments, among many others, appear in Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 831-38 (2006).

26. *E.g.*, Epstein, Knight & Shvestova, *supra* note 24.

27. Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451, 458-59 (2008).

courts.[28] Anecdotal accounts from central and eastern European judges suggest that younger judges – those whose terms will end before they have reached traditional retirement age – are mindful of their post-tenure options.[29] Judges, however, are often appointed late in their careers, and many return to academic posts.[30] Of course, any comparative analysis would need to account for the differences among judicial systems. But equally without doubt, such research efforts could prove quite valuable in illuminating the merits – and disadvantages – of non-renewable terms.

### *C. Solimine & Gely*, Federal and State Judicial Selection in an Interest Group Perspective[31]

The suggestion in this paper is that interest groups have contributed to the increasingly politicized confirmation proceedings for federal judges and elections of state judges. I want to stress "suggestion" because Solimine and Gely are very careful in noting that other factors have contributed; they are not, in other words, pinning all the blame (or credit, depending on your perspective) on interest groups.

Still, theirs is an eminently testable proposition. I think here of research on whether the nomination of Robert Bork – a rallying point for so many liberal interests – fundamentally changed the nature of Supreme Court confirmation proceedings.[32] The short answer is that the extensive lobbying against Bork probably did have a big effect: the nominee's ideology is now more important than ever before. But – and this is a big but – while the importance of ideology has reached new heights, the Senate's emphasis on this

28. Calabresi & Lindgren, *supra* note 25, at 819-20 (noting that constitutional court members in France serve nine-year non-renewable terms and that Germany has a twelve-year non-renewable term); *see also* John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1677 n.22 (2004) (commenting that lengthy non-renewable terms are the standard model for European countries' constitutional courts); Epstein, Knight & Shvestova, *supra* note 24, at 31 (fourteen of the twenty-seven European countries in their study used non-renewable terms); Mary L. Volcansek, *Exporting the Missouri Plan: Judicial Appointment Commissions*, 74 MO. L. REV. 783 (2009) (pointing to the adoption of non-renewable terms by "new democracies" of eastern Europe).

29. WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 15 (2005) (quoting a Bulgarian Constitutional Court judge who remarked that his peers "continuously" try to satisfy political interests to secure post-tenure employment).

30. A. E. DICK HOWARD, JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 96 (Peter H. Russell & David M. O'Brien eds., 2001).

31. *See* Solimine & Gely, *supra* note 1.

32. Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296 (2006).

factor had its genesis some three decades earlier, in the 1950s, following *Brown v. Board of Education.*[33] The research thus supports Solimine and Gely's suggestion about the role of interest groups. But it also supports Robert Bork's claim that it was the increasingly political nature of the Supreme Court itself that led to increasingly politicized confirmation proceedings.[34]

Similar analyses for the state courts might be equally illuminating. While we know that organized interests are more involved in judicial campaigns, we do not know why and to what effect. Some say the blame (or credit) lies with *Republican Party of Minnesota v. White*, in which the Supreme Court struck down a canon of judicial conduct that prohibited candidates in state judicial elections from "announcing" their views on contested legal or political issues.[35] In the years since, some commentators have suggested that "*White* galvanized special interest groups to press judicial candidates for their positions on controversial issues."[36] Yet, as Professors Solimine and Gely observe, interest groups also have mobilized in response to the perception that state judges are deciding cases with significant public policy implications.[37] Another possible explanation is the increasing presence of national interest groups, which have provided support both to particular candidates and to local organizations.[38]

Empirical analysis would be useful in understanding interest groups' role in politicizing the judicial selection and retention processes. It would also help to illuminate on-going normative debates. Some commentators welcome the increased campaign spending and heightened political stakes as signs that that the democratic process is working. Others worry that interest groups threaten the legitimacy of the judiciary.[39] Either way, insights from well-designed studies could inform discussion of the desirability of interest group involvement.

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33. 347 U.S. 483 (1954).

34. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 348 (1990).

35. 536 U.S. 765 (2002).

36. Nat Stern, *The Looming Collapse of Restrictions on Judicial Campaign Speech*, 38 SETON HALL L. REV. 63, 99-100 (2008).

37. *See* Solimine & Gely, *supra* note 1 at 549-51.

38. Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1398-99 (2001) (noting the U.S. Chamber of Commerce's involvement in multiple state judicial elections and the American Tort Reform Association's role in creating M-Law, a Michigan-based pro-business organization).

39. *See* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 295-96, 301 (2008) (summarizing both sides of the debate).

## IV. CONCLUSION

I end where I began. All three papers present thoughtful ideas that should engage judges, attorneys, and law professors alike. They should also engage the empirical research community. Understanding the actual – and not merely assumed – effect of campaign contributions on judges' decision-making would aid efforts to assess the full range of proposals. Similarly, it would be instructive to determine how well non-renewable terms maintain judicial independence, given the possibility of careerism on the part of sitting judges. Finally, empirical research would generate insights into the extent to which interest groups have politicized the selection of federal judges and the retention of their counterparts in the states.