ARTICLE

SOME REALISM ABOUT ELECTORALISM: RETHINKING JUDICIAL CAMPAIGN FINANCE

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In his landmark article on judicial campaign finance, Roy Schotland bemoaned the scant attention given to elected judges in the law school curriculum.[1] He might have said the same thing about the treatment of elected judges in legal scholarship. With a few notable exceptions,[2] the existing works which discuss elected judges consist of short articles in bar journals and a small group of student notes. Perhaps for this reason, the writings on judicial campaigns have an oddly dichotomous quality. On the one hand, they reflect a concrete, on-the-ground quality that is regrettably foreign to legal scholarship. The compromises of integrity that can occur in the funding of judicial elections, and their aftermath, are so stark that they baffle those of us who are accustomed to more theoretical problems of adjudication, such as the "countermajoritarian difficulty." Yet when it comes to describing the judicial role that is compromised by such

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1. *See* Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 77 (1985). Schotland also refers to the "naiveté" in legal academia about state judges and judicial elections. *See id*. at 77-81. I would concur in this judgment, but would also stress, as I explain below, that there is a contrasting naiveté or idealism about the notion of judicial independence in the existing more practical literature.

2. One of these exceptions is a superb symposium in this very forum. *See* Symposium, *Election, Selection and Accountability*, 61 S. CAL. L. REV. 1555 (1988).

carryings-on, the scholarship assumes a far more abstract and idealized quality. It stresses "independence" of an uncomplicated sort that is rarely invoked by contemporary scholars writing in more heavily theorized areas.

In this Article, I will try to bridge the gap between idealized adjudication and alarming compromises, between the concrete realities of state judicial elections and more theoretical lenses through which legal academics have come to view adjudication. I will construct this bridge with materials from the tradition of realist and post-realist legal thought.

This body of work is vast and varied, and spans a period beginning in the 1930s and continuing through present day. My discussion of it will emphasize a few interrelated themes.[3] The first is the indeterminacy of legal rules and conceptions (such as the public/private distinction), and the latitude that this indeterminacy creates for judges to draw on extralegal sources in their decisionmaking process. The second is the social situatedness of judges and the strong, perhaps constitutive influence exerted on them by group membership, social structures, and cultural practices. The third is the movement of the judge from an Archimedian posture of objectivity to a range of positions that reflect more interest and involvement in the issues being litigated; a move that is offered often as a description and sometimes as a normative goal.

In building a bridge from this thematic material, I will focus on several questions. First, what have legal scholars come to think about the judicial role and, in particular, judicial independence since legal realism took hold? Second, how do the complications of judicial campaign finance look when played against this backdrop, rather than against the backdrop of an abstract and objectivist judicial virtue? And, finally, how might the

3. While the realists offered both descriptive and normative perspectives on judging, in this Article I focus almost entirely on the former. This may leave room for the criticism offered by Professor John Yoo that I (and other post-realists) offer no "metric" by which to assess particular examples of judging. *See* John C. Yoo, Comments at the Judicial Independence and Accountability Symposium at USC Law School, Program & Webcast Archive (last modified Nov. 21, 1998) <http://www.usc.edu/dept/law/>. Like Yoo, I believe it is useful for every legal theorist to have recourse to a framework that helps her to distinguish sound or praiseworthy from misguided or even culpable adjudication. However, legal realism teaches us that one's normative vision does not always arise out of one's descriptive or critical vision in a straightforward way. *See* Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1200-25 (1985) (arguing that realists had many different answers to the question of what should follow normatively from their critique of formalist approaches to adjudication; some, described as "scientific realism," placed the same somewhat naive faith in social science that formalists placed in the possibility of a "legal science"). In this Article, my point is not so much to say whether particular kinds of judging (or of judicial independence) are good or bad. Rather, it is to say that the post-realist characterizations of judicial independence that we apply in most areas of the law are not applied in the area of judicial campaign finance, though they might be beneficial if applied here.

insights of the post-realist legal universe help us think about solutions to the problems of judicial campaign finance?

I. REALISM, POST-REALISM, AND JUDICIAL INDEPENDENCE: CONCEPTIONS OF JUDGING AND JUDICIAL INDEPENDENCE

As legal theorist Joseph Singer has written, "[W]e are all legal realists now."[4] The realist insight that judges do more than locate objectively discernible answers within a logically coherent legal framework has irrevocably altered the way we conceive the task of judging. This transformation began with the rejection of salient strands of legal formalism—in particular, the notion that law operates as a complete and discrete system of rules from which the answers capable of resolving particular conflicts can be logically deduced. Legal realists challenge at least two aspects of this vision: the discreteness and the determinacy of the body of legal rules. Realists argue that legal rules are not determinate because the abstract terms in which they are framed[5] could be subject to varying interpretations. Even the holdings of particular cases can be read in a broad or narrow way.[6] As a result, judges can appeal to contrasting rules in order to resolve many of the most hotly contested cases.[7] It is thus not possible to say that rules alone could be used to resolve or predict the resolution of cases.

These arguments about indeterminacy are related to realist claims regarding the discreteness of legal rules. Because legal answers cannot logically be deduced from legal rules, the system is less discrete than legal theorists assumed. The system makes it inevitable and necessary for judges to bring factors from their knowledge of the social context of a particular case to their own normative premises and goals to bear on the decisions they make. Thus, judicial decisionmaking infused the body of legal rules with "external" influences, which meant that the law integrated insights from social policy, ethics, and other fields of practical and intellec-

4. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988). Singer notes, however, that this assertion is "partly true and partly false," because legal realism "removed certain sorts of arguments as persuasive tools, but it failed adequately to construct a new vocabulary and stance toward normative legal argument." *Id*. at 532.

5. For a vigorous realist critique of the legal tendency to focus on abstract distinctions rather than on "the social forces which mold the law and the social ideas by which the law is to be judged," see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

6. These arguments about the role of indeterminacy in realism draw on the analysis of Singer, *supra* note 4, at 470.

7. *See id*. at 470.

tual endeavor.[8] This descriptive observation has dovetailed with the realists' normative conviction that law should be an instrument for responding to social needs[9] and with the belief of some realists that forging a connection between law and social science could help serve this goal.[10]

These challenges to the conceptual autonomy of law have also had implications for notions of judicial independence. The conceptual determinacy and independence of certain formalist visions of law secure at least one kind of independence for the judge. A judge who must simply deduce answers from a self-contained conceptual scheme can remain independent of other bodies of knowledge or of the impinging influence of the immediate political context. When realists acknowledge that there are ambiguities to be resolved and choices to be made in the determination of legal controversies, they imply that judges cannot be wholly independent in these ways. They also imply that a judge's ethical precepts or policy preferences might play at least an ancillary role in her resolution of disputes.[11]

This insight reinforces another position taken by some realists: Aspects of judges' personalities inevitably influence their decisionmaking.[12] In the view of some realists, such as Jerome Frank, personality includes only elements of the judge's psychological makeup,[13] but to most it in-

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8. Felix Cohen, for example, described a "functional approach" at work in the best legal analysis that could also be traced through the study of religion and the social sciences. *See* Cohen, *supra* note 5, at 830-33. So for Cohen, this was both a description of a (cross-disciplinary) practice that occurred in some judicial decisionmaking, and a normative recommendation for what should guide judges in virtually all decisionmaking.

9. *See, e.g.*, Cohen, *supra* note 5, at 812.

10. Gary Peller describes this strand of realism as "scientific realism." *See* Peller, *supra* note 3, at 1222.

11. For a prominent post-realist's fascinating discussion of this kind of heteronomy in law, and correlative dependence by judges on other bodies of knowledge, see STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 141 (1994) (discussing law's inevitable interpenetration with interpretation, on the one hand, and ethics, on the other).

12. This is the view of legal realism—decisions depend on "what the judge ate for breakfast"—with which lay people and beginning law students are perhaps most familiar. It is also advanced in less stark form by some legal scholars. *See* LAURA KALMAN, LEGAL REALISM AT YALE 1927-60, at 164 (1986).

13. *See generally* JEROME FRANK, COURTS ON TRIAL (1949). Frank believed that elements of individual psychology had a particularly broad role in adjudication because the bulk of the task, contrary to what much legal scholarship of the time suggested, involved fact-finding. *See id.* at 4.

> [M]ost books by learned lawyers talk as if the chief difficulty in the job of the courts inheres in determining what rules should be applied, what the rules mean, their extent and interpretation . . . . But the other part of the job of the courts, . . . the ascertainment of the facts of individual law suits—presents a far more difficult, a far more baffling problem.

Id. Fact-finding gave scope to the elements of individual judicial psychology because such factors frequently determined how judges responded to particular witnesses and particular facts elicited through testimony. *See id.* at 150-55. Frank thus considered his realism to involve "fact-skeptic[ism]" as well as the "rule skepticism" more familiar in realist works such as those of Cohen.

cludes a broader range of influences, such as judges' political commitments or shared professional understandings. These notions introduce doubts not only about judges' independence from nonlegal bodies of thought, but also about their independence from other groups. The insight that judges' decisionmaking might be significantly shaped by the perspectives (or ideologies) of people outside the judiciary is a crucial strain in post-realist legal thought.

One prominent descendent of legal realism is the critical legal studies movement, which highlights judges' often unconscious investment in legitimating the existing economic and political order.[14] As members of an institutional elite, and, more generally, as citizens whose political consciousness tends to be shaped by dominant ideological premises, judges' thinking becomes infused with assumptions that tend to reproduce features of the existing legal, political, and economic system. These assumptions probably operate beneath the explicit awareness of many judges and serve to moderate judicial impulses toward transformation.[15]

As this movement has expanded into feminist legal theory, critical race theory, and gay and lesbian legal theory, the association of judges with a political or economic status quo[16] has been joined by an emphasis on standpoint epistemology. A judge is unlikely to occupy a posture of complete objectivity in relation to the issues presented in a case, because she inevitably has a set of experiences or perspectives, often shaped by group membership, that confer a discrete vantage point on the issues involved. This question of objectivity can also be characterized as one of independence, in the second sense described above, from groups and group-based perspectives. These experiences or perspectives do not necessarily dictate a judge's decision in a particular case, but they may lead a judge to frame a case in particular terms, or they may exert some torque upon the judge's thinking in resolving a case. To what extent and on behalf of what notions a judge is willing and able to resist such perspectives

14. For a vivid example of this kind of argument in my own field of antidiscrimination law, see Alan David Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

15. A range of works reflecting these premises are collected in the path-breaking anthology, DAVID KAIRYS, THE POLITICS OF LAW (3d ed. 1998).

16. For an elaboration of this point in the critical race literature, see Kimberle Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988). For a comparable elaboration in the feminist literature, see Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987). An article on gay legal theory that makes some similar arguments about the role of judges in legitimation is William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994).

varies greatly with the nature of the case, the self-awareness of the judge, and the judge's conception of her role. But these variables combine to produce in realist and post-realist thought a range of positions a judge might occupy in relation to the substance of a particular case. She may feel, by virtue of affiliation or group membership, more or less implicated in the issues being litigated. She may assume a posture more distant from the litigants or strive for more imaginative engagement with the way the case's outcome may affect their lives.[17] In such analyses, the Ar-

17. Judith Resnik has observed that cases on recusal can function as an interesting window into what we regard as judicial objectivity. *See* Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988). Two recent cases on recusal help to illustrate the range of postures or relations to litigants and issues framed by realist and post-realist work. In the first, *Blank v. Sullivan & Cromwell*, a defendant in an employment discrimination case sought to have Federal District Court Judge Constance Baker Motley recuse herself on the ground that her gender made her unable to address the case with the requisite objectivity. *See* 418 F. Supp. 1 (S.D.N.Y. 1975). The plaintiff sued the defendant law firm under Title VII for sex discrimination in its employment practices. The defendant Arthur Dean requested Judge Motley to recuse herself "on grounds of personal and extrajudicial bias" against him. *Id.* at 1. The defendant alleged that Judge Motley should disqualify herself because she would strongly identify with the victims of sex discrimination in employment and quoted her statement (not given in the case) on the crippling effects of discrimination. *See id.* at 4. Judge Motley refused to recuse herself and gave an eloquent response to the defendant's request:

> It is beyond dispute that for much of my legal career I worked on behalf of blacks who suffered race discrimination. I am a woman, and before being elevated to the bench, was a woman lawyer. These obvious facts, however, clearly do not, ipso facto, indicate or even suggest the personal bias or prejudice required by § 144. The assertion, without more, that a judge who engaged in civil rights litigation and who happened to be of the same sex as a plaintiff in a suit alleging sex discrimination on the part of a law firm, is, therefore, so biased that he or she could not hear the case, comes nowhere near the standards required for recusal. Indeed, if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.

Id.

The criticism of this motion, as well as the broad approval of Judge Motley's decision not to recuse herself, suggest that many legal commentators believe that judges may be implicated in broad, identitarian or political ways—such as Judge Motley's efforts as a leading civil rights advocate at the time of Title VII's enactment—in the issues before them without rendering them unable to adjudicate a particular case. *See* MacDraw, Inc. v. The CIT Group Equip. Fin., Inc., 994 F. Supp. 447, 456 (S.D.N.Y. 1997) (approving Judge Motley's decision on the recusal motion in *Blank*). For a thoughtful discussion of this and related cases concerning race-based recusal motions, see Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 114-19 (1997).

On the other end of the spectrum, Judge Guido Calabresi of the Second Circuit recently recused himself sua sponte from *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996), a case raising the constitutionality of the government's "Don't Ask, Don't Tell" policy, on the grounds that he had spoken against the government's prior exclusion policy while dean of the Yale Law School before going on the bench. *See Judge Withdraws from Case on Gays in Military*, S.F. CHRON., Dec. 20, 1995, at A14. Judge Calabresi's recusal may suggest that judicial involvement that extends to identifying oneself with, or even engaging in public persuasion on behalf of, a particular position on an issue may render a judge too strongly engaged with that particular issue to render a fair opinion. However, the fact that

chimedean position, which was assumed prior to realism and proved to be a viable judicial position "beyond" or "outside" particular controversies, is viewed as descriptively unattainable and, in some contexts, normatively undesirable.[18]

This last insight reflects a point made more recently by feminist theorists: Strict detachment from the perspectives of litigants, which many legal thinkers view as a feature of objectivity or independence, is not simply elusive but is also undesirable.[19] Feminists and other critical scholars argue that what is sometimes lauded as salutary distance actually functions as a means of evading responsibility. A judge who does not fully contemplate the impact of a particular decision on the lives of litigants and those similarly situated, for example, may fail to acknowledge the violence or pain imposed by his decision. Such a judge acts without full comprehension of the tangible meaning of his work. According to this view, an ability to foster a kind of imaginative interdependence—to put oneself in the course of judging in the position of each of the litigants whose case one resolves—may be a crucial aid rather than a barrier to sound adjudication.[20]

some scholars (including myself) believe that it may not have been necessary for Judge Calabresi to recuse himself suggests that the range of acceptable postures or identifications may be fairly broad.

18. Many works within critical jurisprudence have made this point. An exemplary work in this vein is Martha Minow, *The Supreme Court 1986 Term, Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

19. The two most significant works offering this perspective are Martha Minow & Elizabeth Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988), and Resnik, *supra* note 17.

20. Legal theory is not the only place where the post-realist visions of judging have made their mark. While extreme versions of these theses may threaten to obliterate claims of judicial objectivity or independence, more circumscribed versions have shaped mainstream conceptions of the judicial role, and have even been offered by judges in characterizing their work. For example, in her concurrence in *J.E.B. v. Alabama*, 511 U.S. 127 (1994), Justice O'Connor explained why gender might make a difference in the way a trier of fact regards a particular case:

> We know that, like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors. Moreover, though there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case. "Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them." Individuals are not expected to ignore as jurors what they know as men—or women.

511 U.S. at 148-49 (O'Connor, J., concurring) (quoting Beck v. Alabama, 447 U.S. 625, 642 (1988)) (citations omitted). Wisconsin Supreme Court Justice Shirley Abrahamson has made a similar point about judges who act as triers of fact. *See* Resnik, *supra* note 17, at 1928-29. Ambivalence about the norm of judicial detachment has touched judicial self-conceptions as well. Justice Blackmun, in particular, fought the irresponsibility that threatens to be the counterpart of detachment by extensive, sometimes emotive, engagement with the facts and fates of those before him. "Poor Joshua!" he exclaimed, dissenting from the refusal to find state liability in the systematic parental beating of a small child. *See* DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting). In one of his final opinions, a partial dissent in *Planned Parenthood v. Casey*, 505

II. REALISM AND ELECTED STATE JUDGES

A. JUDICIAL ELECTIONS

If, in fact, we are all legal realists (or post-realists) now, the transformation is not yet complete. There is one area where a dose of realism seems to be long overdue; the election of state judges.[21] Nearly eighty-two percent of state appellate judges and almost eighty-seven percent of state trial court judges stand for election of some type.[22] While the majority of these elections are uncontested, contested races have become considerably more frequent over the last two decades.[23] Involvement of state judiciaries in such contentious areas as the death penalty, criminal law enforcement, and reproductive choices has meant that even the formerly still waters of retention elections have become roiled in controversy in some states. More pointedly, some prominent jurists have acknowledged recently that the process of facing election has the power to influence judicial thinking on controversial issues. The late California Supreme Court Justice Otto Kaus argued that judicial elections were the "alligator in the bathtub" of the judicial consciousness. He also acknowledged that electoral pressures

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U.S. 833 (1992), he acknowledged the relation between his own fate and that of women asserting the right to reproductive choice in both the opening and closing to his opinion. He stated:

> Three years ago, [ ] four Members of this Court appeared poised to "cas[t] into darkness the hopes and visions of every woman in the country" who had come to believe that the Constitution guaranteed her the right to reproductive choice. All that remained between the promise of *Roe* and the darkness of the plurality was a single, flickering flame. Decisions since *Webster* gave little reason to hope that this flame would cast much light. But now, just when so many expected the darkness to fall, the flame has grown bright.
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> I do not underestimate the significance of today's joint opinion. Yet I remain steadfast in my belief that the right to reproductive choice is entitled to the full protection afforded . . . before *Webster*. And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.
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> . . . .
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> In one sense, the Court's approach is worlds apart from that of the Chief Justice and Justice Scalia. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.
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> I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

Id. at 922-23, 943 (Blackmun, J., concurring in part and dissenting in part) (quoting Webster v. Reproductive Health Servs., 492 U.S. 490, 557 (1989) (Blackmun, J., dissenting)) (citations omitted).

21. The realists did not manifest their successors' disproportionate focus on the federal bench: Their emphasis on the common law assured that state courts were the subjects of much of their observation. Yet, their concern with how state judges performed their work rarely extended to the ways in which state judges were chosen. My reading of the realists suggests that they gave little consideration to the effects that contested elections would have on judicial independence or objectivity.

22. *See* REPORT AND RECOMMENDATIONS OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, Part II, at 3 n.1 (July 1998) [hereinafter ABA TASK FORCE REPORT].

23. *See id.* at 13-18.

may well have affected his decisionmaking in several controversial cases.[24] His statement prompted a similar acknowledgment by Joseph Grodin, one of three California Supreme Court Justices unseated in 1986.[25]

While these insights have received a good deal of attention, particularly in the wake of the 1986 California retention elections, they have not prompted academics and other legal commentators to reconceptualize the judges' role or reform the electoral process. Responses to the judicial acknowledgments of potential influence have been particularly revealing. Some participants and observers have denied them outright, as exemplified by one (judicial) author's assertion that Justice Kaus could not have actually meant what he said.[26] Others have employed a surprisingly broad typology of state court judges to suggest that such pressures only afflict the unfit, while those with the appropriate judicial temperament are predictably able to resist them.[27]

A second response to the realist challenge implicit in these admissions focuses not on the state judges themselves but on their electoral audience. For every 1986 California retention election, this argument goes, there are hundreds of "low salience" judicial elections in which voters do not insist that judicial decisions reflect their personal values, or in

24. *See* Philip Hager, *Kaus Urges Reelection of Embattled Court Justices*, L.A. TIMES, Sept. 28, 1986, at A23.

25. *See* Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988).

26. *See* Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Elections of 1986*, 61 S. CAL. L. REV. 2007, 2057 (1988). In fairness to Justice Thompson, I should note that this doubt about Justice Kaus's statement is based on an extremely high opinion of him, and although Justice Thompson is willing to exempt Justice Kaus from the kind of behavior being considered, he acknowledges the relevance of the problem:

> Based on a long and close association with Justice Kaus, including service with him on the same district of the California Court of Appeal, I simply do not believe that despite his speaking in the first person he was in fact speaking of himself. It is very much in his character to have done so kindly to avoid the appearance of attack upon some other justice of the court. There are judges willing to be a crocodile meal for the sake of principle and Justice Kaus has always given the strongest of indications of being one of them.
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> Nevertheless, the comments of Justice Kaus merit thought. They bear out the intuition that judges are not fungible in their characters. There is likely to be a bell curve of the various personal characteristics of judges as in any other group . . . .

Id. It would have suggested a more thoroughgoing willingness to consider Justice Kaus' point, however, if Justice Thompson had allowed the possibility, particularly when it was raised by the Justice himself, that even the most morally exemplary of judges can suffer conflicts in the context of such electoral pressure.

27. *See* Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2004 (1988). I emphasize my surprise at this somewhat unnuanced typology, which ends with the witty but reductive suggestion, "if you cannot cope with the crocodile, get out of the bathtub," in large part because it does not correspond with what I consider as the originality and nuance that is characteristic of Justice Linde.

which voters may know little about state judicial decisions and care even less.[28] If we look only at elections that have become hotly contested, this approach appears to have some empirical grounding. Existing studies of the judicial electorate often reveal a public that is uniquely ill-informed about judicial elections and forgets what little it knows soon after exiting the polling place.[29] Yet this empirical response does not—and perhaps cannot—measure an equally important dynamic: the extent to which elections never become hotly contested because judges consciously or unconsciously trim their decisional sails in an effort to avoid a censorious popular response.[30]

The empirical answer to judicial admissions regarding electoral pressure is also joined by a more normative response. The search for shared policy preferences is neither the best nor the only means by which voters can assess judicial performance through elections. There are a range of other standards more responsive to the distinctive relationship(s) that exist between elected judges and their constituents, and state electorates can and should be schooled about the appropriate criteria for selecting or retaining judges.[31] Professor Erwin Chemerinsky argues, for example, that voters should vote "against justices only if they demonstrate that they are unfit for office, corrupt, or incompetent" rather than casting votes based on judges' particular decisions.[32] The resort to—even the articulation of—such criteria reduces the likelihood of compromising pressures on judicial decisionmaking. Yet it does so by attempting to reduce the popular pressure on judges, not by confronting the effect that such pressure—to the extent it emerges—has on judicial decisionmaking.

These latter arguments, whatever their drawbacks, have served as a sort of a safety valve between the widespread use of judicial elections and the pressure of realist insights offered by judges such as Kaus and Grodin. If judicial elections are largely a low salience matter and they can be rendered more so by the proper schooling of the electorate, then they may be regarded as having a limited impact on the character of judicial decision-

28. *See, e.g.*, CALIFORNIA COMM'N ON CAMPAIGN FINANCING, THE PRICE OF JUSTICE: A LOS ANGELES AREA CASE STUDY IN JUDICIAL CAMPAIGN FINANCING 35-37, 74 (1995) [hereinafter LOS ANGELES AREA CASE STUDY].

29. *Id.* at 37, 77-79.

30. I thank Roy Schotland for this insight. *See also* Memorandum from Roy Schotland to Kathryn Abrams (1998) (stating that state court judges in some rural areas are asking that urban judges be brought in to adjudicate abortion cases, on the ground that deciding such cases exerts too much pressure on identifiable, and targettable members of small communities).

31. For examples of this approach, see Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985 (1988); Grodin, *supra* note 25.

32. Chemerinsky, *supra* note 31, at 1985.

making. They create conundra for theories of electoral representation to be sure,[33] but they need not present a decisive challenge to what we prefer to conceive as the independence even of elected state court judges. This somewhat uneasy truce over the election of state judges has been disturbed, however, by the increasing salience of judicial campaign finance. This issue has revitalized the questions about outside pressures on judicial decisionmaking in a form that is more difficult to evade than the issue just discussed.

B. JUDICIAL CAMPAIGN FINANCE

Two major factors have increased the importance of judicial campaign finance in the past twenty to twenty-five years. The first is the rapidly rising cost of waging a successful judicial campaign.[34] A variety of factors have contributed to costs that may run into the six- or seven-figure range, depending on the jurisdiction, office, and race.[35] Recent campaigns, particularly in urban areas, have been marked by a growing reliance on forms of advertising and public education that are more expensive than the traditional posting of signs or door-to-door campaigns. The use of radio or television spots, for example, may run into the tens of thousands of dollars for a single ad.[36] Costs also have been increased by efforts in some recent elections to transform particular judicial votes into referenda on the death penalty or other features of criminal law enforcement.[37] Such elections need not even be contested elections. If a sitting governor or other group

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33. For a discussion of some of these conundra in characterizing judicial "representation," see Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409 (1993).

34. The California Commission on Campaign Financing, for example, found that "spending in Los Angeles County Superior Court races has increased 22-fold" between 1976 and 1994. LOS ANGELES AREA CASE STUDY, *supra* note 28, at 51. The race for Chief Justice of the Ohio Supreme Court went from $100,000 in 1980 to $2.7 million in 1986. *See* SARA MATHIAS, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS 43 (1990). Similarly the successful candidate for Chief Justice in Montana recently spent $250,000, which reflected a 320% increase from a little more than a decade earlier. *See id*.

35. Recent studies suggest that successful campaigns for judgeships on state supreme courts may cost upwards of a million dollars. *See, e.g.*, MATHIAS, *supra* note 34. Candidates for superior court judgeships in Los Angeles County may spend close to $100,000. *See* LOS ANGELES AREA CASE STUDY, *supra* note 28, at 51-52.

36. *See* LOS ANGELES AREA CASE STUDY, *supra* note 28, at 46 (noting that the California Supreme Court justices who lost their seats in the 1986 retention elections spent $1 million on television advertising in the final week of the campaign alone). *See also* Schotland, *supra* note 1, at 63-64 (describing a hotly contested judicial campaign in New York in which candidates spent more than $50,000 in radio advertising).

37. *See* Gerald Uelmen, *The Fattest Crocodile: Why Elected Judges Can't Ignore Public Opinion*, CRIM. JUST., Spring 1998, at 4.

of political opponents choose to target a judge for particular decisions, such efforts create charges that must be answered. They generate a need for higher visibility and contact on the part of the incumbent judge.[38] Another cost has been the charging of fees in connection with crucial endorsements. While endorsement practices vary from jurisdiction to jurisdiction and have been the target of enforcement by some groups seeking to reform electoral practices, commercial endorsements have upped the financial ante in a number of states and municipalities. The use of "slate mailers"—the mailing of "privately prepared sample ballots that list slates of candidates"—has sometimes resulted in bidding wars in which the slot goes to the highest paying (qualified) candidate without regard to the candidate's party affiliation or relation to the organization preparing the slate.[39] Political parties have sometimes sought contributions from candidates in partisan judicial elections, which they use to support the ticket as a whole.[40]

Complicating this pattern of increasing costs is the fact that attorneys are often important contributors to judicial campaigns.[41] Attorneys may give funds, or donate materials or time because they genuinely admire a particular judicial candidate. However, both patterns of giving and direct statements by benefactors make clear that other motives often play a role. The starkest example is of individual lawyers or law firms making contributions during a pending case under circumstances that suggest an effort to curry favor with a judge who has been, or may be, assigned to the case. The dismal story of the Pennzoil litigation has been repeated many times, but it still retains its power to shock.[42] During the Pennzoil-Texaco lawsuit, a lawyer from Pennzoil contributed $10,000 to the re-election campaign of the trial judge initially assigned to the case. Texaco objected and

38. Uelmen gives several examples of state supreme court justices targeted by political leaders in their respective states, frequently over issues of criminal justice. *See id.* at 5 (Justice Penny White of Tennessee, who was defeated), 7 (Justice Rosemary Barkett, who succeeded in her retention bid but was defeated when nominated to the 11th Circuit Court of Appeals; also, then-Chief Justice Leander Shaw, who was obliged to raise $300,000 to retain his seat when faced with a recall campaign organized by antiabortion forces).

39. *See* Schotland, *supra* note 1, at 69-71. *See also* LOS ANGELES AREA CASE STUDY, *supra* note 28, at 57 (quoting one judge who was solicited for substantial sums to be included in campaign slate mailers).

40. *See* Schotland, *supra* note 1, at 64-66.

41. *See* ABA TASK FORCE REPORT, *supra* note 22, at 10-11, 89-92 (documenting the variation in attorney contributions to judicial campaigns (as much as 75% of campaign costs) but finding no discernible pattern in the extent of attorney contributions).

42. The following description is drawn from the account provided by Jason Levien & Stacie Fatka, *Cleaning Up Judicial Campaigns: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71, 71 (1997), but accounts of this debacle pervade the literature on judicial campaign finance.

demanded a new trial, while simultaneously contributing $72,700 to seven Texas Supreme Court justices who were in a position to make the final ruling on the case, including three justices not up for re-election. Pennzoil then contributed more than $300,000 to the campaigns of the supreme court justices and eventually became the victor in the lawsuit. More prevalent patterns are less stark, but still suggestive of opportunistic motives. Some firms or particular segments of the bar contribute to judges whose campaigns are uncontested; others contribute to both competitors in order to hedge their bets concerning the outcome; still others send a contribution as a "show of support" after a particular candidate has been elected.[43] As one veteran attorney put it, "'People who make substantial contributions do so with the thought of gaining a responsive ear.'"[44] This may be true even in cases where contributors doubt a judge's qualifications.[45] Finally, in some segments of some bars, contribution has become such a prevalent norm that lawyers pay in order to avoid "jeopardizing . . . [their] clients in [a particular] judge's courtroom"[46] or to avoid looking cheap. One attorney described his contribution of $1000 to a supreme court campaign by saying, "[f]or the Supreme Court, for a successful attorney, if you give less than that, you look like a chintz."[47]

These contributions create lines of influence that are clearer and more compelling than those that connect elective judges to the voters more broadly. The number of elections in which judges depend critically on campaign contributions is likely to be larger than the number of "high salience" elections in which mobilized voters measure judicial performance by their own political norms. Moreover, as a result of disclosure requirements imposed by most states, judges know precisely who has contributed to their campaigns and how much. Because these are often lawyers' groups associated with particular substantive positions or firms known to represent particular clients, it is difficult for a judge to avoid hearing a clear message about the interests favored by his financial supporters. The

43. *See* Schotland, *supra* note 1, at 63.

44. Daniel R. Biddle, *Fear Contributes to Lawyer's Donations*, PHILA. INQUIRER, May 15, 1983, at 23-A (quoting Edward S. Levy, a long-time Philadelphia attorney). Further evidence of this purpose may be found in the fact that when bar associations create blind trusts to fund judicial campaigns, they are rarely able to raise substantial amounts. *See* LOS ANGELES AREA CASE STUDY, *supra* note 28, at 114-15 ("Lawyers are apparently less willing to contribute to judicial candidates if their contributions are made anonymously through a trust fund.").

45. One lawyer described the widespread contribution by attorneys to the campaign of Allegheny County Common Pleas Court Judge Rolf Larsen for the Pennsylvania Supreme Court, despite the fact that many doubted his qualifications. "What could I say? He was a sitting judge." Biddle, *supra* note 44, at 23-A.

46. Schotland, *supra* note 1, at 63.

47. Biddle, *supra* note 44, at 23-A.

increasingly urgent need for contributions fueled by skyrocketing campaign costs adds to the judge's sense of past obligation and a sense of future concern: A group that is deeply dissatisfied with decisional outcomes may support a competitor or fund the opposition in a retention election. The financial power connected with judicial campaign funding may appear no more decisive than the voters' power to unseat a particular judge in a future election, but it is closely and increasingly linked to that negative outcome. Moreover, because these implicit threats are communicated by known actors with identifiable interests who know precisely how to assess judicial performance in relation to their goals, such pressures can be extremely difficult to ignore.[48]

Notwithstanding the larger pressures and starker betrayals associated with contributions to judicial campaigns, this facet of elected judges has remained insulated from realist perspectives. This holds true in two respects. First, through a combination of First Amendment restrictions, vestigial Jacksonian democracy, and political inertia, most states have failed to respond adequately to these worrisome constraints on elected judges.[49] Perhaps more interesting, even those descriptions that have sought to expose and correct the inappropriate pressures created by judicial campaign finance have critiqued this influence by reference to unexamined, one might say prerealist notions of judicial independence. For example, two authors of an article on revising *Buckley v. Valeo*[50] to respond to problems in judicial campaign finance refer cryptically to the "independence and integrity of the judiciary."[51] In another example, an article discussing proposed revisions in the Model Code of Judicial Conduct discusses in a

48. Although it is not part of my focus here, a question of public perception arises in the context of judicial campaign finance that is not present in the context of judicial elections or retention votes. A judge who responds to constituent opinions may be viewed as acting as a responsible public servant and may be suspect only in contexts such as those identified by Justice Kaus where the judge alters a vote from a long-standing pattern because of electoral pressures. In contrast, a judge who responds to the preferences of contributors in pending litigation will almost certainly be viewed as coopted or corrupt, or as having had his opinion "bought" through contributions. This concern with the appearance of impropriety is a recurrent theme in the literature on judicial campaign finance. *See* MATHIAS, *supra* note 34, at 47-48; Levien & Fatka, *supra* note 42, at 71-73, 76-78; Schotland, *supra* note 1, at 90-96.

49. It is noteworthy in this regard that both Schotland, *supra* note 1, which was written in 1985, and the LOS ANGELES AREA CASE STUDY, *supra* note 28, which was written a decade later, focus on the same three local bar initiatives that attempted to respond to problems with judicial campaign finance. *See* Schotland, *supra* note 1, at 97-107; LOS ANGELES AREA CASE STUDY, *supra* note 28, at 90-93. The California Commission study, however, does consider other proposals such as Model Code responses and public financing efforts.

50. 424 U.S. 936 (1976).

51. Levien & Fatka, *supra* note 42, at 85-86.

starkly unelaborate manner the need for an "independent, fair, and competent judiciary."[52]

There is doubtless more than one reason for this choice. Those most concerned about the questionable ethics of judicial campaign finance are lawyers and judges, who may have little time for, or interest in, the jurisprudential niceties that preoccupy academics. Moreover, the most striking offenses may be stark enough to render insignificant any quarrels over the model to which they may be compared. If judicial contributions amount to all-too-effective influence peddling, does it matter whether the appropriate mode of judicial behavior is that of a classical objectivist jurist, Dworkin's Hercules, or Derrick Bell's celestial curia?[53] Alternatively, perhaps—and this is the hypothesis I find most intriguing—judicial realism is somewhat of an embarrassment to those who want to resist the extension of legislative-style influence over the judiciary. If we want to oust the specter of judicial decisions sold to the highest bidder, we may want a model of judicial functioning that is hermetically sealed against the possibility of corruption, beyond reproach as to potential influence by extra-legal sources.

In the remainder of this Article, I will dispute this intuitive proposition. I will argue that realist and post-realist perspectives on judging produce no less critical a posture on current practices of judicial campaign finance. In fact, they may help both to refine our sense of what is inappropriate about this kind of constituent influence and to think more broadly about effective solutions.

III. LEGAL REALISM AND THE PRACTICES OF JUDICIAL CAMPAIGN FINANCE

Let us begin by crediting the central insights of the realists and their critical descendants. Judges are not detached, disinterested "others" who deduce legal answers from a logically complete and coherent system of rules. They are actors whose judgment and discretion must give shape and application to an often indeterminate body of rules. Moreover, they are human beings whose life experiences, affiliations, predilections, psychic needs, and accidents of fate push and pull against each other to influence the way they exercise this discretion. As proponents of critical legal stud-

52. Maura Anne Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 839 (1994).

53. *See* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); R. DWORKIN, TAKING RIGHTS SERIOUSLY 105-30 (1977); Derrick Bell, *The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997).

ies have suggested, these more particularized perspectives may render some judges unable or unwilling to disrupt dominant frameworks.[54] They may also render others more responsive to the plight of those made marginal, as feminists and critical race theorists have hoped.[55] Moreover, the potential for judicial identification—be it experiential or imaginative—with claims placed before the bench may not necessarily be a bad thing. It prevents the detachment that can make judges oblivious to their power over others, as well as their potential for wreaking change and violence on individual lives.

If we imagine judges to function in this way, does this somehow normalize or render palatable the influence exercised or threatened through judicial campaign contributions? Are there factors that distinguish the pressures imposed by campaign finance from the complex, identitarian, structural, cultural influences on judicial perception and posture described by realists and critical scholars? I believe there are several. First, the social affinities or influences that shape the discretion of the realist judge are more numerous, less explicit, and more potentially contradictory in their mandates, and, consequently, less predictable in their effect. Many of these influences, particularly group-based identities or affiliations, may shape judges' consciousness or frame their responses in ways that are neither predictable ex ante nor uniform when observed ex post. For example, both Justice Ginsburg and Justice O'Connor describe themselves as having had experiences related to their female gender that have shaped their approach to their profession, or to institutions of education or employment.[56] Yet these experiences or affiliations have produced perspectives that are distinct on the gender issues that have come before the Court, in part because these gender experiences are themselves complex and distinct, and contend with other constitutive experiences and commitments for influencing the Justices' decisionmaking.[57] Not only are these influences plural

54. *See supra* notes 14-15 and accompanying text.

55. *See supra* notes 16-17 and accompanying text.

56. *See* Ruth Bader Ginsburg, *Remarks on Women's Progress in the Legal Profession in the United States*, 33 TULSA L.J. 13 (1997); Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546 (1991).

57. Neither Justice has simply had the experience of "a woman" in the legal profession: Both have had the experience of elite white women, at the highest levels of academic opportunity and achievement. Justice Ginsburg's perceptions of gender may be mediated through her experience as a feminist law reformer or as a law reformer who espoused a particular liberal feminist position on gender inequality. Justice O'Connor's perceptions of gender may be framed by her early experience as a full-time mother or her later experience as a leader in a largely male, state legislative arena. In either case, the Justices' perspectives regarding gender are not the only or even the controlling influence on their decisionmaking. They vie in some incalculable atmospheric conflict with other assumptions about difference, judicial role, statutory interpretation, and more.

and contingent, they also are not necessarily focused on or framed to respond to legal issues.

In contrast with the diffuse, plural, cross-cutting messages communicated by group-based affiliation or shaped by prevailing political discourses, the messages communicated by attorneys' financial support are likely to be more explicit, more readily subject to quantification and comparison, and clearer in their import for particular cases. A judge is likely to know what the trial lawyers' association that contributed to his campaign believes about particular issues or particular kinds of cases, because it is part of their purpose as an organization to articulate views on such matters. A contribution made by a firm that represents a particular client or category of clients is likely to be equally clear in its import. A contribution made while litigation is pending is even less equivocal in the message it directs.

A second distinction concerns the different sources of (or motivations for) decisions influenced by social groups or discourses, and decisions influenced by campaign contributors. One of the central premises of post-realist critical scholarship is that group-based affiliations, or dominant or dissonant social discourses, are powerful engines of social construction: They are as constitutive of those humans who ascend to the bench as they are of any others. Judges most often do not understand influences of this sort to arise from outside themselves. These influences are part of the way a self is formed, and, while critical scholars counsel judicial cognizance or awareness of these constitutive forces, these scholars find it unrealistic, and in many cases undesirable, for judges to strive for separation from such influences in decisionmaking.

Influences from within the profession can also be constitutive of oneself as a judge or private citizen. A judge who has been president of a trial lawyers' association or who has consistently represented a particular kind of client is likely to be shaped to some degree by the perspective of that organization or that kind of client. But when a trial lawyers' association, or a law firm representing a particular kind of client makes a large contribution to a judicial campaign, they are not manifesting a willingness to rest simply on that constitutive association. They are at the very least seeking to remind a judge of an association in a manner that makes as much of an appeal to the judge's immediate or impending financial needs as to his sense of being affiliated or constituted by that connection. Moreover, in the probably more frequent case where the judge has no prior constitutive affiliation with a category of contributor, a contribution reflects an effort to secure a relationship of a different kind; one that offers financial support

in exchange for solicitude or receptiveness to the contributor's future legal claims. Money has been understood to make a claim of a particular kind on a judge's attention—this is one reason, for example, the Constitution provides that the compensation provided to federal judges may not be diminished during their service in office.[58] It invokes a distinct set of fears and aspirations. A judge who acts on the basis of a contributor's preference may not be acting on a self-generated normative vision that gives determinate meaning to the ambiguities in the law; she may instead be acting from a fear of the withdrawal or transfer of support, or about the solvency of future campaigns.

This last point also relates to the argument made by some feminist scholars that it is productive for a judge to experience some identification with, or become aware of, her power over the litigants before her. The process endorsed by feminists is one of imaginative identification, which makes the judge alert to the implications of her decision on the lives of litigants and third parties. The process experienced by a judge deciding a case involving a campaign contributor is in no way an extension of imagination. The interests of this judge are in fact intertwined with those of the litigant in the sense that the litigant's defeat may affect support for the judge in future campaigns. She acts not simply with an awareness of the implications of her decision for others, but also of the implications of her decision for her own professional well-being.

A final argument is that judicial campaign contributions, particularly those made under circumstances that suggest an effort to secure the judicial ear, alter the relationship between elected judges and their constituents in ways that experiential or other constitutive influences do not. The nature of the relation between elected judges and their constituents has been a matter of some controversy in that the device of electoral control appears to be in tension with the freedom from (or the more attenuated structure of) accountability that we believe necessary for some degree of judicial independence. A number of legal scholars, including myself, have sought to develop realist, or pragmatist modes of managing or ameliorating this tension.[59] This precarious balance is not necessarily disturbed by a vision that

58. *See* U.S. CONST. art. III, § 1.

59. I have argued, for example, that this tension can be managed or ameliorated by a conception that both requires judges to be aware of, and attentive to, the perspectives or preferences of their constituents—to the extent that consistent deviation from those perspectives demands some justification—and requires constituents to assess judicial performance by criteria broader than their personal preferences on the issues which judges decided. *See* Abrams, *supra* note 33; Chemerinsky, *supra* note 31; Grodin, *supra* note 25. I believe that argument, which supported the use of race-conscious districting for judicial elections, is consistent with my criticism here of "direct mechanisms of control." I

acknowledges that judges have affinities or perspectival frameworks shaped by particular groups, institutions, or discourses among the constituent body. These connections may amplify certain voices at certain times, but they do not provide mechanisms for control by these voices that alter a more attenuated, judicially appropriate structure of accountability. But this balance may be disturbed when constituents use their preferences—often on a particular issue—as the sole criterion by which to evaluate judicial performance, a possibility that is difficult to prevent and that raises ongoing questions about the appropriateness of an elected judiciary. It is unequivocally disrupted by systems of campaign funding that reintroduce more direct means of control. These means of control create a relationship more closely akin to that between a legislator and her constituents—a relationship that seems disruptive of the realist vision. For while legal realists rejected a vision of judging as a process of logical inference from a set of self-contained rules, neither did they see judging as unconstrainedly political or as continuous with the role of a legislator.[60]

IV. REALIST VISIONS, REALIST SOLUTIONS

Using realist and post-realist conceptions of judging as a standpoint for assessment helps us to identify several factors that should raise concerns about the influence of judicial campaign contributions. First, the singularity, explicitness, and case-relatedness of the messages such contributions often communicate distinguish them from the kind of complex, diffuse, non-case-specific messages we have come to view as an acceptable consequence of judges' social formation or group-specific affiliations. Second, campaign contributions create in judges motives for action that are distinct from the socially shaped, yet largely internalized, normative visions through which judges seek to resolve the indeterminacies implicit in legal rules. Third, campaign contributions create pressures that cause judges to see their own interests as intertwined with those of a party in a case, rather than leading them to identify imaginatively with the positions of the parties. Finally, campaign contributions create mechanisms of direct control over members of the judiciary that move relations of repre-

believe electoral districts of this sort do give a fairly direct mechanism of control to minority voters. However, I see this kind of remedy as specific to the Voting Rights Act and narrowly compensatory in that it grants such a mechanism to a group which, both the legislative history of the Act and the required showing of racial polarization suggest, has a distinct voice systematically muted in the electoral locality in question. *See* Abrams, *supra* note 31, at 1431-35. This is not true of the campaign contributors who are given a direct mechanism of control in the contexts discussed in this Article.

60. *See, e.g.*, FRANK, *supra* note 13, at 292-309 (analogizing roles of legislature and court to those of composer and performer, respectively).

sentation with constituents forcefully in the direction of a legislative model. These distinctions both outline the elements of the realist/post-realist model of judicial independence and suggest directions for change in the current system of campaign finance. In this section, I will discuss several such directions.

A. SOCIAL SITUATEDNESS AND THE TRANSFORMATION OF COLLECTIVE NORMS

One central insight of realist and post-realist scholarship is that judges, like everyone else, are socially situated. The biases, perceptions, sensibilities, and intellectual frameworks through which they approach their work are formed through group membership and social interaction. Moreover, these influences do not simply embellish the presocial personae of judges and others. Rather, such influences are systematically constitutive of who they are. The constitution of judges and others through social formation is an insight upon which one can draw in approaching the question of judicial campaign funding. Judges' membership in and constitution by a professional community may provide an instrument through which changes in norms and ultimately conduct can occur.

Judges and lawyers are part of a larger legal community—a community constituted by elements of shared professional training, common roles and practices, and a range of norms that emerge from these experiences. One must not, of course, oversimplify. Judges and lawyers are also constituted by a range of different relations that occur within that community: the hierarchical relation of a judge and an advocate within a given case; the representational relation of an elected representative to constituents; and many other relations that emerge from the intersection of legal with nonlegal group memberships. Yet, despite this complexity, and despite the evolution of judicial campaign practices, judges are members of a community that most likely still shares certain beliefs about matters germane to judicial campaign finance. Most members of this community probably share a certain set of views, for example, about the kinds of financial dependence that jeopardize the integrity of the judiciary or about the ways in which judicial relationships of representation vary from those of legislators.[61] Emerging practices of campaign finance might thus be constrained

61. As one California Superior Court executive officer explained, "I do think judges view the process of being elected differently than other officials." LOS ANGELES AREA CASE STUDY, *supra* note 28, at 103 (quoting Charles Ramey). *See also* ABA TASK FORCE REPORT, *supra* note 22, Part II, at 3-5 (describing the Task Force's unanimous support for the ABA's endorsement of merit selection of judges and its view of differences between judges and other elected officials).

by institutions that forcefully invoke, or in some cases, reestablish these professional premises.

Current practices of judicial campaign finance reflect a chicken-and-egg problem that does not have its origins solely in the effort of some lawyer-constituents to exert strong, quasi-legislative influence over judges.[62] The problem also stems from pragmatic, ad hoc efforts to address the spiraling costs of running an effective judicial campaign. Thus, the first thing members of legal communities might do to tackle this problem is to address the factors that have contributed to escalating campaign costs. Some of these costs have arisen from the need to distribute information to a public that is often poorly informed about judicial elections. The efficiency of comparatively expensive forms of mass communication is a central factor in this cost. Further costs have arisen from the need of judicial incumbents and other candidates to respond to high-profile challenges on issues such as crime or the death penalty by opponents, political leaders, or others whose interests have been or would be ill-served by particular incumbents or contenders. The latter difficulties may be more intransigent because they involve people with money to spend, who may not share the collective norms elaborated above. These problems may thus require the more systematic types of solutions detailed in Parts IV.B below. But funds expended on (and fundraising required by) particularly costly means of disseminating information to the public may be addressed in a more incremental manner. This problem would seem to require, first, the creation or facilitation of less costly options, and, second, the mobilization of a collective professional ethos to encourage the use of these options.

Empirical analyses of recent judicial campaigns have identified several modes of disseminating information about candidates that have increased campaign costs. Two of the most frequently discussed modes are television and radio spots and, in some jurisdictions, the use of commercial slate mailers. The latter, prevalent in states such as California and particularly influential in local campaigns, have been controversial because positions on a slate are often sold to the highest bidder, regardless of qualifications or substantive compatibility with the mailer's sponsors.[63] Resort to these approaches has often been fueled by the limited efficacy of publicly provided sources of information, such as state voter pamphlets. As the California Commission on Campaign Financing recently observed,

62. Some otherwise revealing articles on judicial campaign finance, such as Sheila Kaplan, *Justice for Sale*, COMMON CAUSE, May/June 1987, at 29, have been flawed by analyzing the problem exclusively in this way.

63. *See* LOS ANGELES AREA CASE STUDY, *supra* note 28, at 114-15.

some states or municipalities charge candidates stiff fees for inclusion in voter pamphlets and many limit the statements to "simple recitals of qualifications."[64] Thus, the Commission recommended that candidates be provided with free access to voter pamphlets if they agreed not to seek or pay for any endorsement in a slate mailer.[65] To make such pamphlets more accessible and useful sources of information, the Commission proposed that states abandon most limits on the information transmitted: Candidates should be permitted to compare their qualifications and views with those of other candidates, and to discuss their views on political issues, so long as they do not appear to commit themselves on cases that are likely to appear before them.[66] Making voter pamphlets available in electronic form for cable television or on the Internet was another proposal for enhancing accessibility and appeal to voters.[67] Such measures might be used to create less costly alternatives for disseminating information. Concerted encouragement from local bar associations in forms ranging from publicity to moral suasion might persuade candidates to forego comparatively expensive inclusion in slate mailers and take advantage of these less costly, but potentially informative, alternatives.

The potential of such approaches for the reduction of campaign costs might facilitate another reform: the imposition of contribution limits. Contribution limits are constitutional even under the current regime of *Buckley v. Valeo*,[68] and they have been endorsed by many of those who have studied judicial campaign finance.[69] Limits on contributions, particularly by lawyers and their families, would decrease the appearance of impropriety and might actually reduce the extent to which incumbent judges feel that neglecting the interests of a contributor in pending litigation would have consequences for future campaigns. More ambitious transformations, such as the use of expenditure limits, could be achieved only on a voluntary basis under the current legal regime.

The propagation and enforcement of community norms by an institution or institutions with significant standing among judges and lawyers

64. *Id.*, *supra* note 28, at 12-14, 99-105.

65. *See id.* at 99. *See also* Schotland, *supra* note 1, at 127-28 (proposing and discussing the use of voter pamphlets for which no fees would be charged).

66. See LOS ANGELES AREA CASE STUDY, *supra* note 28, at 102-03.

67. *See id.* at 107-08.

68. 424 U.S. 936 (1976).

69. *See, e.g.*, LOS ANGELES AREA CASE STUDY, *supra* note 28, at 12, 97-98 (recommending a $500 limit to judicial campaign contributions per donating individual or entity per election to "curtail the importance of large private contributions and at the same time enhance voter information"); Schotland, *supra* note 1, at 96-99 (Cleveland Bar Ass'n Plan).

could be of considerable assistance. One set of institutions which has been the primary vehicle for reform thus far is the "fair practice" committee of local bar associations.[70] Such groups may offer modest incentives—such as contributions from a fund for approved candidates, free publicity, or inclusion in bar association fundraisers—to elect and abide by voluntary expenditure limits.[71] They might be mobilized to press for expedients, such as state-sponsored voter information pamphlets. Finally, these groups might be employed to police violations of contribution limits, make public statements about unacceptable campaign practices, or pursue complaints regarding violations of these norms.[72] Particularly if staffed by leaders of known integrity, such groups would have the power to underscore for judicial candidates the normative assumptions and aspirations that are generally characteristic of the profession: the incompatibility of direct financial control with aspirations to independent (even if socially situated) judicial decisionmaking, and the professional aspiration to relations of representation (even in the context of elected judges) that are distinct from the legislative model.

A more systematic approach to institutional reform from within the profession is also currently in the offing. In July 1998, the ABA Task Force on Lawyers' Political Contributions presented a report which contained recommendations on lawyers' contributions to judicial campaigns.[73] Although this report has been presented to the ABA House of Delegates, it will not be voted upon until August 1999.[74] The Report analyzes practices of judicial campaign finance and lawyers' contributions in various states. It makes six recommendations for implementation through amendments to the Model Code of Judicial Conduct to address judicial campaign concerns.[75] These recommendations are:

> 1. Disclosure of lawyers' contributions to judicial campaigns, including contributions by spouses or dependent children.
>
> 2. Limits on contributions from everyone, including PACs and parties, and including indirect contributions through PACs and parties, which would be set on a jurisdiction-by-jurisdiction basis.

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70. Schotland advocates the use of bar committee oversight, citing the experience of the San Mateo County Bar Association and the Cleveland Plan. *See* Schotland, *supra* note 1, at 96-99, 128-29.

71. One version of this approach has apparently been employed by the Cleveland Bar. *See* Schotland, *supra* note 1, at 99.

72. *See id*. at 128-29.

73. *See* ABA TASK FORCE REPORT, *supra* note 22.

74. *See* Telephone Interview with Roy Schotland, Reporter of the ABA Task Force (Nov. 17, 1998) (notes on file with author).

75. *See* ABA TASK FORCE REPORT, *supra* note 22, at 19-59.

3. Availability of mandatory recusal of a judge in a case if the opposing counsel or party made a contribution that violated the general limit on contributions; or, if there is no general limit, violated the limit set as a trigger level for recusal.

4. Limits on judges' appointments of contributors who gave more than a specified limit, with an exception for special situations.

5. Limits on retaining surplus funds left over after a campaign.

6. Additionally:

a) To add to the information available to voters, Voters' Guides (such as Washington State had for 1996 and 1998 elections).

b) Judicial campaign oversight committees (like the long-standing committee initiated by the Columbus Ohio Bar, or the new one appointed this year by the Alabama Supreme Court).

c) National Center for State Courts should create a system to receive and compile data on judicial campaign finance to establish baselines for frequently used practices and highlight practices perceived as problematic.[76]

The Task Force's proposals address some of the most urgent issues regarding judicial campaign finance, such as the need to control the costs of campaigns and provide the public with greater access to information about candidates. It also incorporates additional safeguards or enforcement mechanisms, such as mandatory recusal in a case where contributions exceed a certain limit or restrictions on judicial appointment of campaign contributors, and recommends local enforcement via bar oversight committees. Importantly, the Task Force Report represents the first time that a major legal institution such as the ABA has undertaken to look into the problems created for judicial integrity by lawyers' contributions to judicial campaigns. If it were to be adopted, it would represent a crucial statement by the largest official organ of the bar about the need for change in judicial campaign financing. This strong collective articulation of community norms on this question would seem likely to produce change in the practices of both the bench and the bar.

76. *Id.* If one retains the post-realist's emphasis on the perspectives and plight of underrepresented groups, one might ask how these changes will affect judicial candidates who are women or members of racial minority groups. It is noteworthy, in this context, that the losers in two of the most highly publicized retention elections (in California and Tennessee) included two white women and one man of color. Although the ABA Report reflects some cognizance of this issue, *see, e.g.*, ABA TASK FORCE REPORT, *supra* note 22, at 28-30 n.49 (discussing impact of contribution limits on women and people of color, and arguing that facilitating such candidates requires a jurisdiction-by-jurisdiction approach to limits), it does not discuss it at length. I thank Judith Resnik for raising this question.

B. Revising Electoral Assumptions in the Context of Judicial Campaigns

If the limited proposals above begin to address some problems of judicial campaign finance, there are others that may go even beyond their reach. Judicial contenders may desire means of disseminating information on a more individuated basis than voter pamphlets, because judicial incumbents may have to respond to high-profile challenges raised by political actors or well-funded interests. These challenges may be difficult to handle within the context of existing legal rules, even with reforms such as those proposed by the ABA Task Force. In this section, I will consider arguments for altering the central premises that have structured the current approach to judicial campaign finance: the unconstitutionality of expenditure limits established by *Buckley v. Valeo* and the widespread reliance on electoral mechanisms for selecting state court judges. Both sets of arguments reflect certain realist assumptions: an insistence on scrutinizing the realities that shape implementation of formal legal rights; a willingness, arising from this context-sensitivity, to acknowledge when legal rules have ceased to serve the broad purposes for which they were enacted; and a skepticism about the public/private distinction and about the naturalness or neutrality of existing institutional arrangements.

1. Buckley *and Expenditure Limits*

One impediment to systematic reform of judicial campaign finance has been the government's inability to impose expenditure limits after the Supreme Court's decision in *Buckley v. Valeo*.[77] While it is unclear whether limiting judicial candidates' campaign expenditures would be effective,[78] this constraint has prevented the exploration of a variety of options in regulating judicial, as well as other kinds, of campaign finance. Several realist arguments provide the basis for reconsidering *Buckley's* conclusion that a limitation on candidates' campaign expenditures represents a constraint on speech. As Jack Balkin argued in his provocative article *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*,[79] many types of arguments employed by legal realists to at-

77. 424 U.S. 1 (1976).

78. Schotland argues, for example, that expenditure limits are "utterly unwise, wholly aside from their constitutionality." Schotland, *supra* note 1, at 121, 121-23 (citing difficulties of setting even statewide limits in different locations and markets, and the possibility of such restrictions being circumvented by independent expenditures).

79. *See* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375. Although I draw on Balkin's analysis in the discussion that fol-

tack economic rights, such as the liberty of contract, might now be raised against broad, libertarian approaches to free speech, such as that reflected in *Buckley*.

The first type of realist argument cited by Balkin is a rejection of regimes of formal rights which fail to attend to the underlying substantive realities.[80] With respect to the liberty of contract, realists argued the material circumstances of different parties made a vast difference how they could exercise this right. These divergent circumstances underscored a second category of realist insight: that what was often at stake was not just a single right, but a conflict between competing interests, both of which might have salient legal status.[81] A court assessing protective legislation in 1935 was not simply vindicating the liberty of contract; it was also balancing that liberty against the power of the state to regulate the market for employment, or against the right of individuals with many different levels of bargaining power to work under relatively equal conditions. A third realist move highlighted by Balkin is skepticism about the naturalness of market ordering.[82] Realists rejected the public/private distinction and other formulations that placed the market outside the category of things that the government was understood to have helped to structure. Not only did governmental regulation help create the boundaries and norms of the market, but legal regimes of property and contract rights were also implicated in the creation of inequalities, which both preceded and pervaded market relations. The notion then that government should hesitate to regulate contractual relations because they were somehow prior to, or outside of, its reach was a final casualty of realist argumentation.

As Balkin suggests, many of these arguments find purchase against the formal regime of *Buckley v. Valeo*. First, there is a world of difference between protecting a formal right to speak and ensuring the opportunity to speak in a meaningful or audible way in the context of an electoral campaign. This is particularly true, as Balkin notes, when the ability to speak is often crucially affected by access to certain "technologies of communi-

lows, I would note that: (1) Balkin's application of these principles to campaign finance is more categorical than the discrete revisions I propose here, *see* Balkin, *supra*, at 378-79; and (2) Balkin applies the notion of "ideological drift" to the general question of the progressive valence of libertarian interpretations of the First Amendment, but not specifically to the question of judicial elections or judicial campaign finance.

80. *See id*. at 380. This argument is one of the central insights contained in Cohen, *supra* note 5.

81. *See* Balkin, *supra* note 79, at 380-82.

82. *See id*. at 378-82.

cation."[83] Participants have different levels of resources to bring to political communication. Whether a particular participant's resources give her access to the optimal technologies of communication may make a great difference in whether she is heard. Expenditure limits may play a crucial role in regulating such disparities: The absence of limits may make advanced and costly technologies the sine qua non of audible or effective communication. These facts lend weight, in this context, to the second form of realist objection: Protecting a unitary right to speak in the context of expenditure limits obscures the fact that there are actually two competing constitutional interests at stake. The first interest is the right of one party to speak at the full level of technology (and consequently, audibility) to which her resources give her access. The second is the right of another party to participate in a process in which she can be heard, notwithstanding her more limited resources. Finally, realists would resist an effort to argue that the government is not responsible for the inequalities in resources that create such disparate access. They would argue that legal regimes of contract and property contribute to the unequal resources of which some parties complain. Moreover, legal regimes of intellectual property may even impact the communication technologies that affect one's ability to be heard. Thus, government's thoroughgoing implication in such disparities prevents it from hiding behind rationalizations about a private market in communication. It may even impose an obligation upon the government to address the inequalities to which it has thereby contributed.

When the *Buckley* Court held that "money is speech," it referred primarily to those whose expenditures would be restricted by legal limits. These arguments suggest, however, that money is also speech for those whose limited funds prevent them from being heard in a costly, technologically amplified contest.[84] This reality, coupled with the government's implication in the inequalities that contribute to it, suggest that a more deferent judicial response to expenditure limits is appropriate. But even if courts reject this realist demand, however, a second strategy with respect to *Buckley* is possible.

Buckley left open the possibility that, in applying strict scrutiny to expenditure limits, the courts would entertain different "compelling state interests" in different factual contexts.[85] A realist approach would argue that

83. *See id*. at 405-06.

84. *See id*. at 406.

85. For an example of a recent legal argument that made this assumption, see Petition for Writ of Certiorari at 21-26, City of Cincinnati v. Kruse, 119 S.Ct. 511 (1998) (No. 98-459) (seeking review of Sixth Circuit decision striking down expenditure limits imposed by Cincinnati on city council elections).

there should be a compelling governmental interest in limiting campaign expenditures in the specific context of judicial elections. The interest furthered via this limitation would be in preserving the integrity and distinctiveness of the judicial role. Some have argued that, in the context of judicial elections, there should be a compelling state interest preserving judicial objectivity or independence.[86] I believe, however, that this argument should be recast in light of the realist arguments above.

Realists and post-realists have problematized notions of objectivity, understood as a single, Archimedian position or vantage point in relation to the issues litigated in a case. This body of work has suggested, however, that we should envision a range of relations a judge might have to a particular case, relations that are shaped by the judge's group membership, socialization, or individual psychological makeup. These relations might lead a judge to have a particular response to witnesses or testimony, to frame a case in a particular way; they might lead her to feel more or less identification with the circumstances of the parties. The range of relations envisioned by realists between a judge and the cases before her does not, however, include the possibility that she would feel a personal stake in the outcome of a particular case, or that she would have a commitment based on a tie to someone outside the case that becomes a factor in his approach to a resolution. Either of these circumstances seem to make the judge's role something a realist would consider nonjudicial. Further, both of these problematic circumstances can be fostered by a system in which spiraling campaign expenditures cause judges to place great emphasis on their relations with campaign contributors. A judge, as we have seen, may feel indebted to a large contributor in a way that causes the judge to feel an obligation when a case involving that contributor or that contributor's interests is before him. A judge may also fear that her resolution of a case involving a contributor or the contributor's interests may impact her directly, in that it may induce a contributor to withdraw campaign support. These effects decisively transform the role of the judge, making it more akin to that of a legislator or other official whose role may include constituent service. By curtailing the importance of judicial campaign finance, we can preserve a judicial role that does not escape the range of "investedness" realists have recognized as the guiding norm, and does not merge into relationships of representation that are more characteristic of legislators.

86. *See, e.g.*, Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution of Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. (forthcoming 1999); Levien & Fatka, *supra* note 42.

2. *Revisiting the Question of Judicial Elections*

Virtually all proposals regarding judicial campaign finance seem to begin with the assumption that some form of electoral selection for many state judges is inevitable.[87] The final contribution of a realist/post-realist approach to judicial independence would be to challenge that assumption. I argue above that it is judicial campaign finance that catalyzes judicial entanglement in the stakes of a case or the formation of quasi-legislative relationships of representation. Yet there is little doubt that the electoral form itself creates the potential that is thereby catalyzed. Without elections, a judge would not be obliged to raise money or consider citizens as constituents whom she must satisfy with particular outcomes (rather than simply informing or persuading through the rational explanation of decisions). Though there may be limited prospect for ending the election of judges, critics of judicial campaign finance owe it to themselves to commence this conversation in earnest. It may be that even the best efforts, addressing abuses through bar committees and reapproaching the limits imposed by *Buckley*, offer too modest a set of interventions to address this spiraling problem. In this context, it may be useful to note that realist and post-realist forms of reasoning offer means of addressing the election of judges as well.

Both realists and their contemporary successors have emphasized the importance of context in shaping the choice or meaning given to legal rules. Thus, Balkin has argued that realists should be particularly concerned with the phenomenon of "ideological drift": a change in the circumstances underlying legal rules or institutional arrangements which gives arrangements that once had one kind of political meaning or valence another wholly different kind of meaning or valence.[88] Judicial elections fit perfectly within this characterization: a fact which, in realist analysis, provides a strong argument for their reappraisal. Judicial elections were, in their Jacksonian heyday, considered a device for ensuring the popular responsiveness of judges, who were otherwise likely to be responsive only

87. The ABA Task Force Report takes the position that even proponents of merit selection cannot neglect the fact that electoral selection remains the primary means of choosing state court judges and reform efforts must be tailored to that fact. *See* ABA TASK FORCE REPORT, *supra* note 22, at 3-4. I would argue, conversely, that those who seek reform of judicial campaign practices should not neglect the long-range goal of eliminating judicial elections as a mode of selection.

88. *See* Balkin, *supra* note 79, at 384-87. Balkin's primary use of the notion of "ideological drift" in this Article is to observe that libertarian approaches to the First Amendment, which once served progressive interests, have experienced the "drift" of a changing political context to the point where they now more frequently serve the interests of conservative opponents of minorities' (and other disenfranchised groups') rights.

to the politicians or bureaucracies responsible for their appointment.[89] Not only have our own understandings about judges altered to the point where many observers would regard this electoral accountability as a cure worse than the disease, but judges must also face the twin challenges of escalating campaign costs and lawyer and litigant contributions to judicial campaigns. The result is not judicial independence of political leaders, or even broader responsiveness to the public, but judicial dependence of a particularly acute sort on the opinions and goodwill of a comparatively narrow range of campaign contributors.[90] Realists concerned with the shifting political meanings underlying a particular rule or practice can no longer afford to let the practice of electing judges go unchallenged.

V. CONCLUSION

The problems of judicial campaign finance, born of changes in the technology of communication and volatile issues such as crime control, may be a distinctively contemporary phenomenon. Yet, as I have argued above, the more enduring tradition of realist and post-realist thought may provide the means of understanding and ameliorating these difficulties.

89. *See* Levien & Fatka, *supra* note 42, at 74; Schotland, *supra* note 1, at 81.

90. Note article where plaintiffs' lawyer criticizes move toward merit selection, arguing not about the lack of dependence in elections, but that proponents of merit selection are sore because they've been less successful in securing dependence. *See* Kaplan, *supra* note 62, at 32.