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### Judicial Peremptory Challenges As Access Enhancers

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## JUDICIAL PEREMPTORY CHALLENGES AS ACCESS ENHANCERS

*Jeffrey W. Stempel\**

*Discussions regarding diminishing access to justice have centered on the high disputing costs, gradual contraction of substantive rights, and increasingly defendant-friendly procedure. The importance of the ideological, experiential, and jurisprudential orientation of the judges presiding over litigation at the trial level has received much less—and insufficient—attention. Because so much focus has been on federal appellate courts, commentators have largely overlooked a potentially powerful tool for improving access and promoting a fair airing of claims at the trial level: a litigant’s automatic ability to transfer a case to a different judge as a matter of right to avoid judges who are unduly hostile to claims for relief, recompense, or change. This procedure of automatic judicial reassignment exists in various forms in roughly one-third of the states and appears to work well. But federal courts—the courts perhaps most in need of such a tool—remain resistant.*

*This Article sets forth a rationale for giving all parties a right to an automatic judicial reassignment (judicial “peremptory challenges,” for lack of a better term) and addresses the concerns of opponents, who wrongly argue that giving litigants this option runs counter to the norm of judicial neutrality. On the contrary, such challenges enhance judicial neutrality and competence and reduce the risk that claims will be “smothered in the crib” by hostile trial judges. In a world with judges whose experience, orientation, competence, and productivity vary widely, the automatic right of reassignment can be a useful tool for increasing access. It should be expanded to all states and especially to federal courts.*

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## INTRODUCTION

Concerns about contracting access to justice have centered on doctrinal developments with relatively little focus on the degree to which judicial attitudes—particularly those of the trial judge—create barriers to vindication of rights and a full airing of claims. Some judges are simply unreceptive-*cum*-hostile to claims for relief based on alleged discrimination, abuse of power, or business misbehavior. But significant evidence demonstrates that judges, like all humans, are prone to cognitive error.<sup>1</sup> Just as there is variance in the human population, there is variance in the judicial population. The identity of the trial judge may matter more to the outcome of a particular case than the applicable law or the views of the judicial system as a whole. And the sum of particular cases is what shapes the whole of the justice system.

Historically, the legal establishment embraced the Blackstonian view that judges were too pure to be subject to bias, whether conscious or unconscious.<sup>2</sup> But judicial attitudes about tort, contract, types of claims, areas of law, witness and attorney credibility, and the like can affect judicial outcomes as much as unconscious race, gender, or ethnic bias. The bench was never as pure and decoupled from the real world of differing sociopolitical influences as portrayed by Blackstone or eighth-grade civics.

In nearly 80 percent of the states, judges are elected, often with no filter of preference for incumbency or presumptive merit selection.<sup>3</sup> Particular

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1. See, e.g., Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 791–94 (2001) (providing rather frightening examples of judges being highly influenced by the “anchoring” effect of the size of a settlement demand irrespective of the merits of a case); Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 420–28 (2007) (surveying literature regarding cognitive errors by judges as well as laypersons).

2. See 3 WILLIAM BLACKSTONE, COMMENTARIES \*361 (stating that judges are essentially immune from challenge unless possessed of a specific personal stake in the case because “the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice”).

3. See ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, RETHINKING JUDICIAL SELECTION IN STATE COURTS 4 (2016), [https://www.brennancenter.org/sites/default/files/publications/Rethinking\\_Judicial\\_Selection\\_State\\_Courts.pdf](https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf) [<https://perma.cc/Z3L3-XMD3>]. Nearly forty states have some form of judicial election, five with elections in which candidates run under party labels. *Id.* Sixteen states have “nonpartisan” elections but this does not eliminate heavy interest-group activity such as police-union endorsements. *Id.* Fourteen states have retention election of judges after initial appointment, which can lead to electoral efforts to unseat an incumbent. *Id.*

interest groups weigh in and attempt to elect judges that favor restrictive abortion laws, oppose pollution control, resist medical malpractice liability, take a dim view of large jury awards, and so on. In some states, judicial elections have become hotly politicized.<sup>4</sup>

The bench cannot realistically be made to fit the fairy-tale idea of neutrality that has, for too long, had too strong a grip on the American legal psyche. What can be changed quite easily—and already exists in roughly one-third of the states—is the ability of the parties and counsel to take steps to mitigate the effects of judicial bias. Litigants can be given the right to reject an assigned trial judge, even when that judge would not be subject to required disqualification, when litigants or counsel believe the case would be better served by reassignment to another judge.

This system, which for ease of reference will be referred to as a “peremptory challenge” of a judge (even though that is not quite accurate) already exists in seventeen states and appears to work well.<sup>5</sup> This procedure provides a means to avoid an initial trial judge assignment that could otherwise be the proverbial “kiss of death” for a meritorious claim or defense due solely to the orientation of the trial judge or limits on judicial ability or open-mindedness.<sup>6</sup>

#### I. THE AWESOME IMPORTANCE OF TRIAL JUDGES REGARDING ACCESS TO JUSTICE

In the American judicial system, trial judges are the real “gatekeepers” of justice.<sup>7</sup> If a claimant draws an unduly hostile trial judge—or even one merely resistant to a claim, constrained in role, or deferential to prominent defendants and counsel—the deck is stacked against the claimant no matter the state of the law or the strength of the facts of the case.

Consider the trial judge’s opportunities to delay a claim, limit information gathering, impose requirements on a claimant, eliminate portions of a claim or categories of remedy, shape adjudication generally, or perhaps even dismiss the claim altogether. Dismissal is obviously the most severe sanction, and it effectively ends the case for many claimants who will lack the resources (or the attorney willing to continue to work on a contingent fee through appeal) to challenge the decision. Appeals are expensive and inevitably take months or years to be heard and decided. While perhaps routine for commercial claimants, they are burdensome and can deter small businesses with commercial claims or individuals pursuing tort, contract, property, or statutory claims. Even in cases where the trial judge’s decision is highly vulnerable to reversal on appeal, an erroneous Rule 12(b)(6)

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4. See Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35, 44–50 (2003).

5. See *infra* notes 36–54 and accompanying text.

6. See *infra* Part II.

7. See Christina L. Boyd, *Gatekeeping and Filtering in Trial Courts*, in THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 129, 135–36 (Lee Epstein & Stefanie A. Lindquist eds., 2017).

dismissal may go unchallenged on appeal because of a losing litigant's lack of resources.

The judge's management style may also make it time consuming and expensive to defeat such motions, even if the motions are weak. Judges vary in the degree to which they force a nonmovant to essentially conduct a "paper trial" to show plausibility of a claim or genuinely disputed issues of material fact that require trial, either of which can impose substantial costs on claimants. The problem of delay is also significant. A trial judge who "sits" on such motions for a long time aids a defendant's war of attrition against the claimant even if the motions are eventually denied.

In addition to eliminating a case via a motion to dismiss or summary judgment, trial judges have the power to burden claimants in seemingly endless ways, such as (1) giving serious consideration to very weak or even specious Rule 11 motions;<sup>8</sup> (2) granting motions for a more definite statement<sup>9</sup> or to strike allegations;<sup>10</sup> (3) dismissing some claims (e.g., denying a private right of action in connection with a consumer protection statute) or foreclosing some types of relief (e.g., counsel fees or punitive damages) via Rule 12(b)(6) or Rule 56; (4) granting protective orders limiting the claimant's access to discovery,<sup>11</sup> which is needed to develop the information and evidence required to prove the claim; (5) delaying decisions on motions to compel discovery<sup>12</sup> or denying them in whole or in part, perhaps with no sanctions imposed upon even a defendant committing discovery abuse; (6) requiring burdensome meet-and-confer sessions<sup>13</sup> with uncooperative opposing counsel or unproductive mediation attempts or pretrial conferences; (7) using a form and methodology for the final pretrial order, through Rule 16, that adds additional costs, burdens, and delay; (8) limiting the parties' ability to examine the venire in jury selection;<sup>14</sup> (9) taking either a very narrow or very broad view of "for cause" rejection of a juror;<sup>15</sup> (10) taking either an unduly narrow or broad view of acceptable attorney demeanor when conducting opening and closing statements, witness examinations, or making objections; (11) making evidentiary rulings that can be either receptive or restrictive;<sup>16</sup> (12) ruling on Rule 50 motions for judgment as a matter of law; (13) electing the instructions given to the jury<sup>17</sup> and authoring a verdict form,<sup>18</sup> or, in a bench trial, using a wide range of styles in rendering findings of fact and conclusions of law (Rule 52); (14) governing the behavior of the jury (e.g., permitting or banning note

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8. References to rules in this list of trial judge powers are to the Federal Rules of Civil Procedure or federal statutes. State court trial judges enjoy these same powers.

9. See FED. R. CIV. P. 12(e).

10. See *id.* r. 12(f).

11. See *id.* r. 26(c).

12. See *id.* r. 37(a).

13. See *id.* r. 26(f).

14. See *id.* r. 47.

15. See *id.* r. 47(c).

16. See FED. R. EVID. 103.

17. See FED. R. CIV. P. 51.

18. See *id.* r. 49.

taking, jury questions, access to evidence, breaks, and working hours); (15) ruling on posttrial Rule 50 and Rule 59 motions and reconsideration motions; (16) making the record that may affect the posture of the case on appeal; or (17) lengthening the proceedings sufficiently to increase costs on the party with comparatively fewer resources, which facilitates a stronger party's war of attrition against a claimant.

In addition to varying intellectual quality, judges may, because of their background, be hostile to particular types of claims. Therefore, they may be unduly receptive to finding pleading problems, limiting discovery, granting dispositive defense motions, restricting receipt of evidence, adopting inadequate jury instructions, permitting misconduct by attorneys for the favored side, or granting defense post-trial motions.

Judges may also be undesirable for reasons unrelated to the claim itself. A rough typology might find the following types of judges: erratic; corrupt (but uncaught) or subtly corrupted;<sup>19</sup> lacking impartiality (but not enough to require disqualification);<sup>20</sup> incompetent or distinctly less competent;<sup>21</sup>

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19. See, e.g., P.J. D'Annunzio, *Bribery Charges Added for Ex-Bucks County Judge, Officials*, LEGAL INTELLIGENCER (Aug. 1, 2017), <http://www.thelegalintelligencer.com/id=1202794474032> [<https://perma.cc/X78P-6EV7>] ("An indicted former Bucks County magisterial district judge and several other public officials are now facing additional charges in their federal money laundering case."). There is also the judge who might be affected by arguable "soft" bribery through campaign support or affinity for a certain segment of the bar or business community. See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873, 889–90 (2009) (disqualifying on due process grounds a state high court judge who won a hotly contested election with the help of more than \$2.5 million of support from an interested litigant and then voted to reverse a multimillion-dollar lower court judgment against that litigant); see also Jeffrey W. Stempel, *Impeach Brent Benjamin Now?! Giving Adequate Attention to the Failure of Judicial Impartiality*, 47 SAN DIEGO L. REV. 1, 2–9 (2010) (describing the magnitude of a nonrecusing judge's error).

20. After several Cleveland Browns players decided to kneel during the national anthem during an August 2017 NFL preseason game as a protest regarding the state of race relations and police practices in the United States, which Ohio Supreme Court Justice William O'Neill strangely saw as antimilitary, he stated on his Facebook page: "[I] will NEVER attend a sporting event where the draft dodging millionaire athletes disrespect the veterans who earned them the right to be on that field. Shame on you all." Debra Cassens Weiss, *Ohio Supreme Court Justice Goes on Facebook to Slam Browns Players Who Kneeled During Anthem*, A.B.A. J. (Aug. 24, 2017), [http://www.abajournal.com/news/article/ohio\\_supreme\\_court\\_justice\\_goes\\_on\\_facebook\\_to\\_slam\\_browns\\_players\\_who\\_knee/](http://www.abajournal.com/news/article/ohio_supreme_court_justice_goes_on_facebook_to_slam_browns_players_who_knee/) [<https://perma.cc/8UBG-SPEX>]. One might understand why a plaintiff alleging excessive use of force by police, race discrimination, mistreatment at the hands of the government or employers, or anything relating to free expression, deference to authority, or the military might not want Judge O'Neill presiding over his or her case, even if this outburst might not require disqualification under existing law.

21. Some judges are undesirable simply because they are not very good; not as a consequence of their ideology. In states that have the challenge system in place, one finds them outpacing other judges in the district in being ousted from cases at the request of a party.

limited in background;<sup>22</sup> presenting management issues;<sup>23</sup> and late adopters.<sup>24</sup>

Clearly falling through the cracks of judicial disqualification law is the judge with orientation issues regarding people, entities, and jurisprudence. Judges, obviously impartial, may have orientations (toward lawyers, litigants, institutions, individuals, beliefs) that make them sufficiently undesirable and thus merit use of a peremptory challenge. The judicial system should respect this and provide for a reasonable outlet for lawyer and litigant efforts to avoid such judges in particular cases.

A judge may be oriented in favor of the government, markets generally, or other portions of the establishment (e.g., an affinity for banks, insurers, or hospitals) or can be antiestablishment (e.g., the former American Civil Liberties Union lawyer who leans against any government restriction on expression or the former Natural Resources Defense Council lawyer who is inclined to find fault with any development effort). Unless these tendencies are both pronounced and public<sup>25</sup> (not every judge pounds the podium on

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22. Some judges are less favored for more benign reasons. Unlike the erratic, mean, biased, or incompetent, there are judges who are adequate, perhaps even excellent for some cases, but come to the bench with little to no experience in the relevant subject matter. A paradigmatic example of this sort of limitation is a former prosecutor. A prosecution background is an especially good pipeline to the bench. Senators may be less likely to oppose nominations on partisan grounds, even for prosecutors active in politics, because of the cache associated with being a prosecutor—a cache that plays well in elections—with such candidates often endorsed by the police union, which is almost a requirement for victory in some jurisdictions. But these judges may have little or no civil litigation experience. The reverse problem occurs if a lawyer with decades of civil litigation experience is suddenly thrust into the arena of criminal trials. The same is true for a government regulatory lawyer with a business case outside the scope of past regulatory activity. Or the former mergers and acquisitions attorney hearing an environmental regulation or gender discrimination case. Or the real property professor presiding over a criminal case or ERISA dispute.

23. At the risk of subdividing the competence issue too greatly, this category includes judges who are not incompetent due to intellectual, educational, or experiential limitations but instead are undesirable because of their management style or absence thereof. An obvious example is the lazy judge who works such short and inefficient hours that cases languish. There are other examples of this genre. There is, for example, the indecisive judge who works very hard and is smart, perhaps too smart, in that recognizing more complexities can paralyze the decision maker. In any event, the judge carries out a *de facto* Hamlet imitation and takes forever to decide a matter, perhaps “deciding” it in such a fuzzy, compromising manner that all parties are dissatisfied. Then there is the polar opposite: the rapid-fire judge. This judge moves fast but often at the cost of a thorough understanding of the matter and insufficient reflection and analysis. This sort of judge may move things along but in doing so may impose unnecessary costs on one or more of the parties. Even if very good overall, the rapid-action judge may not be very good for the types of cases in which a full exploration and airing of the dispute inherently requires more time.

24. This type of judge is not an ideological or jurisprudential conservative so much as a behavioral conservative—the judicial version of the last kid in school to have a smartphone. Although this sort of restraint and resistance to fads may be commendable in many contexts, including litigation, this is not the type of judge a plaintiff wants if seeking (to borrow the language of Rule 11) an extension, modification, or reversal of existing law or the creation of newly articulated law.

25. There can be a sort of “soft” corruption that a litigant may want to avoid as well, as reflected in the words of a well-known columnist: “One of my fond childhood memories is going to the amusement park in Cincinnati on Republican Day. My grandfather, who was a bail bondsman, organized the outings so I could ride on the rides and he could play cards in a

Facebook as did Ohio Supreme Court Justice William O'Neill),<sup>26</sup> recusal is unlikely. Peremptory challenges provide a modest means of allowing the parties to avoid a judge unduly oriented toward the opposition.<sup>27</sup>

In the federal system and that of more than half the states, the only option for obtaining a better suited judge is to find a basis to disqualify the originally assigned judge. But even when the judge is arguably disqualified, prevailing on these motions is no easy task. Motions of this sort are first heard by the challenged judge, who may reject the challenge but remain on the case with hurt feelings that could come back to haunt the challenging party. Review by another judge (often the chief judge of the district) may be more successful but may of course founder in close cases (not every impropriety assures disqualification under current standards). Because a denial of recusal is not a final, appealable order, the party losing the challenge is stuck with the allegedly tainted judge until appeal unless the challenging party can successfully obtain and prevail in mandamus review. Prevailing on mandamus review is a relative rarity unless the tainted judge's refusal to recuse borders on the outrageous.

## II. JUDICIAL PEREMPTORY CHALLENGES AS A MEANS OF INCREASING THE ODDS OF A FULL AND FAIR AIRING OF CLAIMS

One-shot players seeking access to justice are more likely to be disadvantaged by a problematic trial judge than repeat players because they lack the ability to play the "long game" of pooling litigation experience, amortizing losses, and improving with practice.<sup>28</sup> With only one "day in court," these litigants are most hurt by a bad judicial draw that may not be realistically salvageable on appeal, both because of the financial and temporal burden of appeal and the American structure of deference to trial courts through doctrines like the harmless error rule,<sup>29</sup> the "clearly erroneous" standard of review,<sup>30</sup> reluctance to reexamine jury verdicts that

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tent with the judges. To whom he would systematically lose. It was cleaner than outright bribery. Plus, you know, the Ferris wheel." Gail Collins, *Grandpa and the Bounty Hunters*, N.Y. TIMES (Aug. 26, 2017), <https://www.nytimes.com/2017/08/25/opinion/bail-reform-harris-rand-paul.html> [<https://perma.cc/VE6C-B9BZ>]. Logrolling works both ways. Judges looking to leave the bench may have an eye on a "soft landing" at a prestigious firm and litigants may find that during the last years of a judicial tenure, the firms that are prospective employers of retired judges seem to be winning an inordinate share of motions, more even than the normal halo effect of "Big Law" might predict. In addition, a judge looking to find postbench work as an arbitrator or mediator may lean toward the litigants likely to be a source of such work.

26. See *supra* note 20.

27. In a related fashion, a judge's orientation may be toward himself in that he is not so much deferential to other authority figures and institutions but is an authoritarian himself.

28. See Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-114 (1974).

29. See FED. R. CIV. P. 61.

30. See JEFFREY W. STEMPEL ET AL., *LEARNING CIVIL PROCEDURE* 806-08 (2d ed. 2015) (describing the clearly erroneous standard of review under which trial court determinations of fact are accepted unless the appellate court is left with the "definite and firm conviction that a mistake has been committed" (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 564, 595 (1948)); see also *id.* (discussing the abuse of discretion standard in which the appellate court



may have been tainted by problematic judicial rulings,<sup>31</sup> the abuse of discretion standard of review,<sup>32</sup> and the normal cognitive trait of status quo bias<sup>33</sup> that is often thickened by the professional and social ties of justice.

The resulting reversals on appeal despite these factors suggest that trial judges do indeed make a significant number of mistakes even though the majority of appellate decisions affirm.<sup>34</sup> A procedural device that gives litigants an opportunity to attempt to improve the quality of trial court judging—or at least to avoid judges seen as hostile to the case—logically expands access to adjudication and justice by increasing the odds that a claim will receive a full and fair hearing.

Peremptory challenges of judges became available in the United States in the late nineteenth century and spread during the mid-twentieth century.<sup>35</sup>

“defers to trial court to a high degree,” with de novo review, which provides “[n]o deference to [the] trial court” regarding questions of law).

31. For example, in federal courts, the Seventh Amendment controls and provides not only the right of jury trial in matters seeking “legal” relief (essentially damages) rather than equitable relief but also that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII; *see also* *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933) (noting that courts have long been reluctant to question jury fact findings, save for circumstances supporting grant of a new trial); *R.R. Co. v. Fraloff*, 100 U.S. 24, 31–32 (1879) (“Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.”). Although the Seventh Amendment is not controlling in state court, many state constitutions have similar provisions and common law precedent has generally discouraged close scrutiny of jury verdicts. *See* FED. R. CIV. P. 61 (pursuant to the “harmless error” rule, mistakes by trial court are not grounds for reversal unless they affect the “substantial rights” of a party); 9 MOORE’S FEDERAL PRACTICE § 51.20[1][b] (3d ed. 2007) (stating that trial courts are given considerable discretion over jury instructions); *id.* § 51.30 (stating that unless an instruction constitutes “plain error,” reversal on the ground of erroneous instruction requires a timely objection by the aggrieved party).

32. *See supra* note 30 and accompanying text regarding the abuse of discretion standard of review.

33. *See* Cass R. Sunstein, *Introduction* to BEHAVIORAL LAW AND ECONOMICS 1, 4 (Cass R. Sunstein ed., 2000) (“People tend to like the status quo, and they demand a great deal to justify departures from it. . . . In law, an ordinary reference is the status quo [e.g., the trial judge’s ruling being reviewed on appeal], which produces status quo bias.”).

34. *See* 2016 Overview—Appellate Courts, NAT’L CTR. FOR ST. CTS., [http://www.ncsc.org/sitecore/content/microsites/popup/home/csp/csp\\_intro](http://www.ncsc.org/sitecore/content/microsites/popup/home/csp/csp_intro) [<https://perma.cc/RVB8-FUZX>] (last visited Mar. 15, 2018) (finding a reversal rate of 16 percent by the twenty-three state intermediate appellate courts it surveyed); Matthew Bultman, *From NJ to Texas: How the Courts Fared at the Fed. Circ.*, LAW360 (Feb. 21, 2018, 7:04PM), <https://www.law360.com/articles/1013663> [<https://perma.cc/6BNE-NT6W>] (finding that the Federal Circuit reversed district court decisions about 29 percent of the time); *see also* Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 672 (2004) (noting a reversal rate in cases involving civil rights claims of 14.3 percent for plaintiffs and 50.3 percent for defendants); Stanton Wheeler et al., *Do the Haves Come Out Ahead—Winning and Losing in State Supreme Courts, 1870–1970*, 21 LAW & SOC’Y REV. 403, 416–17 (1987) (stating that state supreme courts affirm roughly two-thirds of the time, but the ratio varies according to the type of case).

35. *See* LARRY C. BERKSON ET AL., U.S. DEP’T OF JUSTICE, JUDICIAL SUBSTITUTION: AN EXAMINATION OF JUDICIAL PEREMPTORY CHALLENGES IN THE STATES 5–10 (1986), <https://www.ncjrs.gov/pdffiles1/Digitization/101943NCJRS.pdf> [<https://perma.cc/K93J-HKL9>]. *See generally* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES ch. 26 (2d ed. 2007).

Wisconsin provided for the substitution of judges in criminal cases in 1853,<sup>36</sup> and the Dakota Territory did so in 1875.<sup>37</sup> The availability of the peremptory challenge spread, particularly in the western states. In addition to North Dakota<sup>38</sup> and South Dakota<sup>39</sup> (which continued the practice after the territory became two states), Wyoming,<sup>40</sup> Oklahoma (which repealed the procedure in 1909),<sup>41</sup> Arizona,<sup>42</sup> Montana,<sup>43</sup> Minnesota,<sup>44</sup> Washington,<sup>45</sup> and Oregon<sup>46</sup> enacted peremptory challenge legislation between 1880 and 1920. The Depression era saw another four states adopt the peremptory challenge:

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36. See *State v. Holmes*, 315 N.W.2d 703, 712–13 (Wis. 1982) (upholding Wisconsin's modern peremptory challenge statute and discussing background of the procedure); BERKSON ET AL., *supra* note 35, at 4; FLAMM, *supra* note 35, § 27.18 (describing modern Wisconsin practice); Linda De La Mora, *Statute Allowing Substitution of Judge upon Peremptory Challenge Does Not Violate Separation of Powers Doctrine*, 66 MARQ. L. REV. 414, 418 (1982) (discussing the *Holmes* decision and historical background, including the original 1853 statute).

37. See BERKSON ET AL., *supra* note 35, at 5 n.20; FLAMM, *supra* note 35, § 27.15 (describing modern South Dakota practice).

38. See BERKSON ET AL., *supra* note 35, at 6; FLAMM, *supra* note 35, § 27.13 (describing modern North Dakota practice).

39. See *State v. Thompson*, 180 N.W. 73, 74 (S.D. 1920); FLAMM, *supra* note 35, § 27.15.

40. See *Murdica v. State*, 137 P. 574, 577 (Wyo. 1914); John S. Evans, *Civil and Criminal Procedure—Disqualification of District Judges for Prejudice in Wyoming*, 6 LAND & WATER L. REV. 743, 743 (1971). Wyoming first enacted judicial peremptory challenge while a territory and continued it as a state. See BERKSON ET AL., *supra* note 35, at 6 & n.30. The Wyoming Supreme Court subsequently sought to abolish the procedure but reversed itself in response to strong opposition from the state bar. See BERKSON ET AL., *supra* note 35, at 6–7; FLAMM, *supra* note 35, § 27.19 (describing modern Wyoming practice).

41. See BERKSON ET AL., *supra* note 35, at 7 & n.34. Current law provides only for disqualification for cause. See OKLA. STAT. tit. 20, § 1401 (2016).

42. See BERKSON ET AL., *supra* note 35, at 8 & nn.35–36. Arizona has revised the statute several times but retained full peremptory challenge that does not depend on the truth of any allegations of bias or prejudice. See *id.* at 8–9; FLAMM, *supra* note 35, § 27.3 (describing modern Arizona practice).

43. See BERKSON ET AL., *supra* note 35, at 9 & nn.44–45; see also *State ex rel. Anaconda Copper Mining Co. v. Clancy*, 77 P. 312, 313–15 (Mont. 1904). The *Anaconda Copper* litigation reflects the legal realist origins of peremptory challenges in Montana and a persuasive rationale for the procedure that continues today. The originally assigned judge favored the powerful mining company so strongly that it prompted a special session of the legislature, which enacted the peremptory challenge, the constitutionality of which was affirmed by the state Supreme Court. See BERKSON ET AL., *supra* note 35, at 9. Montana's challenge practice requires filing an affidavit of prejudice but does not involve an inquiry into whether the judge actually is prejudiced. See FLAMM, *supra* note 35, § 27.10 (describing modern Montana practice).

44. See BERKSON ET AL., *supra* note 35, at 10 & n.47; FLAMM, *supra* note 35, § 27.8 (describing modern Minnesota practice).

45. See BERKSON ET AL., *supra* note 35, at 10 & n.51; FLAMM, *supra* note 35, § 27.17 (describing modern Washington practice).

46. See BERKSON ET AL., *supra* note 35, at 10–11 & n.53. Oregon's procedure does not require an allegation of prejudice by the party seeking to remove the originally assigned judge. See FLAMM, *supra* note 35, § 27.14 (describing modern Oregon practice).

Nevada,<sup>47</sup> Idaho,<sup>48</sup> New Mexico,<sup>49</sup> and California.<sup>50</sup> Although the rate of adoption of peremptory challenges slowed during the mid-twentieth century, the practice continued to grow until roughly 1980 with the addition of the practice in Indiana in 1955,<sup>51</sup> Illinois in 1963,<sup>52</sup> Alaska in 1967,<sup>53</sup> and Missouri in 1973.<sup>54</sup>

Although there have been revisions of statutes, and even some attempted repeals, the number of states providing for peremptory challenges<sup>55</sup> has essentially remained steady for the past forty years. It appears that there have been no serious efforts at adopting peremptory challenges in any of the states that currently lack the practice. However, a recent increase in concern about judicial impartiality—spurred by revisions to the Model Code of Judicial

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47. See *State ex rel. Beach v. Fifth Judicial Dist.*, 5 P.2d 535, 536 (Nev. 1931) (upholding the constitutionality of the statute); BERKSON ET AL., *supra* note 35, at 11 & n.58. Current peremptory challenge practice is governed by Nevada Supreme Court Rule 48.1, which provides that “each side is entitled, as a matter of right, to one change of judge by peremptory challenge” for which it must pay a fee of \$450. NEV. SUP. CT. R. 48.1; see also FLAMM, *supra* note 35, § 27.11 (describing modern Nevada practice).

48. See BERKSON ET AL., *supra* note 35, at 12 & n.64. Any party is permitted one automatic change of judge if the motion is timely made at the outset of the case but an affidavit must be filed. *Id.* at 12; FLAMM, *supra* note 35, § 27.5 (describing modern Idaho practice).

49. See BERKSON ET AL., *supra* note 35, at 12 & n.66; see also *State ex rel. Hannah v. Armijo*, 28 P.2d 511, 512–14 (N.M. 1933); *Gesswein v. Galvan*, 676 P.2d 1334, 1335 (N.M. 1984). During the mid-1980s, the New Mexico Supreme Court became concerned over what it regarded as an “ever increasing number of disqualifications” placing an “unreasonable burden on the system.” BERKSON ET AL., *supra* note 35, at 13. But this effort at restriction was subsequently retracted. See *Gesswein*, 676 P.2d at 1336–38. The Court then adopted a rule permitting removal of the initially assigned judge only upon a showing of bias or prejudice. BERKSON ET AL., *supra* note 35, at 13. But the state legislature subsequently enacted legislation removing the requirement and providing for what I term “pure” peremptory challenge that does not require the challenging party to articulate a reason for substitution or to prove lack of impartiality. See FLAMM, *supra* note 35, § 27.12 (describing modern New Mexico practice).

50. See BERKSON ET AL., *supra* note 35, at 14 & n.77. State Supreme Court decisions upheld the constitutionality of the statute but suggested that constitutionality hinged on alleging grounds for disqualification rather than mere preference of the challenging party. See *id.* at 13–15. See generally *Solberg v. Superior Court*, 561 P.2d 1148 (Cal. 1977); *Johnson v. Superior Court*, 329 P.2d 5 (Cal. 1958). The current California law, originally enacted in 1982, provides an automatic right to a substitution of judge. CAL. CIV. PROC. CODE § 170.6 (West 2011); see also FLAMM, *supra* note 35, § 27.4 (describing modern California practice).

51. See BERKSON ET AL., *supra* note 35, at 16 & n.87. No affidavit of prejudice is required to eject the judge from the case. See FLAMM, *supra* note 35, § 27.7 (describing modern Indiana practice).

52. See BERKSON ET AL., *supra* note 35, at 16 & n.92. The Illinois statute requires the challenging party to assert that it cannot obtain a fair trial before the challenged judge. See *id.* at 16; FLAMM, *supra* note 35, § 27.6 (describing modern Illinois practice).

53. See BERKSON ET AL., *supra* note 35, at 16–17 & nn.93–94. The state Supreme Court promulgated its rules adopting peremptory challenge to alleviate concern that providing for peremptory challenges through legislation might violate separation of powers. See *id.* at 17; see also FLAMM, *supra* note 35, § 27.2 (describing modern Alaska practice).

54. See BERKSON ET AL., *supra* note 35, at 17 & n.95; see also *Nat. Bridge Dev. Co. v. St. Louis Cty. Water Co.*, 563 S.W.2d 522, 523–24 (Mo. Ct. App. 1978). No allegation or proof of cause is required to remove the judge. See *Nat. Bridge Dev. Co.*, 563 S.W.2d at 524; BERKSON ET AL., *supra* note 35, at 17; FLAMM, *supra* note 35, § 27.9 (describing modern Missouri practice).

55. Recall that Oklahoma briefly provided for peremptory challenges but has not done so since 1909. See *supra* note 41.

Conduct and the infamous facts leading to the *Caperton v. A.T. Massey Coal Co.*<sup>56</sup> and *Williams v. Pennsylvania*<sup>57</sup> decisions—has spurred new attention to the issue of judicial peremptory challenges as a means of facilitating disqualification of judges whose impartiality is at issue.<sup>58</sup>

State peremptory challenge protocols vary in language but appear to be consistent in operation. Some states provide for substitution of a different judge simply upon request. Others require an affidavit of bias, with most treating the affidavit as something akin to a mere formality.<sup>59</sup> Most states with this sort of requirement do not look behind the affidavit but find its mere filing to be sufficient to require replacement of the initially assigned judge.<sup>60</sup> Some states also require payment of a fee for judicial reassignment;<sup>61</sup> moreover, automatic judicial reassignment is generally limited to once per case for each party or side and must be done in a timely manner, which

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56. 556 U.S. 868 (2009). Ordinarily, even egregiously bad recusal decisions like this are matters of state law and not subject to further review beyond the state's own courts. But the U.S. Supreme Court found that a disqualification error of this magnitude constituted a deprivation of due process. In spite of the egregious facts of the case, the Court's vote in the matter was surprisingly close (five to four).

57. 136 S. Ct. 1899 (2016) (finding a violation of the Due Process Clause where Pennsylvania's Chief Justice failed to recuse in a case involving a prisoner he had prosecuted). Although rather obviously correct, *Williams* was not unanimous, with three justices dissenting, which reflects the resistance to disqualification for cause shown by many jurists.

58. See, e.g., Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 503–05 (2007). The Brennan Center for Justice has emerged as perhaps the strongest consistent voice for judicial reform. Most of its focus has been on replacing elected judges with judges appointed through merit selection, regulating the potentially corrupting influence of campaign contributions, and facilitating disqualification more easily in cases where the judicial impartiality regarding the parties or counsel is in question. These are, of course, important goals that can be facilitated by peremptory challenges, particularly the goal of limiting bias or prejudice regarding litigants or institutions directly impacted by litigation—and I support peremptory challenges in large part because of this benefit they provide. But my argument in favor of peremptory challenges is not only that they provide another means of attacking *litigant-specific partiality* but also that they provide a means of avoiding judges who *lack impartiality or are hostile regarding the legal issues presented* in the case or who are *less competent* than their colleagues.

59. Compare ALASKA R. CIV. P. 42(c) (permitting assignment of a new judge upon request), ARIZ. R. CIV. P. 42.1(f)(1), and CAL. CIV. PROC. CODE § 170.1(c) (West 2017), with MINN. R. CIV. P. 63.03 (requiring affidavit of bias). Regarding application of the affidavit of bias requirement and its tendency to be treated as a mere formality rather than a fact to be proven through introduction of evidence, see *infra* note 60. For example, in both Alaska and Minnesota, reassignment of a judge appears to be automatic upon submission of the affidavit without any testing of the affidavit.

60. See generally FLAMM, *supra* note 35, ch. 27 (reviewing the eighteen states with peremptory challenge provisions and essentially finding that even in states requiring submission of an affidavit of bias or prejudice, affidavits are treated as conclusive and judicial substitution is essentially automatic); Laurie McKinnon, *An Examination of the Judicial Peremptory Challenge: Variations Between States and Considerations of Constitutionality* (May 2018) (unpublished M.A. thesis, University of Nevada, Reno), <https://pqdtopen.proquest.com/doc/1808210796.html?FMT=AI> [<https://perma.cc/F9YQ-ENHT>] (classifying seven states as “pure” peremptory challenge states with no affidavit requirement and noting that ten states require an affidavit for cause but that the affidavit is normally treated as only a formality).

61. See, e.g., MONT. CODE ANN. § 3-1-804 (2017) (requiring fee as set by another portion of Code); NEV. REV. STAT. § 1.230; NEV. SUP. CT. R. 48.1(2) (requiring payment of \$450 fee when exercising right of judicial reassignment).

essentially means at the outset of litigation.<sup>62</sup> The former requirement is designed to prevent a tool for avoiding a bad judicial assignment from becoming a tool for judge shopping. The latter requirement is to prevent a litigant from waiting to see how the judge views the case and rules on motions before making the peremptory challenge decision.<sup>63</sup> Both features make substantial sense and, as discussed below, effectively refute much of the resistance to peremptory challenges expressed by opponents.

The peremptory challenge appears to work well in the states that have it and attorneys appear to favor it.<sup>64</sup> Where courts or legislatures have attempted to cut back on or eliminate the feature, lawyers have opposed these attempts.<sup>65</sup> This is not to say that peremptory challenges, like any legal tool, will not present problems as well as benefits. Supporters acknowledge that there is potential for abuse and, sometimes, actual abuse.<sup>66</sup> A particular concern—but one not affecting civil litigation—is that a judge regarded as insufficiently favorable to prosecution might be targeted for removal by prosecutors, while a judge seen as insufficiently protective of defendants would be targeted by criminal defense attorneys, particularly the public defender's office.<sup>67</sup>

Although circumstances such as these raise concern, they may merely be an acceptable consequence of peremptory challenges having their desired effect. For example, a defense lawyer may want to eject a harsh sentencing “hanging” judge from the case. This is not an abuse but simply a lawyer in an adversary system attempting to avoid an extremist judge. Further, every protocol has drawbacks as well as advantages. The question is whether the peremptory protocol does a better job overall than the system without such challenges. A peremptory challenge is of course legitimate to avoid the judge with actual bias or prejudice. But it hardly makes the challenge improper when used to avoid judges at the extremes in terms of both jurisprudential tendencies and competence.

A relatively small number of judges are subject to an inordinate number of peremptory challenges while some judges are almost never challenged.<sup>68</sup>

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62. See generally FLAMM, *supra* note 35, ch. 27; see also *id.* §§ 26.5–26.6; McKinnon, *supra* note 60 (manuscript at 37).

63. This aspect of peremptory challenge practice is consistent with disqualification practice generally. Disagreement with a judge's rulings is not a basis for disqualification, and a judge's “judicially acquired” bias against a party or counsel (e.g., for disregarding court rulings or engaging in prejudicial conduct) is not ground for recusal. The lack of partiality supporting disqualification under Judicial Conduct Rule 2.11 or 28 U.S.C. § 455(a) must predate the case and come from an “extrajudicial” source. See generally FLAMM, *supra* note 35, ch. 4.

64. See FLAMM, *supra* note 35, at 754–56.

65. See *id.*

66. See *id.* at 757.

67. See *id.* at 758.

68. For example, in 2003 in the Eighth Judicial District, Clark County, Nevada (Las Vegas and environs), 117 of the 433 judicial peremptory challenges were directed at a single judge of the eighteen-judge bench. In other words, one judge accounted for 27 percent of the challenges. The second-most-challenged judge was removed sixty-eight times. There were fifty-five motions against the third-most-challenged judge. More than half of all peremptory challenges in the judicial district (240 of 433) were directed at only three judges (17 percent

The high rate of challenges for some judges is unlikely to be solely because of their jurisprudential views or traits but likely also reflects the local bar's nonpartisan, nonideological assessment of their abilities.

### III. THE WEAKNESS OF TRADITIONAL ARGUMENTS AGAINST THE JUDICIAL PEREMPTORY CHALLENGE

Expanding use of judicial challenges is a modest and simple reform that merely seeks to expand the use of a methodology that has already proven to be successful. It is not a radical proposal in that it *is* the status quo in one-third of the states. But traditionalists nonetheless may object in that they (wrongly) see this as an assault on judicial neutrality and integrity. They may even refuse to accept the premise that the identity of the judge affects (or at least can affect) the result of a case.

It is important to avoid misplaced characterizations of peremptory challenges. Their availability does not permit litigants to “pick” their judges, as critics may contend. Nearly every state with the challenge system permits plaintiffs and defendants only one such challenge. Any challenge must be exercised at the outset of the case before the judge has made any substantive rulings.<sup>69</sup> This means that the judge ultimately hearing the case will not be handpicked by anyone. A randomly assigned judge will preside unless one of the litigants can establish cause for disqualification pursuant to applicable recusal statutes. Critics who label the peremptory challenge procedure “judge shopping” are simply incorrect.

Other well-established procedures that have not drawn the ire of critics or judicial romantics appear to provide litigants with far more opportunity than the peremptory challenge to “forum shop.” For example, litigants may employ the following strategies: removal to federal court;<sup>70</sup> a “minimum

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of the bench). No other judge had more than twenty-five challenges for the year and one-third of the bench had ten or fewer. See Glenn Puit, *Scores of Litigants Bump Walsh*, L.V. REV.-J., Feb. 29, 2004, at 1B.

69. See BERKSON ET AL., *supra* note 35, at 40–42 (noting that states almost universally permit only one peremptory challenge, often per side rather than per party); see also FLAMM, *supra* note 35, ch. 27; *id.* at 769 (“[A] party or its attorney may ordinarily make only one peremptory disqualification application in any proceeding.”).

70. See 28 U.S.C. §§ 1441–1448 (2012). For example, defendant insurance companies involved in coverage or bad faith disputes can frequently remove the case to federal court because most insurance policies are issued to consumers in states other than the home state of the insurer. This effectively allows nonresident defendant insurers to choose whether the case proceeds in state court or federal court and deprives the policyholder local state court forum.

contacts” approach to personal jurisdiction;<sup>71</sup> a liberal approach to venue<sup>72</sup> (but subject to the possibility of transfer to a more convenient venue);<sup>73</sup> stringent enforcement of forum selection<sup>74</sup> and choice of law<sup>75</sup> clauses, including arbitration or other forum-specific dispute-resolution clauses;<sup>76</sup> and clever selection of particular plaintiffs or claims in order to bring a test case or a potentially precedent-setting case in a favorable forum.<sup>77</sup> Under this status quo of extensive outcome shopping options, now part and parcel of American litigation, it rings hollow for some to argue that the peremptory challenge of judges deviates too greatly from the American ideal of neutral adjudication.

Moreover, the system of peremptory challenges has substantial informal constraints. Both plaintiffs and defendants must calculate the danger that, by demanding automatic reassignment of the judge, they will obtain a worse trial

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71. See generally *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945). The required minimum has been ratcheted up significantly in recent years. See generally *Bristol-Myers Squibb, Co. v. Superior Court*, 137 S. Ct. 1773 (2017); *BSNF Ry. v. Tyrell*, 137 S. Ct. 1549 (2017); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (restricting exercise of “general” personal jurisdiction that does not require a lawsuit to be linked to the forum state to a corporate defendant’s “home” which is either its state of incorporation or locus of management); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (regarding the degree of contact required to sustain “specific” personal jurisdiction in cases where the substance of the underlying lawsuit is linked to the forum).

72. See 28 U.S.C. § 1391 (providing for proper venue either where (1) any defendant resides, if all defendants reside in the state in which the district is located; (2) in location of any significant part of the activity giving rise to the claim; or (3) any defendant is subject to the court’s personal jurisdiction, if neither (1) nor (2) are satisfied). However, the broad general venue statute may in certain cases be supplanted by a more specific venue provision. See, e.g., *T.C. Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520–21 (2017) (requiring that patent actions be solely subject to 28 U.S.C. § 1400(b), the patent venue statute, rather than to general venue statute 28 U.S.C. § 1391). *T.C. Heartland* grew out of the perceived abusive forum shopping that had made the U.S. District Court for the Eastern District of Texas a magnet for patent enforcement claims, attracting nearly one-third of all such claims, with patent holders winning in this district at a higher percentage than in other courts. See Robert G. Bone, *Forum Shopping and Patent Law—a Comment on TC Heartland*, 96 TEX. L. REV. 141, 144–48 (2017).

73. See 28 U.S.C. §§ 1404, 1406 (2012).

74. See *STEMPEL ET AL.*, *supra* note 30, at 177 (noting that forum-selection clauses are usually enforced).

75. See *id.* at 245 (noting that choice-of-law clauses are generally enforced so long as the chosen law is connected in some way to the parties or the dispute). Technically, of course, choosing the law is not the same as choosing the forum. But it is a litigation strategy that can be used to gain greater advantage than could ever be obtained in front of a favorable judge or jury. In some areas of law such as insurance coverage, state laws can be very inconsistent and even diametrically opposed.

76. Predispute arbitration clauses are routinely enforced, even when part of mass, standardized form contracts and in the “fine print” of a long usage agreement, invoice, or order confirmation. See generally *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (upholding an arbitration clause precluding class action against a vendor); *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (enforcing an arbitration clause in a mobile phone usage agreement that also barred dissatisfied customers from pursuing class action relief).

77. Cf. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–7 (1984) (positing a model in which potential litigants rationally choose when, where, and how to make and settle claims based on the likelihood of achieving gains and generally refrain from pursuing litigation unlikely to provide net gain).

judge for their case. For both sides, then, the judicial challenge is unlikely to be used in an automatic or reckless manner.

In addition to the baseless charge of peremptory challenges as permitting excessive judge shopping, critics may allege that peremptory challenges will create undue administrative burdens for courts. But there is essentially no evidence suggesting that challenges create a significant administrative burden, much less an expensive one. In addition, a party seeking a substitution frequently must pay a fee. If the fee is set at a sufficiently high (but not unduly discouraging) amount, this will both suppress irresponsible use of the challenge and generate sufficient revenue to alleviate any additional administrative costs.

### CONCLUSION

The theme of this Colloquium—access to justice—undoubtedly invokes a connotation of something far grander than merely expanding a procedural device of the adversary system. But this perhaps prosaic proposal offers a chance for concrete progress toward the goal of giving claimants meaningful access to the courts. Automatic judicial assignment also provides something of value to defendants and may therefore be more politically feasible than other proposals to expand access, such as the creation of new substantive rights, proconsumer agencies, or one-way fee shifting.<sup>78</sup>

Permitting litigants some flexibility to avoid a claim-killing or otherwise problematic judge is a small but workable solution that will advance access at the margins. More claims are likely to receive the hearing they deserve, which should (also at the margins) improve both individual access to justice and force the system to grapple with claims that test its commitment to equal justice. The ability to sweep potentially meritorious claims aside through dismissal motions based on judicial hunch or strangle them with unreasonable restrictions in wars of attrition against foes with greater resources will decline. Although expanding the availability of peremptory challenges of judges will not dramatically reverse the trend of declining access to courts, it at least provides the adversary system with another tool to level the playing field.

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78. Cf. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 146–47 (1987) (positing that to be adopted and successful, social welfare programs must be available to the populace at large and not solely to historically disadvantaged groups such as racial minorities; moreover, disadvantaged groups will obtain significant benefit from programs with general eligibility). “[I]n order to draw sustained public support [program benefits must be available] to all members of society who choose to use them.” *Id.* at 151–52.



