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Charles G. Geyh

Indiana University Maurer School of Law, cgeyh@indiana.edu

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Why Judicial Elections Stink

CHARLES GARDNER GEYH*

Those who are concerned about judicial independence and accountability in the United States quite rightly focus their attention on state judicial election campaigns. It is there that the most sustained and successful efforts to threaten judicial tenure in response to isolated, unpopular judicial decisions have occurred; and it is there that escalating campaign spending has created a public perception that judges are influenced by the contributions they receive. Attempts to address these problems have been undermined by four political realities that the author refers to as "the Axiom of 80": Eighty percent of the public favors electing their judges; eighty percent of the electorate does not vote in judicial races; eighty percent is unable to identify the candidates for judicial office; and eighty percent believes that when judges are elected, they are subject to influence from the campaign contributors who made the judges' election possible.

Conceding the inevitability of judicial elections in light of entrenched public support, court reformers have relegated themselves to proposing incremental reforms aimed at lessening the detrimental effects of judicial elections. As valuable as these efforts are in the short term, the author argues that they will ultimately fail because judicial elections are inherently unable to preserve judicial independence or promote judicial accountability. The author thus proposes a six point long-term strategy aimed at overcoming popular support for judicial elections, gradually phasing elections out of existence, and replacing them with an appointive model of judicial selection akin to that employed in the federal system.

I. INTRODUCTION

The Conference giving rise to the articles published in this symposium has succeeded in assembling some of the most accomplished practitioners of applied scholarship in the court reform arena: Professor Stephen Burbank, the unacknowledged drafter of the Report of the National Commission on Judicial Discipline & Removal, and a long-time Congressional advisor; Judge Robert Katzmann, who in his former life as a Brookings Institution fellow and Georgetown law professor dedicated himself to improving the working relationship between judges and legislators through groundbreaking conferences and field experiments; Samantha Sanchez, who left academia to become director

* Professor of Law, Indiana University School of Law at Bloomington. I would like to thank Luke Bierman, Alan Tarr and Emily Van Tassel for their comments on earlier drafts of this article. Thanks likewise to David Giampetroni for his fine research assistance. The views expressed in this article are the author's alone, and not necessarily those of the American Bar Association or the Justice at Stake campaign, with whom the author is currently working on different projects.

of the National Institute on Money in State Politics; and Professor Roy Schotland, the Reporter to the ABA Task Force on Lawyers Political Contributions and a prime mover behind the recent summits of state supreme courts on improving judicial selection.

For those of us in applied academia, the business of “applying” academic expertise often requires that the theoretically desirable be sacrificed for the practically possible. Radical reform proposals may be the bread and butter of the ivory tower crowd, but are a luxury that practitioners of applied scholarship—who struggle to implement court improvements in the teeth of the public’s natural resistance to change—can rarely afford. And so, when it comes to state judicial selection, we tend to tinker.

There is, however, an occupational hazard associated with being an inveterate tinkerer, which is that when the ship takes on water and begins to list, our first inclination is to put shims under the deck furniture. This is not to imply that our system of state judicial selection is a sinking ship. It is, however, a system with fundamental flaws that all but guarantee the failure of pending incremental reform proposals to yield lasting improvements.

In this article, I will begin in Part II by surveying the current state of the changing judicial independence and accountability landscape, to the end of explaining why judicial selection generally, and judicial elections in particular, are an appropriate center of attention. In Part III, I will describe the “Axiom of 80,” which simultaneously renders judicial elections inadequate to promote judicial accountability, inimical to judicial independence, and yet makes judicial elections an inevitable centerpiece of judicial selection systems. In Part IV, I will survey a variety of incremental measures that court reformers—conceding the political inevitability of judicial elections—have proposed to make judicial elections less independence-threatening and more accountability-enhancing. In Part V, I make the case that judicial elections are ultimately unsalvageable as a means to promote judicial accountability, incremental reforms notwithstanding. Finally, in part VI, I argue that as practitioners of applied scholarship, the trail of incremental reform that we blaze needs to include a fork, in which one path remains dedicated to short-term improvements in judicial elections, while the other runs a longer but ultimately more promising course toward the gradual elimination of elected judiciaries.

II. JUDICIAL SELECTION AS THE CRITICAL LANDMARK IN THE INDEPENDENCE-ACCOUNTABILITY LANDSCAPE

There seems to be a general consensus that court-directed hostility has been on the upswing in recent years, with any number of manifestations. Yellow journalists with a flair for the hyperbolic have labeled various trial judges

“idiots,”¹ “fuzzy headed buffoons,”² and “stooges.”³ From the political right of center, former federal judge and Supreme Court nominee Robert Bork has branded the “arrogantly authoritarian” Supreme Court “a band of outlaws” for its “promotion of anarchy and license in the moral order.”⁴ From the political left of center, former district attorney Vincent Bugliosi has dubbed the majority of the Court that decided *Bush v. Gore* the “felonious five,” “transparent shills for the right wing of the Republican Party,” and “judicial sociopaths” who “belong behind bars” for their “treasonous” behavior.⁵

Antagonism toward the courts has gone beyond name-calling to embrace an array of actions, some taken, others threatened. Some have favored removing errant judges. In the federal system, House majority whip Tom DeLay recommended the impeachment of “activist” judges;⁶ in Ohio, “legislators reacted with dark mutterings about impeachment” to the state supreme court’s invalidation of tort reform legislation;⁷ in New York, the governor and the mayor of New York City have been reported to exhibit a “readiness . . . to demote or remove judges with whom they disagree”;⁸ and California Governor Gray Davis, when asked what should happen when a judge “reasonably . . . comes to a decision that is contrary to [the governor’s] position?” replied, “They shouldn’t be a judge. They should resign. My appointees should reflect my views. They are not there to be independent agents.”⁹

Another response to unpopular decisions has been to circumscribe—or attempt to circumscribe—court jurisdiction. In the federal system, restrictions have been imposed on federal court review of habeas corpus proceedings, prisoner rights litigation, and immigration cases.¹⁰ In New Hampshire, a constitutional amendment was introduced to reduce or eliminate the state supreme

¹ Andrea Peyser, *Idiot Judge Will Be to Blame if Chaos Erupts*, N.Y. POST, Sept. 2, 1999, at 6.

² *Id.*

³ Jack Newfield & Maggie Haberman, *Three Stooges Are Court Clowns*, N.Y. POST, Sept. 29, 1998, at 12.

⁴ Joan Biskupic, *Bork, Uncorked: The Judge Holds the Supreme Court in Contempt*, WASH. POST, Mar. 16, 1997, at C01.

⁵ Vincent T. Bugliosi, *None Dare Call It Treason*, NATION, Feb. 5, 2001, at 11, 14, 15.

⁶ Ralph Z. Hallow, *Republicans out to Impeach ‘Activist’ Jurists*, WASH. TIMES, Mar. 12, 1997, at A1.

⁷ *Opinion: Truce Needed on Tort Reform Soon*, DAYTON BUS. JOURNAL, Sept. 27, 1999, at <http://www.bizjournals.com/dayton/stories/1999/09/27/editorial1.html>.

⁸ Juan Gonzalez, *Pols Rule Courtrooms: Acting Judges Owe Their Job to Pataki*, RUDY, N.Y. DAILY NEWS, Jan. 18, 2000, at 8.

⁹ *Transcript of Governor’s Comments on Judges*, SACRAMENTO BEE, Feb. 29, 2000, at 8.

¹⁰ A.B.A., *An Independent Judiciary*, in REPORT OF THE COMM. ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 57 (1997).

court's authority to review school funding issues following a controversial court ruling on that subject.¹¹

Yet another possibility has been to consider manipulating judicial salaries and budgets. In Ohio, the same decision that provoked threats of impeachment prompted calls to deny justices pay raises.¹² In Maryland, the press reported that the Mayor of Baltimore had urged the legislature to withhold state funding for the city court system until "the judiciary offers more cooperation in reform efforts,"¹³ while the State Senate President, unhappy with a recent decision of the state's high court, noted that "there may be other ways to let them know how unhappy the General Assembly is with their performance," adding that "They do have a budget to be approved."¹⁴ And in Florida, the Chair of the House Fiscal Responsibility Council, which controls the judiciary's budget, wrote a pointed letter (on note paper identifying himself as appropriations chair) to members of the Florida Supreme Court, letting them know that "Your decisions continue to be a mockery to the victims and their families."¹⁵

In some instances, states have attempted to bring mechanisms for judicial discipline to bear against judges whose decisions, at least in the minds of disciplinary authorities, go over the top. In California, for example, disciplinary proceedings were initiated against appellate court judge Anthony Kline for issuing a dissenting opinion in which he "refused to acquiesce" in an earlier decision of the state supreme court with which he disagreed.¹⁶ In New York, Brooklyn Criminal Court Judge Lorin Duckman was removed from office by the New York Court of Appeals in the wake of intense pressure from Governor Pataki and Mayor Giuliani, in part because of a "substantial record of petitioner's intentional disregard of the requirements of the law in order to achieve a personal sense of justice in particular cases before him."¹⁷

In still another development, court critics have targeted the judicial selection process. In the federal system, Thomas Jipping and his Free Congress Foundation's Court Watch campaign worked to defeat the confirmation of so-

¹¹ Ralph Jimenez, *Judges, Lawyers Decry the Virulence of Attacks on High Courts*, BOSTON GLOBE, Oct. 4, 1998, New Hampshire Weekly, at 1.

¹² *Opinion: Truce Needed on Tort Reform Soon*, *supra* note 7.

¹³ Thomas Waldron, *O'Malley Insists Funds for Courts Be Delayed*, BALT. SUN, Feb. 12, 2000, at 1A.

¹⁴ Matthew Mosk, *Miller Threatens Funding Revenge over Court's Ruling*, WASH. POST, Mar. 17, 2000, at B2.

¹⁵ Martin Dyckman, *Courts at Mercy of Legislative Purse*, ST. PETERSBURG TIMES, March 23, 2000, at 17A.

¹⁶ State of California Commission on Judicial Performance, *Inquiry Concerning Justice J. Anthony Kline, No. 151, Notice of Formal Proceedings* (filed June 30, 1998).

¹⁷ Gary Spencer, *Court of Appeals Removes Duckman: Dissents Stress Threats to Independence*, N.Y.L.J., July 8, 1998 at 1.

called “activist” Clinton nominees to the lower court bench.¹⁸ In states with “merit-selection” systems in which judges stand for retention elections, interest groups unhappy with particular decisions of those judges have campaigned for their defeat.¹⁹ And in states with partisan or nonpartisan elections, incumbents have likewise been challenged on account of their decisions in isolated cases.²⁰

Finally, there has been a grab-bag of proposals to control perceived judicial excesses in a variety of ways. Robert Bork has advocated a constitutional amendment to permit Congressional override of unwelcome Supreme Court rulings.²¹ New Hampshire has considered imposing term limits on its judges.²² In Florida, constitutional amendments have been drafted that would change the political balance on the state supreme court by increasing its size.²³

This broad array of developments initially begat an equally broad response from organizations interested in judicial independence. In 1996, the American Bar Association established a commission expansively titled the “ABA Commission on Separation of Powers and Judicial Independence.”²⁴ The American Judicature Society inaugurated a Center for Judicial Independence in 1997.²⁵ The Constitution Project, then under the auspices of the Century Foundation, began a new “Citizens for Independent Courts” initiative in 1998.²⁶ And between 1995 and 1998 law journals at Georgia State University, Mercer University, St. John’s University and the University of Southern California published symposia on the general subject of judicial independence.²⁷

¹⁸ Terry Carter, *A Conservative Juggernaut*, 83 A.B.A. J., June 1997, at 32, 34.

¹⁹ Task Force on the Distinction Between Intimidation & Legitimate Criticism of Judges, *Defending Justice: Courts, Criticism and Intimidation*, in UNCERTAIN JUSTICE: POLITICS AND AMERICA’S COURTS 121, 146–47 (2000).

²⁰ *Id.*

²¹ Biskupic, *supra* note 4.

²² Jimenez, *supra* note 11.

²³ *Repel Dangerous Plan to Take over the Courts*, PALM BEACH POST, Mar. 16, 2000, at 14A.

²⁴ See *An Independent Judiciary*, *supra* note 10, at 1.

²⁵ See American Judicature Society, *Welcome to the Center for Judicial Independence*, at <http://www.ajs.org/cji/> (last visited Oct. 24, 2002) (discussing the history of the Center for Judicial Independence).

²⁶ Task Force on the Distinction Between Intimidation & Legitimate Criticism of Judges, *supra* note 19, at viii.

²⁷ Symposium, *Judicial Review and Judicial Independence: The Appropriate Role of the Judiciary*, 14 GA. ST. U. L. REV. 737 (1998); Symposium, *Federal Judicial Independence*, 46 MERCER L. REV. 637 (1995); Symposium, *The Voices and Groups That Will Preserve (What We Can Preserve of) Judicial Independence*, 12 ST. JOHN’S J. LEGAL COMMENT. 1 (1996); Symposium, *Judicial Independence and Accountability*, 72 S. CAL. L. REV. 311 (1999).

More recently, however, the focus has begun to funnel toward judicial selection. The American Bar Association established a Standing Committee on Judicial Independence that commissioned a task force to explore lawyers' political contributions to judicial election campaigns, which issued a report in 1998; the Standing Committee later created the Commission on Public Financing of Judicial Campaigns, which published its report in 2001.²⁸ In 2000, the Constitution Project refocused its energies on developing guidelines for judicial election campaigns.²⁹ In 2000 and 2001, the National Center for State Courts hosted successive annual summit meetings of state supreme courts on improving judicial selection.³⁰ And in 2001 and 2002, law journals at Loyola University at Los Angeles and now Ohio State University have focused entirely or in significant part on judicial selection.³¹

There is more than faddishness behind this change in focus. One of the primary lessons learned from the groundwork laid by the general judicial independence projects of the mid-nineties is that when one seeks to map serious threats to independence, most roads go through judicial selection. It is important to understand why.

A. Proposals to Hold Judges Accountable for Their Decisions by Means Outside of the Electoral Process Have Been Rejected

Among the states, fundamental respect for an independent judiciary is sufficiently entrenched that states embroiled in cyclical wars waged in the name of judicial accountability are typically deterred from resorting to weaponry more lethal than the ballot box. As Professor Peter Shane has observed, all states have adopted a tripartite system of separated powers in which the judiciary is assigned the task of keeping the political branches within their constitutionally assigned roles through the exercise of judicial review. This shared vision of the judicial role implies a baseline of judicial independence that the courts must possess in order to serve their purpose.³²

²⁸ A.B.A., *Commission on Public Financing of Judicial Campaigns* in REPORT OF THE COMM. ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE vi–vii (2001).

²⁹ See *Introduction to the Survey*, The Constitution Project, at <http://www.constitutionproject.org/ci/survey/introduction.htm> (last visited Oct. 24, 2002).

³⁰ See, e.g., National Center for State Courts, *Call to Action: Statement of the National Summit on Improving Judicial Selection*, available at <http://www.ncsc.dni.us/SummitCalltoAction.htm> (last visited Aug. 21, 2002).

³¹ *National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353 (2001); Symposium, *Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 1 (2003).

³² Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMPORARY PROBS. 21 (1998).

Most attempts to move the baseline have not fared well. Isolated cranks have threatened judges with removal by impeachment for making unwelcome decisions, but no impeachments have materialized. Efforts to remove unpopular judges by other means (outside of the electoral process) have likewise been unsuccessful.³³ Proposals to pack courts and end judicial review have an almost perfect track record of failure.³⁴ Jurisdiction-stripping has enjoyed somewhat greater success, at least in the federal system, but usually in a watered-down form that has merely limited, not eliminated access to a particular court, and for the stated purpose of improving the efficient administration of justice.³⁵ In a like vein, budgetary impasses between courts and legislatures are not uncommon, and, as noted above, legislatures sometimes threaten to hold the judiciary's budget hostage in response to unpopular judicial decisions, but do so only occasionally.³⁶

B. Judicial Elections Have, Perhaps by Default, Become the Primary Vehicle for Retaliation Against Judges on Account of Their Decisions

With most avenues for promoting judicial accountability blocked, court critics have focused their attention on judicial elections as the means of choice to rid the system of unwelcome judges and substitute jurists whose views are more consonant with their own. Whereas other proposals have flashed in the pan unpredictably and disappeared quickly, efforts to exploit or retool judicial selection generally and judicial elections in particular have become increasingly pervasive.

Concerted campaigns to defeat judges up for reelection or retention election on account of their decisions in isolated cases have cut across states and subject areas. In Mississippi, Nebraska, Tennessee and Wisconsin, interest groups have

³³ Although New York State Supreme Court Judge Lorin Duckman was indeed removed by the New York Court of Appeals, the bases for his removal included, but were not limited to, events that related to his decision-making, which undercuts the use of his case as an example of an independence-threatening removal. See Spencer, *supra* note 17.

³⁴ Charles Gardner Geyh, *Customary Independence*, in JUDICIAL INDEPENDENCE AT THE CROSS-ROADS: AN INTERDISCIPLINARY APPROACH 160, 166–68 (Stephen B. Burbank & Barry Friedman eds., 2002) (discussing the chronic failure of court-packing proposals); WILLIAM ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937*, at 21 (discussing the chronic failure of efforts to limit judicial review).

³⁵ Linda Greenhouse, *How Congress Curtailed the Courts' Jurisdiction*, N.Y. TIMES, Oct. 27, 1996, at E5.

³⁶ Legislative manipulation of judicial budgets is nonetheless a serious problem when it occurs, and there are indications that it is occurring with increasing frequency. See, e.g., Charles Gardner Geyh, *Highlighting a Low Point on a High Court: Some Thoughts on the Impeachment and Removal of Pennsylvania Justice Rolf Larsen and the Limits of Judicial Self-Regulation*, 68 TEMP. L. REV. 1041 (1995) (discussing budgetary crisis provoked by state supreme courts that exercise their inherent authority to ensure adequate court funding).

called attention to one or two decisions as proof that a particular judge was soft on crime.³⁷ In Illinois, a judge faced a fierce retention battle because he was allegedly not soft enough.³⁸ In California, the issue was abortion;³⁹ in Georgia, homosexual rights and family values.⁴⁰ In Idaho, it was a water rights decision.⁴¹ In Ohio, it was school funding, and then tort reform, which has likewise been a pivotal issue in Alabama, Michigan, Pennsylvania and Texas.⁴² And in still other states, “the” critical issue is sometimes a pretext for another: For example, the U.S. Chamber of Commerce launched a multi-state advertising campaign in judicial races in order to “stop the tidal wave of new lawsuits” (in the words of its web page), yet at the same time ran ads in Mississippi focused entirely on the candidates’ victims rights record.⁴³

In some of these cases, campaigns to unseat incumbents at the ballot box on the basis of isolated decisions have been successful, including Justices White in Tennessee, Lanphier in Nebraska, Robertson in Mississippi and Silak in Idaho.⁴⁴ It is true that the vast majority of incumbent judges continue to win reelection, but one should not assume that because few judges lose their reelection or retention elections, few judges feel threatened by the specter of a challenge to their incumbency based upon the decisions they render in particular cases. Were incumbents to feel no threat, they would presumably perceive no need to campaign aggressively (and spend lavishly) in defense of their seats, which is clearly not the case.

³⁷ Kirk Loggins & Duren Cheek, *Activists Target Tennessee Judge*, THE TENNESSEAN, July 9, 1998, at 1A; Steve Schultze, *Election 99 TV Ad Battle Could Change Nature of Supreme Court Campaigns*, MILWAUKEE SENTINEL, Mar. 29, 1999, at 1; Traceil Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68 (1999).

³⁸ Bruce Dold, *Judges up for Election Walk a Delicate Tightrope*, CHI. TRIB., Oct. 23, 1998, at 27.

³⁹ Dion Haynes, *Interest Groups Politicizing State Court Balloting: Jurists Forced to Chase Money*, CHI. TRIB., Nov. 2, 1998, at 4.

⁴⁰ Jonathan Ringel, *Campaign Attack Tests New Rules*, FULTON COUNTY DAILY REPORT (Atlanta), June 19, 1998, at 1.

⁴¹ Dan Popkey, *Trout Says Politics Had Nothing to Do With Ruling*, IDAHO STATESMAN, Oct. 28, 2001, at 1A (reporting on defeat of Justice Silak in wake of water ruling).

⁴² Josh Goldstein & Chris Mondics, *An Effort to Sway Pa. Election*, PHILA. INQUIRER, Aug. 12, 2001, at A18 (reporting on tort reform as the pivotal issue in interest groups’ efforts to unseat judges in Alabama, Michigan, Mississippi, Ohio, and Texas); Emily Heller & Mark Ballard, *Hard-Fought, Big-Money Judicial Races: U.S. Chamber of Commerce Enters Fray with Ad Money*, NAT’L J., Nov. 6, 2000, at A1.

⁴³ Heller & Ballard, *supra* note 42.

⁴⁴ See *supra* notes 37–41 and accompanying text.

To the contrary, in many jurisdictions the cost of winning reelection is increasing exponentially.⁴⁵ If we define a judge's decision-making independence in terms of her capacity to remain impartial and decide cases according to facts as she finds them and law as she construes it to be written, then threats to that independence can occur not only when a judge loses her job for exercising independent judgment, but also when a judge perceives that she may lose her job for doing so. If so, the spiraling costs that incumbents feel they must incur to stave off reelection or retention election challenges may be a better proxy for gauging the escalating threat to decisional independence than the rate of electoral defeat. By the same token, the unprecedented sums that individuals and organizations are contributing to judicial campaigns underscores the primacy, at least in their minds, of judicial elections as a device for promoting judicial accountability.

C. Increased Activity in the Judicial Election Arena Has Created Important Satellite Issues Affecting Independence and Accountability

To fully appreciate why judicial elections deserve the limelight in the variety show of threats to judicial independence, it is important to understand that the judicial independence "problem" caused by electing judges does not end with the concern that a judge's impartiality in politically sensitive cases may be compromised by the fear of losing her reelection or retention bid. It extends to the perception, if not the reality, that judges are beholden to the burgeoning volume of contributors who make their reelection possible.⁴⁶ That perception, in turn, coupled with the premise underlying campaigns to defeat judges who make rulings with which voters disagree—namely, that judges are supposed to make decisions agreeable to their "constituents"—contributes to the view that the

⁴⁵ The A.B.A. Commission on Public Financing of Judicial Campaigns found that:

The cost of running judicial election campaigns is increasing dramatically across the country. "In the thirty-nine states that elect judges at some level," reported *The Nation* magazine in 1997, "the cost of judicial races is rising at least as fast as that of either Congressional races or presidential campaigns, as candidates for the bench pay for sophisticated ads, polls and consultants." While cautioning the Commission that national averages can be misleading, given variations among the states, Samantha Sanchez of the National Institute on Money in State Politics testified that "[t]he average, or mean, cost of running for [Supreme Court judicial] office has risen over the last decade, as has the median cost of running." In his testimony to the Commission Dr. Craig Holman, Senior Policy Analyst for the Democracy Program at the Brennan Center for Justice, and a consultant to the Commission, attributed the phenomenon to increased competition for judicial office: "Running for judicial office is costing dramatically more money than it ever has in the past. There's been this brand new interest . . . in competing for judicial offices and where there are elections offered for it, it costs much more."

A.B.A., *supra* note 28, at 9 (citations omitted).

⁴⁶ See *infra* notes 50–52, 57–58, 69 and accompanying text.

judiciary is as “political” a branch of government as the other two, and should be no more independent of the people it serves than the legislature or the governor. And therein lies the potential for the erosion of the public’s longstanding respect for an independent judiciary.

III. THE “AXIOM OF 80”

Efforts to address threats to independence that arise in the context of selecting judges must take into account four political realities, that together constitute what I am calling the “Axiom of 80”: (1) Roughly 80% of the public prefers to select its judges by election and does so; (2) Roughly 80% of the electorate does not vote in judicial elections; (3) Roughly 80% of the electorate cannot identify the candidates for judicial office; and (4) Roughly 80% of the public believes that when judges are elected, their decisions are influenced by the campaign contributions they receive.⁴⁷

A. Eighty Percent of the Public Favors Selecting Judges by Election and Does So

Those who favor judicial elections rightly point out that when we speak of an “independent” judge, we are not using the term in its literal sense. No one suggests that judges should be so completely free from influence or control that they may pursue avocations as outlaws or libertines, whenever the spirit moves them. Rather, the unspoken adverb “appropriately” precedes “independent judge” in our collective understanding, and an appropriately independent judge is one whose autonomy is circumscribed by some measure of accountability to the public she serves. For fans of judicial elections, an appropriately independent judge is properly held accountable to the electorate from time to time, and to the extent that elections diminish a judge’s absolute independence, it is a fair price to pay for ensuring accountability.

This view would seem to be widely shared. Elections are, after all, the way we select our leaders in a representative democracy (never mind, for the moment, that judges are not supposed to be our “representatives”). Every state entering the Union since 1845 has provided for the election of judges in one way or another, and a total of forty-two states call for at least some of their judges to stand for election. Practitioners of applied academia who regard the toll elections take on judicial independence as too high a price to pay for the accountability they

⁴⁷ The “80” in “Axiom of 80” refers to the percentage of voters or survey respondents who corroborate each of the four political realities that I describe here. I hasten to add, however, that the “Axiom of 80” is, first and foremost, a rhetorical device. The percentages to which I allude will vary between jurisdictions and elections. The 80% figure will not always hold, but that does not undermine the essential correctness of the point that the “Axiom of 80” makes.

promote, must therefore toil in the shadow of entrenched public support for judicial elections. This support runs as high as 80% in some jurisdictions, and translates into 80% of the nation's judges standing for election.⁴⁸

B. Eighty Percent of the Electorate Does Not Vote

Eighty percent public support for judicial elections is the first of four political realities in the "Axiom of 80." The second political reality is in tension with the first: despite the overwhelming popularity of judicial elections on a conceptual level, it is not uncommon to find that 80% or more of eligible voters fail to vote in judicial elections.⁴⁹ On the one hand, when judicial and political branch candidates share the same ballot, there is a well-documented "roll off" of voters, who cast ballots in the political branch races but not the judicial.⁵⁰ On the other hand, when judicial elections do not share the ballot with high-profile political branch contests, voters simply stay home.⁵¹ Although there has been some conjecture that increased spending on judicial campaigns may translate into increased voter interest, such a conclusion is far from clear. In 1997, for example, record spending in a Wisconsin Supreme Court race yielded a meager 21% voter turnout, prompting the executive director of the state elections board to opine that "People come out because they have a reason to come out. And these races don't get people out as much as other things do."⁵²

⁴⁸ *Mixed Signals: People Want to Elect Judges but Don't Know Them*, BIRMINGHAM NEWS, Mar. 26, 2000, at 2C (reporting 85% support for judicial elections).

⁴⁹ William Yelverton, *Low Turnout, But Voters Had Some Surprises*, TAMPA TRIB., Sept. 5, 1996, at Pinellas 1 (reporting 17.5% turnout in local Florida judicial races); Stephanie Gauthreaux, *Judicial Race Vote Turnout Running Low*, BATON ROUGE ST. TIMES, Dec. 8, 1990, at 1A (reporting expected 13–15% turnout in Louisiana judicial race); Erich Smith, *Election Watchdogs Expect Low Turnout in Philadelphia*, ASSOCIATED PRESS, May 17, 1997, available at 1997 WL 2526732 (reporting an anticipated 12% turnout as a sign of "traditional voter apathy toward judicial races"); Sharon Theimer, *Lavish Campaign Spending Doesn't Lift Voter Turnout*, WIS. ST. J., April 3, 1997, at 3C (reporting 21% turnout in state supreme court race).

⁵⁰ Larry Aspin, *Trends in Judicial Retention Elections, 1964–1998*, 83 JUDICATURE 79, 81 (1999) (reporting that in 1998, 29.5% of those who voted in political branch races did not vote for judicial candidates up for retention election on the same ballot).

⁵¹ See *supra* notes 49, 50.

⁵² Theimer, *supra* note 49.

C. Eighty Percent of the Electorate is Unfamiliar with the Judicial Candidates

In Michigan, a spokesperson for the governor attributed low voter turnout to the fact that “People just don’t know who they’re voting for.”⁵³ This is a third political reality that may help to explain the second: as much as 80% of the electorate is completely unfamiliar with its candidates for judicial office.⁵⁴ Once again, one might hypothesize that as more money is spent on advertising in judicial races, voter ignorance will diminish, but that too is far from clear. Surveying the wreckage of the recent Michigan Supreme Court races to which I just alluded, Chief Justice Elizabeth Weaver complained that “[f]ifteen million dollars was spent on this last election and the public is less informed now than when we started.”⁵⁵

D. Eighty Percent of the Public Believes that Financial Contributions to Judicial Election Campaigns Buy Influence

Even if increased spending in judicial campaigns has done little to relieve voter apathy and ignorance, this is not to suggest that the public perceives such spending to have had no impact. To the contrary, the public believes that when judges are elected, their decisions are influenced by the money they receive from contributors. In Texas, a 1998 survey sponsored by the state supreme court found that 83% of Texas adults thought that money had an impact on judicial decisions.⁵⁶ In Ohio, a 1995 survey reported that nine out of ten residents believed that campaign contributions influenced judicial decisions.⁵⁷ And in Pennsylvania, a 1998 poll sponsored by a special commission appointed by the Pennsylvania Supreme Court, found that nine out of ten voters believed that

⁵³ Sara Scott, *State’s Top Judge Joins Chorus for Reform*, GRAND RAPIDS PRESS, Dec. 10, 2000, at A31.

⁵⁴ *People Want to Elect Judges but Don’t Know Them*, *supra* note 48 (reporting that 80–85% of Alabamians could not identify eleven of twelve supreme court candidates); Gene Nichol, *Better Justice, by Appointment*, RALEIGH NEWS & OBSERVER, May 10, 2001, at A23 (citing exit polls in a neighboring state which revealed that “over 80% of voters said they had no idea who the judges they had just selected were”).

⁵⁵ Scott, *supra* note 53.

⁵⁶ Texas Supreme Court Chief Justice Thomas R. Phillips, State of the Judiciary Address to the 76th Legislature of the State of Texas (Mar. 29, 1999), *available at* <http://www.tomphillips.com/state76.htm>. (citing a “recent statewide survey”).

⁵⁷ T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, THE PLAIN DEALER (Cleveland), Feb. 15, 2000, at 1A.

judicial decisions were influenced by large campaign contributions.⁵⁸ In short, we have a fourth political reality to complete the Axiom of 80: Eighty percent (closer to ninety, but where's the symmetry in that?) of the public thinks that campaign contributions buy influence with judges.

And so we are confronted with the conundrum of a public that does not vote, would not know the candidates if it did, but which will not relinquish the franchise it declines to exercise, even as it believes that judges are corrupted by the contributors they must solicit if they are to win the elections that the public will not abandon. The Axiom of 80 thus isolates a set of conflicting political realities in judicial elections that fosters neither independence nor accountability. If it is inevitable that judges stand for election, it is equally inevitable that they will be subject to loss of tenure for the rulings they make, and it opens the door to the likelihood that they will appear beholden to financial contributors who make their reelection possible. Widespread voter ignorance and apathy, on the other hand, undercut the likelihood that judges will be held accountable to the public in any meaningful way.

IV. INCREMENTAL REFORM IN THE SHADOW OF THE AXIOM OF 80

The perceived inevitability of judicial elections has had a profound effect on recent developments in judicial selection reform. For the better part of the twentieth century, judicial reformers peddled merit selection systems as the surecure for what ailed elected judiciaries. The phrase "merit selection" implies a system in which judges are selected on the basis of qualifications, rather than popularity or partisanship. As to popularity, virtually all merit selection systems feature retention elections, which opens the door to the possibility that the electorate will hinge a judge's continuation in office on her popularity, rather than merit. The presence of retention elections in merit selection systems can only be explained as a concession to the entrenched political necessity of preserving judicial elections in some form, so that merit selection proponents have an answer for detractors who oppose plans that "take away our right to vote."

Even then, it is somewhat disingenuous to say that merit selection systems preserve the right to vote. Retention elections are designed to minimize the risk of non-retention, by stripping elections of features that might inspire voters to become interested enough to oust incumbents. Thus, there is no choice to make between competing candidates or viewpoints, no race to follow, no opportunity to pick a new winner, and no political party to support. I realize that one can (and should) recast the justifications for retention elections in less cynical terms, as an

⁵⁸ A.B.A., *Task Force Report on Judicial Campaign Finance: Executive Summary*, in REPORT OF THE COMM. ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 2 (Nov. 1998).

effort to focus voter attention on professional competence, judicial demeanor, etc., which are legitimately related to evaluating the judge's merit. The essential point, however, is that retention elections diminish the scope of voter control over judicial selection—a point not lost on fans of contested judicial elections who have successfully stalled the merit-selection movement across the United States.

As to the relationship between merit selection and partisanship, critics note that governors do not make apolitical nominations in merit selection states; rather, they typically pick favored partisans from the pool of candidates that the selection commission deems qualified. Merit selection thus does not eliminate the influence of partisanship and interest-group politics from judicial selection, but merely moves it from the point at which judges are elected to the point at which they are appointed.

Organizations dedicated to court improvement generally, and to merit selection in particular, have not been blind to their recent inability to attract new converts to merit selection from the ranks of states that continue to select judges through contested elections. The American Bar Association, without abandoning its longstanding support for merit selection, has shifted some of its focus to exploring other ways in which contested elections might be improved.⁵⁹ For the past two years, Professor Roy Schotland has co-hosted conferences of public officials from the states that elect their supreme courts, at which the subject of merit selection has been taken off the agenda, so that greater attention can be devoted to reforms that program organizers regard as more viable.⁶⁰ Even the American Judicature Society, which spearheaded the merit selection movement throughout much of the twentieth century, devoted its 2001 annual meeting program to judicial election reform, suggesting that it too may be broadening its horizons.

In short, reformers conceded to the political necessity of judicial elections long ago, and now many appear poised to raise the white flag on merit selection systems that split the difference between purely appointive models and contested elections. If the first political reality of the Axiom of 80—the public's entrenched preference for judicial elections—could be conquered and judicial elections ended in favor of true appointive systems, the remaining three political realities, which arise only when judges are elected, would likewise be overcome. Not even the moribund merit selection movement, however, can lay claim to a system that succeeds on that score. On the contrary, retention elections, by virtue of the sterile questions they ask the electorate to decide, breed voter apathy and ignorance, and inspire highly motivated interest groups to launch anti-retention campaigns on the theory that they need only energize a small block of voters to influence election

⁵⁹ A.B.A., *Standards on State Judicial Selection*, in REPORT OF THE COMM. ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE v (2000).

⁶⁰ See Introduction, *supra*.

outcomes. That, in turn, requires incumbents to stave off opposition with monies solicited from contributors to whom they then appear beholden.

Having reached the end of the road with merit selection and having accepted elections as a permanent part of the judicial selection landscape, reformers are now embarking on new programs of incremental change. Such programs concede the inevitability of the first political reality, and confine themselves to modest proposals that seek to reduce the independence-threatening effects of judicial elections and address the remaining three Axiom of 80 political realities.

To lessen the general threats to a judge's decision-making autonomy that can arise in the context of judicial elections, the Constitution Project has developed "higher ground" standards of conduct aimed at securing voluntary commitments from judicial candidates not to attack incumbents' rulings in misleading ways or stake out positions on how they will decide future cases.⁶¹ In a separate initiative, the Constitution Project's Task Force on the Distinction Between Criticism and Intimidation of Judges recommended the creation of state and local coalitions to respond to unfair criticism of judges when it arises in contexts including but not limited to elections.⁶² The American Bar Association Commission on Separation of Powers and Judicial Independence made a similar recommendation, and the ABA Special Committee on Judicial Independence followed up with a video to assist state and local bars in the development of response programs.⁶³ In a related move, the ABA modified its model Code of Judicial Conduct to authorize judicial candidates to "respond to personal attacks or attacks on the candidate's record."⁶⁴ And the first summit of states with elected supreme courts recommended (among other things) that contested elections be conducted in a non-partisan manner, and that the terms of judicial office be lengthened to reduce the frequency with which judges must stand for election.⁶⁵

In addition to these general efforts to alleviate election-related threats to judicial independence that flow inevitably from the first political reality of the Axiom of 80 (that 80% of the public prefers to elect judges and does so), other incremental reforms have been proposed to address the remaining three Axiom of 80 political realities. To reduce voter apathy and ignorance (political realities two and three, respectively), the First National Summit on Improving Judicial

⁶¹ See generally, National Center for State Courts, *The Higher Ground: Standards of Conduct for Judicial Candidates*, at <http://constitutionproject.org/ci/standards.html> (last visited Oct. 24, 2002) (listing the Constitution Project's Higher Ground Standards).

⁶² Task Force on the Distinction between Intimidation and Legitimate Criticism of Judges, *supra* note 19, at 155-56.

⁶³ A.B.A., *supra* note 10, at 50; Videotape: Response to Judicial Criticism (Special Committee on Judicial Independence) (on file with the author).

⁶⁴ A.B.A. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(e) (2000).

⁶⁵ National Center for State Courts, *supra* note 30, at <http://www.ncsc.dni.us/SummitCalltoAction.htm>.

Selection recommended that states develop voter guides to provide more information about the judicial candidates. The ABA Commission on Public Financing has recommended that public monies be available to underwrite the costs of producing such guides.⁶⁶ Several states that employ retention elections have implemented judicial performance evaluation programs that go beyond bar-generated assessments of an incumbent's performance to include information gathered from jurors, witnesses, litigants and court personnel, and the First National Summit on Improving Judicial Selection urged the proliferation of these programs.⁶⁷ In a like vein, the ABA Commission on State Standards for Judicial Selection, effectively accepting contested elections as unavoidable, addressed itself to the concern that elections were ill-suited to guarding against the selection of unqualified judges, and so recommended "the creation of credible, deliberative, non-partisan bodies to evaluate the qualifications of all judicial aspirants."⁶⁸

To address the fourth Axiom of 80 political reality—the perception that judges are dependent on contributors who donate substantial sums to their campaigns—the ABA Task Force on Lawyers Political Contributions recommended that the ABA Code of Judicial Conduct cap the dollar amount a judicial candidate may receive from any given contributor, and the Code has since been so amended.⁶⁹ On a related front, the ABA Commission on Public Financing of Judicial Campaigns has recommended full public financing for state supreme court races to end the perception that judicial candidates are dependent on private campaign contributions. The First National Summit on Improving Judicial Selection made a similar recommendation.⁷⁰

V. WHY JUDICIAL ELECTIONS ARE UNSALVAGEABLE AND INCREMENTAL REFORMS WILL FAIL

For years, court defenders have called attention to differences between the judiciary and the political branches of government. Judges are supposed to be impartial; governors and legislators are not. Governors and legislators are supposed to represent the views of their constituents; judges are not. Judges are subject to ethical restrictions that limit their ability to clarify their positions or comment on their decisions; governors and legislators are not. These distinctions are routinely trotted out in defense of the incremental reforms summarized in Part III: We should support public financing for judicial campaigns, longer terms of judicial office, limits on campaign contributions in judicial races, and self-

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ A.B.A., *supra* note 59, at v.

⁶⁹ ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5C(3) (2000).

⁷⁰ National Center for State Courts, *supra* note 30.

imposed restraints on campaign conduct, because judges are supposed to be impartial and uninfluenced by “constituents” and contributors; and we need to defend judges who have been unfairly criticized, because they are subject to ethical rules that prevent them from defending themselves. Seemingly lost in the incremental reform shuffle, is the obvious point that the fundamental differences between the judiciary and the other branches undermine the legitimacy of judicial elections altogether.

In *Marbury v. Madison*, Chief Justice Marshall declared that it is the province of the judiciary to say what the law is. It is the courts that must bring the law to bear in individual cases, clarify disagreements between private citizens as to what the law requires, analyze the legislature’s handiwork and tell us what statutes mean, and tell the political branches when their interpretations of the Constitution, as embodied in legislation or executive action, are wrong and must be invalidated.

In other words, we need some entity to arbitrate the law’s meaning, and those who make, execute and live under the laws of the state and nation, depend on the specialized expertise of judges to perform that function. Governors need not be lawyers and often are not. The same may be said of legislators. With respect to judges, however, virtually every state with an elective judiciary has embedded in its constitution or statutes the requirement that judges be licensed to practice law in that state.⁷¹

It is one thing to expect voters with no training in the law to decide whether the policies favored by senators and governors (who may not be lawyers either) coincide with their own positions, and quite another to expect them to decide whether the rulings of judges coincide with the law. If we suspend disbelief and assume that voters can actually acquire the expertise needed to assess a judge’s familiarity with and fidelity to innumerable laws as reflected in the myriad cases she has decided, then the learning curve will be considerably steeper than that required to divine a political branch candidate’s position on the major issues of

⁷¹ ALA. CONST. art. VI, § 6.07 (amended 1901); ALASKA CONST. art. IV, § 4; ARIZ. CONST. art. VI, § 22; ARK. CONST. art. 7, §§ 6, 16; CAL. CONST. art. VI, § 15; COLO. CONST. art. VI, §§ 8, 11; DEL. CONST. art. IV, § 2; FLA. CONST. art. V, § 8; GA. CONST. art. VI, § 7; HAW. CONST. art. VI, § 3; IDAHO CONST. art. V, § 23; IDAHO CODE § 34-615(2) (Michie 2001); ILL. CONST. art. VI, § 11; IOWA CODE § 602.1603 (West 1996); KAN. CONST. art. 3, § 7; KY. CONST. § 122; LA. CONST. art. V, § 24; MD. CONST. art. IV, § 2; MICH. COMP. LAWS ANN. § 168.409 (West 1989); MINN. CONST. art. VI, § 5; MISS. CONST. art. 6, §§ 150, 154; MO. CONST. art. 5, § 21; MONT. CONST. art. VII, § 9; NEB. REV. STAT. ANN. 24-301 (Michie 1995); NEV. REV. STAT. ANN. 2.020 (Lexis 1998); N.J. CONST. art. 6, § 6 ¶ 2; N.M. CONST. art. VI, §§ 8, 14; N.Y. CONST. art. VI, § 20; N.C. CONST. art. IV, § 22; N.D. CONST. art. VI, § 10; OHIO REV. CODE ANN. §§ 1901.06, 2501.02, 2503.01 (West 1994); OR. REV. STAT. §§ 2.020, 2.540, 3.050; PA. CONST. art. V, § 11; TENN. CODE ANN. 17-1-106 (1994); TEX. CONST. art. 5, §§ 2, 7; UTAH CONST. art. VIII, § 7; WASH. CONST. art. 4, § 17; WIS. CONST. art. VII, § 24; WY. CONST. art. 5, §§ 8, 12.

the day, and decide whether the candidate will be receptive to the concerns of constituents.

Historically, however, it has been impossible for voters to gather the information they need to make intelligent decisions from the candidates themselves. First, judges are not supposed to care what voters think. The Model Code of Judicial Conduct declares that a judge “shall not be swayed by partisan interests, public clamor, or fear of criticism.”⁷²

Second, Canon 3B(9) forbids judges from making extra-judicial comments on pending or impending cases.⁷³ Although the prohibition is limited to comments that “might reasonably be expected to affect [a proceeding’s] outcome or . . . fairness,” the remainder of the section and the accompanying comment strongly suggest that most, if not all, case-specific comments will violate the rule.⁷⁴ Although Canon 5A(3)(e) provides that judicial candidates “may respond to personal attacks or attacks on the candidate’s record,” this provision has not been widely adopted, and the Code makes no attempt to reconcile its terms with Canon 3B(9)’s prohibition of public comments on pending cases.⁷⁵

Third, although not technically forbidding judges to comment on completed cases, Canon 2 provides that judges generally must “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,”⁷⁶ and conduct all their extra-judicial activities so that they do not “cast reasonable doubt on the judge’s capacity to act impartially as a judge.”⁷⁷ In addition, until very recently, at least, judicial candidates had been prohibited from “mak[ing] statements that appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”⁷⁸ Against this regulatory backdrop, Judith Kaye, Chief Judge of the New York Court of Appeals has observed that commenting on completed cases is “generally viewed as an

⁷² ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 3B(2) (2000).

⁷³ *Id.* Canon 3B(9).

⁷⁴ *Id.* The rule itself creates an exception for statements “explaining for public information the procedure of the court,” as if without such an exception comments so benign could be construed to affect the outcome or fairness of proceedings. And the accompanying comment states in unqualified terms that “judges abstain from public comment regarding a pending or impending proceeding,” and that in mandamus proceedings “the judge must not comment publicly.” *Id.* Canon 3B(9) cmt.

⁷⁵ *Id.* Canon 5A(3)(e).

⁷⁶ *Id.* Canon 2A.

⁷⁷ *Id.* Canon 4A(1).

⁷⁸ *Id.* Canon 5A(3)(d)(ii). The continuing validity of this restriction has been cast into doubt by the Supreme Court’s recent decision in *Republican Party v. White*, 122 S. Ct. 2528 (2002). See *infra* notes 85, 86 and accompanying text.

‘unwise course,’” because “in a legal system where *stare decisis* plays an important role, today’s completed case [is] grist for tomorrow’s docket.”⁷⁹

Fourth, and finally, voters who look to the candidates to tell them what they plan to do after they are elected have, at least historically, been sorely disappointed. Although the Supreme Court’s recent decision in *Republican Party v. White*⁸⁰ creates uncertainty as to its continuing vitality, Canon 5 of the Code provides that candidates for judicial office shall not “make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.”⁸¹

In short, if voters are expected to second-guess the decisions of a judge who brings years of specialized training to bear in deciding complex, subtly nuanced issues of law, they need more information than would be required to assess the performance of political branch officials for whom no professional training is required. And yet, voters have had access to far less information from judicial candidates than their political branch counterparts.

A. Conventional Responses to the Information Shortfall in Judicial Elections

The revelation that the Code of Judicial Conduct has created an information shortfall for voters in judicial elections is hardly new, and has elicited at least two alternative responses, both of which are deficient. The first alternative is to counsel voters against casting their ballots on the basis of whether they agree with a judge’s decisions, to urge them instead to look at the judge’s entire record for the purpose of assessing the jurist’s character, competence and temperament, and to supply voters with information that enables them to make such assessments.⁸² The second is to shrug, concede the inadequacy of the information upon which voters cast their ballots, but conclude that it is the only way to ensure judicial accountability.⁸³

The primary problem with the first alternative is its futility. Codes of judicial conduct authorize judges to tell the electorate about the incumbents’ integrity and demeanor, but permit them to say very little about the cases they decide. Deciding

⁷⁹ Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 713–14 (1997).

⁸⁰ 122 S. Ct. 2528 (2002).

⁸¹ ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (2002).

⁸² Task Force on the Distinction Between Intimidation & Legitimate Criticism of Judges, *supra* note 19.

⁸³ See The Federalist Society, *Judicial Selection White Papers: The Case for Partisan Judicial Elections*, at <http://www.fed-soc.org/Publications/White%20Papers/judicialection.htm> (last visited Aug. 19, 2002).

cases, however, is what judges do, and those decisions are important because they can affect people's lives in profound ways. If we make voters go to the trouble of deciding whether a judge should remain in office, it is fatuous to suppose that they can be persuaded to bracket out their views on the merits of the judge's most important decisions and cast their ballots on the basis of an arid assessment of the incumbent's general fitness. Groups interested in judicial election outcomes, sensing pent up voter demand for case-specific information that codes of judicial conduct have foreclosed the candidates from providing themselves, have found it worth their time and energy to spend millions of dollars on campaign advertising attacking or defending the decisions of incumbent judges. The question of whether the electorate is willing to vote without regard to the merits of an incumbent's decisions would thus appear to be one that the marketplace of ideas has already answered in the negative.

The second alternative, on the other hand, overestimates the potential for elections to foster accountability. Up to this point, I have entertained the fiction that voters are capable of assessing the performance of judges on their own. When it comes to assessing the performance of lawyers and other professionals in the context of malpractice litigation, however, it is presumed that except in obvious cases, a jury is incapable of making such assessments without the benefit of expert testimony.⁸⁴ The reason is clear: how can people who have no specialized expertise or training assess the professional competence of one who has such training and expertise, unless someone with the requisite knowledge offers them guidance? In judicial elections, the code of judicial conduct forecloses the candidates from supplying that guidance themselves, and so the task falls to others.

Unlike malpractice litigation, however, where the court has at least some hope of preventing jurors from being confused by unqualified experts, in judicial elections, the first amendment guarantees that all bets are off. At first blush, lawyers might seem to be the most qualified source of information on the professional competence of judicial candidates, but groups that find themselves at odds with the views of bar organizations on such matters have challenged the assumption that the bar is a disinterested purveyor of information.⁸⁵ For their part, bar organizations have challenged their challengers by calling attention to allegedly misleading information that other groups have included in their advertising. Voters are caught in the middle. Incapable of evaluating judicial candidates unassisted, unable to receive such assistance from the candidates themselves, and ill-equipped to evaluate the trustworthiness of information they

⁸⁴ GEOFFREY HAZARD, ET AL., *THE LAW AND ETHICS OF LAWYERING* 169 (3d ed. 1999).

⁸⁵ See *The Federalist Society*, *supra* note 83, at <http://www.fed-soc.org/Publications/White%20Papers/JudicialElection.htm> (criticizing the role of the organized bar in judicial elections).

receive from sources that accuse each other of being unreliable, they are left to vote badly, or not at all. The opportunity for self-interested organizations and single-issue voter groups to influence election outcomes disproportionately is thus correspondingly greater.

It is sometimes argued that since state judges “make” common law and federal judges (for the most part) do not, state judges are policy-makers in ways federal judges are not; thus, the argument goes, holding state but not federal judges directly accountable to the electorate makes sense. I am unpersuaded. First, it bears emphasis that the power to make common law is effectively limited to Supreme Court justices, who constitute an extremely small subset of all judges when compared to the number of judges who must stand for election. Second, whatever potency this justification may have originally had has diminished in tandem with the decline of state common law generally over the course of the past century.⁸⁶ Third, the information shortfall that undercuts the electorate’s capacity to evaluate intelligently the decisions judicial candidates make on high profile issues can only be more acute when it comes to assessing often arid and obscure questions of common law. To the extent that popular control over tort, property and contract law is desirable, the obvious alternative is to let voters elect legislators who may codify or override the common law, consistent with the public’s preferences.⁸⁷

Repeated references here to voter ignorance, apathy and incapacity may create the impression that mine is an essentially condescending and elitist perspective. Not so. Rather, my views are rooted in the recognition that the complexities of modern life make specialists of us all, if only because the volume of information available on the universe of subjects relevant to our lives has become so vast that mere mortals can gain mastery over no more than their small corner of it. To delegate judicial selection and oversight of the common law to elected officials who make it their business to be adequately informed on such subjects is thus a pragmatic approach, not an aristocratic one.

⁸⁶ GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982) (“The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law.”).

⁸⁷ Although it is beyond the scope of this article, codification of the common law is sometimes complicated by court-construed limits on legislative power under state constitutions. See Robert F. Williams, *Forward: Tort Reform and State Constitutional Law*, 32 RUTGERS L. J. 897 (2001).

B. *A New Response to the Information Shortfall in Judicial Elections: Authorizing Candidates to Provide the Electorate with the Information It Seeks*

In *Republican Party v. White*,⁸⁸ decided after the conference giving rise to this symposium was held, the Supreme Court of the United States invalidated one of the restrictions on judicial campaign speech responsible for the information shortfall in judicial elections, and in so doing, may have created a new dynamic in court races. The good news is that the information shortfall may soon be overcome. The bad news is that efforts to preserve judicial impartiality may be seriously compromised. To the extent the decision liberates judicial candidates to emulate their counterparts in political branch races by committing themselves to positions on issues they are likely to decide as judges, it will accelerate the downward spiral of politicization that can be arrested only if judicial elections are eliminated.

At issue in *White* was a provision of the Minnesota Code of Judicial Conduct that prohibited a judicial candidate from “announcing his or her views on disputed legal or political issues . . . (the announce clause).” Only a few states worded related prohibitions so broadly, but the Minnesota Supreme Court had narrowed its construction of the clause to “prohibit candidates only from publicly making known how they would decide issues likely to come before them as judges.”⁸⁹ As revised, the prohibition appeared comparable to that in the ABA Model Code of Judicial Conduct, which declares that a judicial candidate shall not “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”⁹⁰

A Minnesota Supreme Court candidate challenged the constitutionality of the announce clause. Minnesota conceded that the clause imposed a content-based restriction on the candidate’s speech and was therefore subject to strict scrutiny, but argued that the state’s compelling interest in preserving judicial impartiality and the appearance of impartiality justified the restriction.⁹¹

Justice Scalia, writing for a five member majority of the Supreme Court, disagreed. The Court opined that “impartiality” could mean one of three things.⁹² First, the “traditional sense” of the term and its “root meaning” was a “lack of bias

⁸⁸ *Republican Party v. White*, 122 S. Ct. 2528, 2528 (2002).

⁸⁹ In *In re Code of Judicial Conduct*, 639 N.W.2d 55 (Minn. 2002), the Minnesota Supreme Court adopted the Eighth Circuit’s construction of Minnesota’s “announce clause”; the quoted language is drawn from the opinion of the Eighth Circuit, in *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881–82 (8th Cir. 2001).

⁹⁰ ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (2000).

⁹¹ *White*, 122 S. Ct. at 2534.

⁹² *Id.* at 2535.

for or against either *party*,” but since the announce clause only proscribed candidate speech on *issues*, not *parties*, the Court concluded that the clause failed to preserve this definition of impartiality.⁹³ Second, the Court continued, it was “perhaps possible” that impartiality could mean a “lack of preconception in favor of or against a particular *legal view*,” but the Court saw no significant government interest in discouraging judges—who are supposed to be learned in the law—from developing their views on legal issues.⁹⁴ A third “possible meaning of ‘impartiality’ (again not a common one),” continued the Court, is openmindedness, but in the majority’s view the announce clause was too underinclusive to preserve impartiality in this sense of the term, because it barred candidates from taking public positions on issues only on the campaign trail, but not elsewhere.⁹⁵

As an initial matter, it is not at all clear why the Court’s vivisection of impartiality was necessary. The Court would have us suppose that the announce clause was the state’s chosen means to achieve the end of impartiality, and that when the means imposes a content-based restriction on speech, the Court’s duty is to strictly construe the means-ends relationship. But impartiality is not an end in itself. It is an instrumental value designed to preserve a different end altogether: the rule of law. If the ultimate goal is to enable judges to uphold the rule of law (*i.e.*, to resolve disputes between parties on a case-by-case basis according to the applicable facts and law), then a judge who locks herself into a particular position on the parties, the law, or the facts before a case is heard plainly undermines that goal. Conversely, a rule that bars a candidate from committing herself in this way promotes the rule of law directly. In either case, waltzing off into musings on the subtle nuances of impartiality adds little to the necessary analysis.

Apart from being unnecessary, the Court’s trifurcated analysis of impartiality is patently fallacious. As to the first definition, whenever a judicial candidate takes a categorical position on an issue that concerns a class of would-be parties (be it gays, fundamentalist Christians, women, environmentalists, white collar defendants, immigrants), that position can reflect, or be perceived as reflecting, the candidate’s underlying biases vis-à-vis members of that class. Indeed, judicial candidates on the stump will rarely, if ever, have occasion to make statements that exhibit bias toward particular parties independent of the issues those parties are likely to litigate.

As to the second definition, the Court beats the stuffing out of a straw man, when it rejects the silly notion that impartiality requires judges to have a total “lack of preconception” on particular legal views. There is, however, a clear difference between the judge who harbors preconceptions on issues of law, which

⁹³ *Id.* (emphases in original).

⁹⁴ *Id.* at 2536 (emphasis in the original).

⁹⁵ *Id.* at 2536–37.

is both inevitable and desirable, and the judge who has publicly etched his position on such issues in stone before the case is heard—which is the problem that the announce clause was designed to address.

It is the Court's treatment of the last definition of impartiality, however, that is the most troubling. Although Justice Scalia does his best to marginalize openmindedness by making it his third place definition and branding it "not a common one," it is the most important definition in this case, and as far as I can tell, the only definition of relevance to Justice Scalia during his own confirmation testimony.

As judicial nominees, virtually every member of the Supreme Court majority rebuffed attempts by members of the Senate Judiciary Committee to elicit their views on particular issues that might come before the Court. They did so out of a professed desire to preserve their impartiality, by which they clearly meant openmindedness. Justice Scalia's efforts are illustrative. When asked for his views on the equal protection clause, Justice Scalia demurred. "[T]he only way to be sure that I am not impairing my ability to be impartial in future cases . . . before the Court," he asserted, "is simply to respectfully decline to give an opinion on whether any of the existing law on the Supreme Court is right, or wrong."⁹⁶ Again, when asked his position on *Roe v. Wade*, Judge Scalia elaborated on his objection to such inquiries:

I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.⁹⁷

If, however, Justice Scalia and the other members of the majority were to evaluate their own self-imposed announce clause in light of their reasoning in *White*, they would presumably have to concede that refusing to share their views with the Senate Judiciary Committee for the stated purpose of preserving their openmindedness "is so woefully underinclusive as to render belief in that purpose a challenge to the credulous."⁹⁸ After all, their personal announce clause applied

⁹⁶ *Hearing on the Nomination of Judge Antonin Scalia to be Assoc. Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 99th Cong., 2d Sess. 58 (1986).

⁹⁷ *Id.* at 37.

⁹⁸ *White*, 122 S. Ct. at 2537. One could conceivably argue that federal judicial nominees would be testifying as to their positions under oath, while state judicial candidates would not, which might place added pressure on federal judicial nominees to abide by their sworn statements later. As a practical matter, however, there is absolutely no precedent for the proposition that the Senate would formally revisit a Justice's confirmation hearings and seek to

only to the slender band of statements they made in confirmation proceedings, and not to public positions they had previously taken on any number of occasions. How could they possibly think that refusing to answer issue-specific questions during a day or two of confirmation hearings would preserve their impartiality as justices on such issues, when they had previously made their views known on those very same issues as students, lawyers, academics, and judges?

But this line of inquiry is ridiculous. As nominees, they were right to send overly inquisitive senators packing, for the reasons Judge Scalia gave: the positions a judicial nominee takes in response to inquiries from his Senate "voters," will be perceived as a "condition of his confirmation," which is hardly the case with respect to positions the nominee had taken previously in other contexts. By the same token, the positions a state judicial candidate takes in response to inquiries from his voters will be perceived as a condition of his election, unlike positions previously taken, and the *White* Court majority's failure to appreciate the parallel to their own experience is baffling at best.

The clear relationship between the announce clause and the state's interest in preserving openmindedness was obscured by the majority's redefinition of the announce clause itself. As previously noted, the Minnesota Supreme Court had adopted a narrow interpretation of the clause that "prohibit[ed] candidates only from publicly making known how they would decide issues likely to come before them."⁹⁹ If candidates take positions that make it clear "how they would decide issues likely to come before them," then they have communicated the message that their minds are already made up on those issues. Conversely, by preventing candidates from taking such positions, openmindedness is preserved.

Without explicitly rejecting Minnesota's construction of its own rule, the U.S. Supreme Court gave the rule a more expansive gloss that prohibited a candidate from "stating his views on any specific nonfanciful legal question within the province of the court for which he is running."¹⁰⁰ Unlike the Minnesota Supreme Court's interpretation of its announce clause, this variation is overly broad, because it includes among the candidates subject to sanction those who have carefully avoided compromising their openmindedness by characterizing their views as tentative or subject to change.

The Court's apparent redefinition has created artificial distance between the announce clause and another provision of the Code of Judicial Conduct, the so-called "pledges or promises clause," which forbids judicial candidates from making "pledges or promises of conduct in office other than the faithful and

remove him from office for changing his mind after ascending the bench, while voters are put in a position to punish deviations between a candidate's earlier words and later actions in every campaign cycle.

⁹⁹ *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881–82 (8th Cir. 2001).

¹⁰⁰ *White*, 122 S. Ct. at 2529–30.

impartial performance of the duties of the office.”¹⁰¹ While the majority was willing to entertain the possibility that a judicial candidate might feel particular pressure to honor her campaign “promises” in future cases that could compromise her impartiality qua openmindedness, the constitutionality of the pledges or promises clause was not at issue here. The announce clause, in contrast, applied only to what the Court characterized as “*nonpromissory* statements made during a judicial campaign,” to which judges would later feel no special allegiance.¹⁰²

What the Court says may ring true when it comes to “nonpromissory statements” generally. If, however, the statements at issue were confined—as the Minnesota Supreme Court intended—to those in which the candidates promise nothing explicitly but nonetheless reveal how they intend to decide future issues, it cuts the other way. Such candidates may well feel an obligation to abide by their earlier representations that is comparable to the pressure they feel to honor their promises. Following the majority’s logic, if a candidate says “the only position an honorable judge could take on this issue is X,” or “elect me judge for one reason only: I take position X,” or “the people of this community will only support a judge who takes position X, and rest assured, I do,” the prospect of facing her voters again if she abandons position X poses no special problems. Presumably, this is because she never actually “promised” to adhere to the position she previously took, and can placate furious voters by telling them so. My point is one that should be evident to all, save perhaps the majority: a candidate can commit herself to a future position with or without resort to express pledges or promises. The line separating the pledges and promises clause from the announce clause (as the Minnesota Supreme Court read it) is thus neither as bright nor wide as the majority would have us believe.

The problem is compounded by the way in which the Court morphed the meaning of the ethical rule at issue, so as to invalidate an “announce clause” not found in nature. The Supreme Court did not invalidate the announce clause as written; nor did it invalidate the clause as construed by the Minnesota Supreme Court to emulate the ABA Model Rule. Rather, it gave the rule a *sui generis* spin that is arguably the law of no state in the nation. And so, exactly what rule did the Court invalidate, and how are the states supposed to revise their rules of judicial conduct in order to comply with the Court’s decision?

It would seem that there are three possibilities. One is to construe the decision to do as little damage to existing rule structures as possible. The Court declined to accept the narrow construction of the “announce clause” adopted by the Minnesota Supreme Court, and went no further than to invalidate a general clause prohibiting candidates from “stating [their] views on any specific nonfanciful

¹⁰¹ ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (2000).

¹⁰² *White*, 122 S. Ct. at 2537.

legal question.”¹⁰³ Thus, the argument would go, more focused clauses employed by the vast majority of jurisdictions barring candidates from making statements that appear to commit them to deciding future cases in particular ways (like ABA Canon 5A(d)(3)(ii)), will preserve impartiality more directly than the announce clause as construed by the Supreme Court in *White*, and pass muster.

There is, however, every reason to believe that this first approach will prove unavailing. The Court divided the world of judicial campaign statements into two groups—the promissory and the nonpromissory—and concluded categorically that candidates who make nonpromissory statements do not undermine their subsequent impartiality because as judges they will have no special obligation to remain consistent with their earlier views. Insofar as statements falling outside the scope of the pledges or promises clause are, by definition, nonpromissory, it would appear that the future of restrictions on such statements, such as those imposed by ABA Canon 5A(d)(3)(ii), is bleak.

A second possibility would be to run with the promissory-nonpromissory distinction that the Court makes. Under this approach, a state may not prevent candidates from making nonpromissory statements—even those that would appear to commit the candidate with respect to issues that may come before the court—but may still bar candidates from promising to decide issues in particular ways, because candidates will feel duty bound to abide by their campaign promises and thereby compromise their impartiality.

While this approach would salvage the pledges and promises clause from the wreckage of *White*, it would effectively invite judicial candidates to run their campaigns like a cynical game of “Mother, May I?” The presence of the magic words “I promise” would render a candidate’s position one from which she may be reluctant to depart later, and for which she may thus be subject to sanction, while the same statement of position, unaccompanied by the magic words, would supposedly impose no comparable constraints on the candidate’s future decision making and therefore be immune to discipline. The net effect would be to create a “safe harbor” for candidates to stake out their positions on issues they will have to decide as judges, as long as they do not couch their positions as pledges or promises.

But even this assumes the continuing validity of the pledges or promises clause, an assumption that is far from safe. Although the majority distinguished the pledges and promises clause from the announce clause, the cynicism animating the Court’s belief that judges feel no special duty to adhere to the “nonpromissory” positions they take to win votes as candidates, likewise left it doubtful that judges would feel constrained by their pledges or promises. While grudgingly conceding that it “might be plausible, perhaps” for a judge to feel bound by his promises as a candidate, the Court was quick to insert an acerbic

¹⁰³ *Id.* at 2529–30.

parenthetical noting that “one would be naïve not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment.”¹⁰⁴

In other words, the majority was openly skeptical that a judge’s openmindedness could be compromised by the promises she made as a candidate, because we all know that candidates for elective offices are notorious liars and promise breakers who will feel utterly unfettered by the commitments they made to gain office. This may be an unremarkable observation if made by a saloon patron after the last call, but is pretty stunning when announced by the Supreme Court of the United States as a matter of judicial notice. At a minimum, the Court’s acidic aside does not bode well for future arguments that the state has a compelling interest in preventing judicial candidates from making campaign promises because candidates will feel duty bound to honor their promises to the detriment of their impartiality.

That leaves a third, and in my view, the most likely possibility: *White* should be understood as a case in which “strict scrutiny” is code for the proposition that the government’s interest in preserving judicial impartiality will never suffice to justify content-based restrictions on campaign-related speech—never mind what that interest is. The Court’s analysis of the state’s interest in preserving impartiality is so hopelessly unpersuasive that one is driven to scour the balance of the opinion in search of another explanation for the outcome that at least five intelligent people might find convincing. An important clue is embedded in the concurring opinion of Justice Kennedy, who accepted the Court’s analysis, but adhered to the view that “content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests.”¹⁰⁵ Whatever the drawbacks of Justice Kennedy’s position as a general matter, there is no denying its resonance in the context of the popular election—a poster child for the first amendment. The operating premise of popular elections is that the people are capable of making sound choices, if only they are fully informed. If that premise proves false, a state may adopt a different method of selecting the officials in question. Retaining elections, however, while seeking to “improve” voter decisionmaking by denying the public access to information the government finds unhelpful, is not an option as long as the First Amendment is in place—regardless of how unhelpful that information may actually be.

In other words, if we ask voters to shop for judges because we think they can distinguish the good ones from the bad, then it is hard to justify stripping the marketplace shelves of the ideas that voters deem necessary to make those distinctions. Consistent with the spirit of Justice Kennedy’s concurrence, the

¹⁰⁴ *Id.* at 2537.

¹⁰⁵ *Id.* at 2544.

majority takes a defensible tack when it quotes Justice Thurgood Marshall for the proposition that:

The greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.¹⁰⁶

If “state-imposed voter ignorance” is unacceptable per se, then the state’s reasons for keeping voters in the dark are largely irrelevant, and the Court’s enfeebled analysis and rejection of those reasons are inessential to its ultimate conclusion.

As the dust settles on the decision in *White*, the Court’s bottom line becomes clear: if you don’t like what judicial campaign speech does to the impartiality of elected judges, your solution is not to curtail campaign speech. It is to end judicial elections. The point is one that Justice O’Connor underscored forcefully in her concurrence: “Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system,” she observed. “In doing so the State has voluntarily taken on the risks to judicial bias,” which make its “claim that it needs to significantly restrict judges’ speech in order to protect judicial impartiality . . . particularly troubling.”¹⁰⁷ “If the State has a problem with judicial impartiality,” she concluded, “it is largely one the state brought upon itself by continuing the practice of popularly electing judges.”¹⁰⁸

In the aftermath of *White*, judicial candidates will be under increasing pressure from interest groups and voters to announce their positions on issues likely to come before the court, and candidates who do not comply can anticipate accusations that they are hiding behind debunked ethical rules. The blurring that already exists between judicial and political branch candidates is bound to accelerate. What has distinguished judges from other elected officials is their capacity to uphold the rule of law by deciding cases impartially on the basis of facts as they find them and law as they construe it to be written, without regard to the popularity of the decisions they make. If, however, judicial campaigns are transformed into referenda on past rulings that judges defend from the stump, feature position taking on pending or impending cases that candidates clarify in

¹⁰⁶ *Id.* at 2541 (quoting *Renne v. Gear*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

¹⁰⁷ *Id.* at 2544 (O’Connor, J., concurring).

¹⁰⁸ *Id.* The majority opinion made a comparable point when it referred to the ABA’s longstanding opposition to judicial elections and support for appointive systems on judicial independence grounds, which “may be well taken,” but concluded that a state could not “leav[e] the principle of elections in place while preventing candidates from discussing what the elections are about.” *Id.* at 2541.

campaign speeches, and effectively require candidates to commit themselves to deciding future cases in particular ways, that capacity for impartiality will have been seriously compromised.

Skeptics argue that only the hopelessly naive still think that judges decide cases in light of the law and facts alone, without regard to exogenous considerations of their politics and the views of their voters. Hence, the argument goes, enabling judges to campaign like other public officials will simply dispense with a useless fiction. There is, however, a difference between conceding the empirical reality that judges are sometimes influenced by extraneous considerations, which I do, and embracing a system of judicial selection that encourages if not celebrates them, which I do not. As long as the tripartite system of separated powers our state and national governments employ depends on its courts to ensure that the executive and legislative branches and the temporary majorities they represent conform their conduct to the dictates of the Constitution, methods of judicial selection that make judges no less subject to the influence of temporary majorities are anathema. In short, *White* will accelerate politicization of judicial elections and decisionmaking. The time is now to do something about it.

VI. TOWARD THE GRADUAL ELIMINATION OF ELECTED JUDICIARIES

If, for the reasons elaborated upon above, we accept that judicial elections are undesirable in principle, then our focus should be on devising a long-term strategy for phasing them out. The pivotal task for this strategy will be to overcome the public's entrenched acceptance of judicial elections as an essential component of judicial selection. To that end, I propose a six-point strategy.

A. *Patience*

The great social, political, and cultural movements of the twentieth century took time to unfold and develop. The fights for women's suffrage, civil rights, environmental quality, and an end to the Vietnam War, to name a few, spanned years and sometimes decades. "The mills of the gods grind slowly,"¹⁰⁹ wrote Charles Hamilton Houston of his protracted efforts to invalidate Jim Crow laws in the courts. Changes in public sentiment take time, and a strategy to end judicial elections must therefore be oriented toward the long-term and led by individuals and organizations who are undeterred by slow progress and temporary set backs.

Because the gradual elimination of judicial elections is a long-term strategy, it would be ill-advised to abandon short-term plans for incremental reform in the interim. First, it would seem unnecessarily ascetic to deprive ourselves of

¹⁰⁹ Videotape: *The Road to Brown* (California Newsreel ca. 1990) (on file with the Indiana University School of Law Library).

opportunities for short-term alleviation from the pain of the judicial election bunion, simply because we anticipate complete relief following surgery several years hence. Second, and borrowing again from the civil rights example, moving court and public opinion from an entrenched acceptance of separate but equal to the realization that separate is never equal, was not accomplished in a single leap, but in a series of small steps demonstrating that, case after case, attempts to guarantee separate but equal treatment had failed. Similarly, if incremental reform of judicial elections is repeatedly tried, but fails to achieve lasting results, it will gradually assist in softening public resistance to the elimination of judicial elections altogether.

B. Identifying a Theme

My foregoing comparison of a proposed campaign to end judicial elections to the great movements of the twentieth century may strike readers as aggrandizing judicial selection or trivializing the great movements to which it is compared. But therein lies the problem. To gain traction with the public, judicial selection must achieve the status of a movement. Those skeptical of the potential for judicial selection to achieve such status would do well to recall that the public's entrenched preference for judicial elections is itself the product of a movement that began with the Jacksonian Democrats in the 1830s and gradually swept a nation that had theretofore appointed its judges.

To be recognized as a movement, the drive to end judicial elections must be linked to a theme that resonates with the public and gives the campaign persuasive force. For that reason, the theme should *not* trumpet the need for judicial independence or sound judicial administration. Although judicial elections do indeed undermine judicial independence and effective judicial administration, our purpose is not to make the world a safer place for judges. Rather, our purpose is to make the world a safer place for the people whom judges serve.

With that in mind, one could reorient the movement toward protecting individual rights and liberties—a goal that can only be achieved if cases are decided by impartial judges who are not at risk of losing their jobs at the hands of an angry majority. Such a tack may, however, be underinclusive. It would not, for example, comfortably encompass the need of business organizations to have an evenhanded forum for resolution of commercial disputes. For one thing, corporations and partnerships are not thought of as “individuals.” For another, the terms “rights” and “liberties” are encumbered by the implicit prefix “civil,” giving them a constitutional aura that may limit their capacity to capture sub-constitutional, economic, and other statutory or common law “rights.” A more all-encompassing, and hence preferable theme might therefore be to “restore impartial justice.”

C. *Capitalizing on Bellwether Events*

Great social, political, or cultural movements calculated to win public support over time have depended for their success on catalyzing events that galvanize public opinion and give their movement focus and drive. The Civil Rights movement had Selma, the anti-War movement had Kent State, and the clean air movement had Los Angeles.

Groups committed to judicial selection reform have had a veritable buffet of bellwether events to feed upon that illustrate quite poignantly the threat judicial elections pose to impartial justice. The problem, however, is that such groups invariably cite a horrid experience with one form of judicial election as grounds for adopting some other form of judicial election which has had a horrid experience of its own; as a result, these events serve more as millstones than bellwethers. Thus, for example, horror stories emerging from partisan judicial elections in Texas have led to calls for non-partisan judicial elections, which can be countered with horror stories from non-partisan elections in Wisconsin, Ohio and Michigan, which in turn have served as fodder for merit selection proponents to load their cannons, only to have them backfire in the face of retention election disasters in Tennessee and Nebraska.

All of the foregoing examples are illustrative of the perils to impartial justice inherent in selecting or retaining judges by popular vote, which could be used much more effectively in the service of a broader movement to end judicial elections generally. The failure of incremental reforms to end the judicial election parade of horrors, would, as discussed above, simply strengthen the argument for ending elections altogether. Looking toward the immediate future, *Republican Party v. White* will all but assure a bumper crop of new judicial election fiascos constituting bellwether events upon which the movement to end judicial elections can capitalize.

D. *Professionalizing the Judiciary*

If we are to convince the public that judges ought to be selected differently than public officials in the political branches, it is essential to explain why by highlighting the differences between them. One difference to which I alluded earlier is the almost universal requirement that judges be lawyers, which highlights the specialized expertise that states expect judges—as distinguished from legislators and governors—to possess. That distinction could be drawn more vividly for the public's benefit if the credentials of all judicial candidates were

publicly reviewed by qualification commissions akin to those endorsed by the American Bar Association.¹¹⁰

The professional expertise of judges vis-à-vis their political branch counterparts could be further accentuated by placing greater emphasis on judicial training and continuing education. That means dedicating more resources to judicial training before judges ascend the bench, and to continuing judicial education after they have done so. It also means more effectively acquainting the public with the important and expanding role that judicial education plays across the states.

The business of getting the word out on the credentials judges must possess and the continuing education they receive could be incorporated into the information prospective jurors are given upon checking in for jury duty. Although this section is captioned “professionalizing the judiciary,” it could just as easily be renamed “educating the public.” I have not done so, however, because the problem with general calls for public education on the role of the courts, is their tendency toward diffusion. Long term programs to develop videos, launch speaker programs, alter curricula, and revise textbooks to better acquaint children and adults with what courts do are all for the best, but lack the focus needed to yield results more specific than engendering an incrementally deeper understanding of the judiciary at some indeterminate point in the future.

The public education program I propose here is much more targeted. The message is that unlike elected officials in the executive and legislative branches, judges are specially trained experts with a specialized task to perform. Yes, judges are critically important, and yes, they possess considerable power and discretion. Then again, so do other key players in the administration of justice: police officers, rank and file prosecutors, prison wardens, and probation and parole officers. We do not elect *them*, however, because voters are ill-suited to assess the specialized qualifications and training required for such positions, and the same is no less true for judges.

E. Enhancing Alternative Means to Promote General Judicial Accountability

Those enamored of judicial elections might concede that judges, like police officers, parole officers, and others, must possess specialized expertise and training, but would be quick to point out that police officers and parole officers—unlike judges—can be fired if they do not perform their jobs satisfactorily. Do away with judicial elections, the argument goes, and you do away with the only meaningful way to hold judges accountable for mis-, mal-, or non-feasance.

¹¹⁰ See Luke Bierman, *Beyond Merit Selection*, 29 *FORDHAM URB. L.J.* 851 (2002) (proposing “credentialing” programs for would-be judges).

I argued earlier that judicial elections promote accountability so poorly that the minimal gains they engender on that score are offset by the losses to independence they cause. That should not, however, diminish the concern that the judiciary ought to be accountable to the public it serves; or lead one to suppose that the public can be persuaded simply to drop judicial elections with nothing to take their place. If the public is to abandon its support for judicial elections because of the threat they pose to impartial justice, alternative means to promote judicial accountability must be more fully developed and promoted.

One means of promoting accountability worth exploring concerns adverse publicity. In his testimony before the original ABA Commission on Separation of Powers and Judicial Independence, Senior Judge and Former Dean Louis Pollack made the obvious but important point that judges are no more desirous of having their foibles publicized than anyone else. Characterizing "intimidation" as "too strong" a term to describe the impact of criticism on judges, Judge Pollack nevertheless acknowledged that from a judge's perspective, "it would be nice to make a decision that doesn't necessarily get closer than about page 23 to anybody's attention who is reading the next day's newspapers."¹¹¹

The now defunct Civil Justice Reform Act included an experiment with adverse publicity. Pursuant to one section of that Act, federal trial courts were required to collect and publish information relating to decisionmaking delays on their dockets. That information was reported by the legal press, and before the Act sunset in 1997, preliminary indications were that delays had declined in the aftermath of required reporting.¹¹²

The timeliness of a judge's decisions is but one aspect of her overall performance. A number of jurisdictions that require incumbent judges to stand for retention elections have experimented with comprehensive judicial performance evaluation programs that gather information on judges from lawyers, staff, witnesses, parties, and jurors.¹¹³ Regardless of whether judges stand for election, however, comprehensive assessments of their performance would be accountability enhancing in and of themselves, and could be made all the more so if effectively publicized.

Judicial discipline is another means to hold judges accountable for a variety of inappropriate behaviors ranging from chronic delays in decisionmaking, to abusiveness toward lawyers, litigants, and staff, to inebriation on the bench, to

¹¹¹ A.B.A., *Public Hearing of the Commission on Separation of Powers and Judicial Independence* 40 (Oct. 11, 1996), available at <http://www.abanet.org/govaffairs/judiciary/home.html> (last visited Jan. 2003).

¹¹² Charles Gardner Geyh, *Adverse Publicity as a Means of Reducing Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 CLEV. ST. L. REV. 511, 533 (1993).

¹¹³ Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375 (2001).

gender and racial bias.¹¹⁴ Mechanisms for judicial discipline are already in place among the states, but the availability and use of such mechanisms have not been adequately publicized. The net effect is that meritorious disciplinary complaints may never be filed, and disciplinary actions taken may never come to the public's attention.¹¹⁵ It bears reemphasis that adverse publicity of the misconduct and resulting disciplinary action can be just as chastening as the disciplinary action itself. As one federal judge observed in the context of an interview concerning judicial discipline and misconduct, "the threat of newspaper coverage is a big deterrent. Every judge worries about something coming out in the newspaper."¹¹⁶

F. Restructuring the Judicial Selection Process to Provide Prospective Accountability for a Judge's Political and Judicial Philosophy

The foregoing discussion dwells upon means to ensure that judges remain diligent, competent, and well-behaved in the absence of judicial elections. Election proponents, however, would emphasize that the "problem" that elections serve to remedy is only occasionally that incumbent judges demean themselves inappropriately or lack technical competence or diligence. More often, the problem is that a judge's decisions are animated by a political or judicial philosophy that segments of the public find objectionable—a problem that elections can, at least occasionally, address. If the public is to relinquish its grip on judicial elections, an alternative means for addressing a judge's political acceptability must be proffered in exchange.

Returning to an earlier theme, as other methods of controlling judicial decisionmaking—impeachment, jurisdiction-stripping, court-packing, etc.—have gradually fallen into disrepute and disuse, elections, like the proverbial cheese, stand alone as a means for promoting political accountability. Against this

¹¹⁴ For a discussion of the range of behaviors for which discipline has been sought and imposed in the federal system, see Jeffrey N. Barr and Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25 (1993).

¹¹⁵ For example, the National Commission on Judicial Discipline and Removal's investigation of the federal discipline statute found "widespread ignorance about the Act in virtually every respondent group and a widely shared perception that some meritorious complaints are never filed." REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 99–100 (1993). Issues of secrecy and a consequent lack of public familiarity with the disciplinary process are at least as prevalent in state disciplinary process. See, e.g., Mary Ellen Keith, *Judicial Discipline: Drawing the Line Between Confidentiality and Public Information*, 41 S. TEX. L. REV. 1399 (2000) (discussing tension between the need to preserve secrecy as a means to protect judges from frivolous complaints, and the need to promote public confidence in the judiciary in Texas and elsewhere).

¹¹⁶ Richard Marcus, *Who Should Discipline Federal Judges and How?*, 149 F.R.D. 375, 428 (1993).

backdrop, the public's current disenchantment with merit-selection is understandable. Such systems propose to replace the one remaining, closest-to-viable means for ensuring a judge's political acceptability, with a method of selection that professes to focus entirely on a candidate's technical merit at the initial selection stage and thus understates, if not ignores, political acceptability as a relevant selection criterion.

To provide a means for assessing political acceptability in the absence of elections, I would propose a modified federal model of judicial selection for the states. Like the federal model, state judges could be nominated by the governor and confirmed by the state senate or some other subset of the state legislature. Judges so selected would then serve during good behavior. Two modifications of the federal model are in order.

First, as discussed above, technical merit is a necessary (but not sufficient) credential for judicial office. A professional judiciary must possess the competence, experience, character, and temperament needed to do the job well. Accordingly, nominees for whom legislative confirmation is sought should be limited to those approved by independent judicial qualification commissions akin to those proposed by the American Bar Association.

Second, the federal model of judicial selection is currently enveloped in a fog of uncertainty as to just how "political" the appointments process should be—a fog that should be lifted before the model is exported to the states. The federal appointments process has always been "political" in at least three senses of the term: it is, by design, a process conducted by the "political" branches of government; it has, from its inception, been vulnerable to partisan "political" manipulation; and it is subject to majoritarian "political" influence from constituents of political branch officeholders. More recently, federal judicial selection has become political in yet another way, as the judicial and political philosophy of would-be judges has become a more prominent issue for president and Senate alike.

This latest development is not especially surprising when one considers that the ascendance of state and federal judicial independence has proceeded along separate but parallel tracks. As elections have become the last remaining means to promote political accountability of state judges in the wake of the public's gradual acceptance of an independent judiciary and rejection of other accountability-promoting devices that threaten the judiciary's autonomy, so too the appointments process has become the one remaining means to promote political accountability in the federal system. Viewed in this light, a politicized appointments process is inevitable, because the public and the political branches will be loathe to relinquish their last remaining means of control over the judiciary's political landscape, and desirable, because it affords some measure of prospective accountability without interfering unnecessarily with subsequent judicial decisionmaking or institutional autonomy.

Dyed in the wool advocates of judicial elections often contend that appointive systems akin to the one I propose are no better and probably worse than elections. An appointive process, the argument goes, simply moves the point at which partisan politics matters, from the moment of election to the moment of appointment; and unlike appointive systems, which often profess to be apolitical when they are not, elections are at least honest about being openly political.

On the latter point, I not only concede that the appointments process can be at least as political as elections, but argue that its inherently political character is a virtue that serves to promote prospective judicial accountability. More fundamentally, however, the assertion that an appointment process does no more than change the moment at which politics matters misses the essential point that the moment at which politics matters is very important. Suppose that you are a defendant who stands accused of committing a violent crime. Which judge is likelier to give you an impartial hearing: one appointed for life twenty years before by a governor committed to “getting tough on crime?” Or one at risk of being voted out of office next month by an electorate committed to “getting tough on crime?” Simply put, a politicized process for determining whether an individual will become a judge is less threatening to that person’s capacity to be impartial and uphold the rule of law than a politicized process for determining whether that same person will be permitted to remain a judge.

VII. CONCLUSION

After presenting my paper at the conference that gave rise to this symposium issue, one member of the audience observed that I would be well advised to change my name to Don Quixote. I do not dispute his point that, in our current climate, proposing an end to judicial elections is akin to tilting at windmills, but the N.A.A.C.P.’s strategy to end Jim Crow laws must have seemed equally far-fetched in the 1940s. To make this more than a daydream, we must approach judicial selection not merely as a project or a campaign, but as a movement—a movement to recapture impartial justice and the rule of law. With each judicial campaign cycle will come a new round of election-related disasters that can serve to stoke the fires of reform. To succeed, the appointive system that we offer in its stead must ensure not just an appropriately independent, but also an accountable judiciary. I, for one, am optimistic. Then again, so was Don Quixote.

