

Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World

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PRESERVING THE DELICATE BALANCE
BETWEEN JUDICIAL ACCOUNTABILITY AND
INDEPENDENCE: MERIT SELECTION
IN THE POST-*WHITE* WORLD

Mark S. Cady & Jess R. Phelps***

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INTRODUCTION

April 27, 1933:

The Great Depression continued to devastate the nation's agricultural sector, and farm foreclosures reached epidemic proportions.¹ Judicial supervision of farm foreclosure sales quickly became the focus of popular discontent, and judges were the natural target of agrarian animosity.² It was perhaps no great surprise that public outrage boiled over in the small northwest Iowa town of Le Mars—specifically targeting Judge Charles C. Bradley.³ Around 5 p.m., a group of farmers “swept into the courtroom” and demanded that the judge “[p]romise [not to] sign any more foreclosure actions.”⁴ When Judge Bradley refused, he was “dragged . . . into the courthouse square.”⁵ One of the farmers “produced a rope and pulled it taut around the judge’s neck . . . [but] Judge Bradley still would not swear the oath the farmers demanded. The mob lifted him up off the ground by the rope, and he appeared to collapse.”⁶ Upon a warning that the elderly judge might die if the violence continued, the mob dispersed, leaving Judge Bradley with “his neck chafed, his lips bloody, his hair and face filthy.”⁷ Commentators later noted that “Judge Bradley . . . could scarcely have done more to uphold the honor of his office.”⁸ In this sense, Judge Bradley represents the judicial ideal; a judge willing to risk personal harm, even death, to uphold the integrity and impartiality of the judiciary—goals most agree judicial selection methods should be designed to further. Although Bradley’s case provides an admittedly extreme example, it was concern over threats to judicial independence that fueled the establishment of merit selection as a compromise between accountability and independence within state judicial systems.

¹ See RICHARD, LORD ACTON & PATRICIA NASSIF ACTON, *TO GO FREE: A TREASURY OF IOWA’S LEGAL HERITAGE* 248–49 (1995) (“About half of Iowa’s farmers financed their lands through mortgage debt, and with the collapse in the prices of produce, foreclosures became inevitable.”).

² See *id.*

³ See *id.* at 250–51.

⁴ *Id.* at 252 (stating the judge’s refusal was based on the fact that “he had not sufficient time to study the fifteen cases then before him.”).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 254 (“Even in explaining his reluctance to comment on the episode to the press, the judge maintained a dignified reticence: ‘It is not ethical for the bar to get into the limelight.’”).

Strategies have changed over the last eighty years, but interest groups still attempt to influence the judiciary—albeit more subtly than their 1930s predecessors. One common method is through the use of candidate surveys designed to flesh out a judge’s positions or personal views on disputed issues with the implicit purpose of then using this information to shape voting decisions regarding a specific judge’s election or retention.⁹ Interest groups surveys are a relatively new phenomenon largely triggered by the Supreme Court’s 2002 decision in *Republican Party of Minnesota v. White*, which held the state’s “announce clause”—an ethical canon which formerly restricted the ability of judicial candidates to discuss disputed legal and political issues—unconstitutional.¹⁰ To date, attention from the academy has almost exclusively focused on the decision’s impact on the remaining judicial canons and upon overall judicial independence.¹¹ Surprisingly absent from the writings of those critical of *White*, however, is any discussion of the role judicial selection methods can play in promoting judicial independence; more specifically, the potential of a merit-based system to remove the need for information regarding a judge’s personal viewpoints and perspectives. This Article is an initial attempt to fill this void. This Article argues that merit selection can play a role in addressing the threat presented by *White* to the independence and impartiality of state judicial systems. Justice O’Connor made this clear in her *White* concurrence, noting that the real problem with Minnesota’s judicial selection process was that the state:

[H]as chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias. . . . As a result, the State’s claim that it needs to

⁹ See, e.g., FAMILY ACTION COUNCIL OF TENNESSEE, 2006 FAMILY ACTION COUNCIL OF TENNESSEE VOTERS’ GUIDE QUESTIONNAIRE FOR JUDICIAL CANDIDATES (2006), http://www.factn.org/documents/Tennessee_3.pdf (providing an example of a recent interest group survey).

¹⁰ 536 U.S. 765 (2002); see Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-White World*, 55 *DRAKE L. REV.* 691, 702 (2007) (*White* and other free-speech decisions “have created a sea change in judicial campaign practices.” Special interest groups are no longer obliged to conduct independent campaigns in a “parallel universe” while the candidates run issue-free “Marquis of Queensbury” campaigns.).

¹¹ See, e.g., Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 *U. PA. L. REV.* 181 (2004); Wendy R. Weiser, *Regulating Judges’ Political Activity After White*, 68 *ALB. L. REV.* 651 (2005); Christopher Rapp, Note, *The Will of the People, the Independence of the Judiciary, and Free Speech in Judicial Elections After Republican Party of Minnesota v. White*, 21 *J.L. & POL.* 103 (2005).

significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one brought upon itself by continuing the practice of popularly electing judges.¹²

Part I of this Article will briefly provide an overview of current judicial selection methods, focusing on the policy considerations underlying the historical development of merit selection. Part II will focus on the role ethical canons were originally intended to perform and the overall impact of the *White* decision. Part III will discuss how the concept of what constitutes an "informed voter" is fundamentally shaped by a jurisdiction's choice of selection method. This Part will specifically detail what information is relevant to voters within merit selection systems in light of the system's nonpolitical nature. Part IV will then explore the issue of how information should be relayed to voters—specifically focusing on the role of state-sponsored judicial evaluation programs.

I. THE EVOLUTION OF JUDICIAL SELECTIONS

A threshold constitutional decision for any jurisdiction is deciding upon a method of selecting its judges. From the earliest days of the republic, much attention has been devoted to the issue of judicial selection—specifically on the development of a selection method able to preserve the independence of the judiciary while also ensuring that judges remain, in some degree, accountable.¹³ Over the course of American history, however, no single method has gained uniform acceptance and such consensus will likely remain elusive.¹⁴ This is perhaps not surprising as past efforts to reconcile these competing objectives have been

¹² *White*, 536 U.S. at 792.

¹³ See Stephen B. Presser et al., *The Case for Judicial Appointments*, 33 U. Tol. L. Rev. 353, 357 (2002) (explaining how "the question posed has remained the same: Is it more appropriate in a constitutional republic to have judicial branch officials sworn to apply the law with the utmost objectivity and independence appointed by an executive or elected by the people?"); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 Fla. St. U. L. Rev. 1, 2–3 (1995) (explaining "[t]he debate over selection and tenure of judges has been ongoing since shortly after the founding of our nation. Although not frequently recognized as such, the debate, is in reality, but one manifestation of a much more fundamental philosophical and political disagreement regarding the role of judges in our political system.").

¹⁴ See PHILIP L. DUBOIS, *FROM BALLOT TO BENCH* 1–6 (1980) (detailing the history of judicial selections in the United States and the myriad forms implemented at the state level); Norman L. Greene, *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 Alb. L. Rev. 597 (2005); Joseph E. Lambert, *Contestable Judicial Elections: Maintaining Respectability in the Post-White Era*, 94 Ky. L.J. 1 (2005) ("There is no consensus among the states and the federal government as to the best method of judicial selection.").

met with strong skepticism,¹⁵ and states may have valid reasons for assigning different values to either objective based on the state's political situation.¹⁶ Depending upon the relative values attached to the goals of judicial accountability and independence, the form of judicial selections can vary considerably. As a result, although selection methods have evolved, this evolution has not followed a consistent trajectory or direction.¹⁷ Instead, the debate over how to select judges can be more readily analogized to that of a giant pendulum swinging between the two almost inapposite objectives of judicial accountability and independence; the direction of which is dictated by the public's vision of the judiciary at a given point in time.¹⁸ For example, if a state decides that independence is the primary objective, judges may become disconnected from political reality; thus undermining public acceptance of judicial decisions and the very legitimacy of the state's judiciary.¹⁹ If, on the other hand, the state decides to focus on accountability, judges will be forced into the role of politicians and may be overly sensitive to the demands of the voting public.²⁰ In such jurisdictions, a judge will likely need to campaign, and strong incentives exist for judges to become immersed in the political process—an activity anathematic to the both traditional and contemporary views of a judge's role in society.²¹

One can get a sense of the present state of this debate by looking to current state practice. Five forms of judicial selection are currently utilized among the states: “two forms of election (partisan and nonpartisan), two forms of appointment (gubernatorial and legislative), and one appointment/election hybrid (the merit plan).”²² Many states utilize different methods depending on the level of the court and variation within

¹⁵ See, e.g., Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 79 (2003) (explaining that the general institutional reluctance to alter judicial selections, in this case toward an appointive model, “is akin to tilting at windmills.”).

¹⁶ See, e.g., R. Darcy, *Conflict and Reform: Oklahoma Judicial Elections 1907–1998*, 26 OKLA. CITY U. L. REV. 519, 519 (2001) (explaining Oklahoma's efforts to “evolve away from politics, corruption, and outside pressure toward fairness, impartiality, and judicial independence” and how this desire affected the choice of selection method utilized).

¹⁷ See F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 440–41 (2004).

¹⁸ See Leslie Southwick, *The Least of Evils for Judicial Selection*, 21 MISS. C. L. REV. 209, 212 (2002) (“A fair indication of the pendulum swings in sentiments around the country is that all the states that entered the Union before 1845 provided for appointed judges.”).

¹⁹ See Micheal R. Dimino, *Pay No Attention to that Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 311–12 (2003).

²⁰ See James Layman, *Judicial Campaign Speech Regulation: Integrity or Incentives?*, 19 GEO. J. LEGAL ETHICS 769, 770 (2006). See generally Dimino, *supra* note 19, at 302–03.

²¹ See Dimino, *supra* note 19, at 311–12.

²² See Hanssen, *supra* note 17, at 431–32.

even these five categories is widespread.²³ To provide an overall view of the role that selection methods can play in promoting various societal objectives, this Part will focus on the historical evolution of merit selection. This Part will also discuss the interaction between judicial selection methods and political speech.

A. FOUNDING PRACTICES—JUDICIAL APPOINTMENT

Initially, colonial experience with appointed judges colored decision-making.²⁴ Appointment was still the chosen method, but in a slightly different fashion reflecting an early American distrust of executive power—requiring legislative approval under the early model.²⁵ As a result, early state constitutions used the legislature as a clear and authoritative check on the independence of the judiciary.²⁶ “Yet, even at the outset, in some states the elective principle [was] obtained. Thus in New Jersey, Virginia, and South Carolina the legislature elected the judges, and Vermont and Tennessee when they became states in 1793 and 1796 each adopted the same practises [sic]”—a form of legislative appointment.²⁷ In short, early state constitutions “put state courts very much under the thumb of state legislatures.”²⁸

The appointive method has still not fallen entirely out of use.²⁹ Today “proponents of the appointive method of selection and retention argue that it is the best means available to ensure the independence of judges, because it insulates judges from periodically having to submit themselves . . . to the electorate for approval.”³⁰ However, “[t]he advantage of the appointment process is, depending on one’s ideology, also its weakness. That is, the system promotes judicial independence by having no substantial check on the judge after the confirmation process.”³¹ The

²³ See generally AMERICAN JUDICATURE SOCIETY, APPELLATE AND GENERAL JURISDICTION COURTS 3 (2004), <http://www.ajs.org/js/JudicialSelectionCharts.pdf>.

²⁴ Learned Hand, *The Elective and Appointive Methods of Selection of Judges*, 3 EFFICIENT GOV. 130, 130 (1913) (“When the colonies came to make their constitutions, they generally accepted such institutions as they were used to, and most of them provided for the appointment of the judges”).

²⁵ Hanssen, *supra* note 17, at 442 (explaining that “[t]he legislature enjoyed the exclusive right to choose judges in six states, shared those rights with the governor in seven others (usually in the form of confirmation powers).”).

²⁶ *Id.* at 442–43 (This “check” was strengthened by the fact that “legislatures were not hesitant to use th[eir] influence. In late eighteenth-century Rhode Island, supreme court justices who nullified a legislative act were called before the legislature to explain themselves and were replaced by the legislature when their terms expired the following year.”).

²⁷ Hand, *supra* note 24, at 130.

²⁸ Hanssen, *supra* note 17, at 441.

²⁹ See AMERICAN JUDICATURE SOCIETY, *supra* note 23, at 3.

³⁰ Webster, *supra* note 13, at 13–14.

³¹ Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. (SPECIAL ISSUE) 53, 58 (1986); see also Frederic M. Miller, *Discipline of Judges*, 50 MICH. L. REV. 737, 737 (1952) (“In most of the states, judges of the appellate courts and of the trial

appointive method has lost much of its former support, and most states have now shifted to other methods.³²

B. THE JACKSONIAN ERA AND THE RISE OF JUDICIAL ELECTIONS

A profound shift in the method of judicial selections occurred during the presidency of Andrew Jackson, as “[t]he concept of an elected judiciary emerged . . . as part of a larger movement aimed at democratizing the political process in America.”³³ This “movement was spearheaded by reformers who contended that the concept of an elite judiciary . . . did not square with the ideology of a government under popular control.”³⁴ Interestingly, this shift can also be largely attributed to erosion in the level of support legislatures had previously maintained as “[a] growing dissatisfaction with legislative performance hastened a shift in power.”³⁵ These public desires fueled the “pressure to replace appointive offices of all kinds” and to remove responsibility for judicial selection from state legislatures and executive branches.³⁶ As a result, although the first twenty-nine states provided for judicial appointment, most states entering the Union during or after Jackson’s presidency relied on partisan election, and many state constitutions were rewritten to further facilitate this shift.³⁷ It should also be noted that this movement also had a political element as “[t]he introduction of elections stood to benefit those who had proved themselves adept at winning elections [in this instance, Jackson’s Democratic Party],” but regardless of the cause, selection methods were fundamentally reordered during this period.³⁸ In drawing upon the earlier pendulum analogy, this shift—driven by con-

courts of general jurisdiction are subject to discipline or removal from office by impeachment at the hands of the legislature Such proceedings are seldom instituted.”)

³² AMERICAN JUDICATURE SOCIETY, *supra* note 23, at 3.

³³ Hand, *supra* note 24, at 130. As Hand notes:

Georgia has the distinction, good or bad, of being in 1812 the first state to elect any judges by vote of the people, though the change applied only to the inferior courts, and it was not till twenty years later that Mississippi, in a burst of democratic enthusiasm, became the first state to elect all its judges by popular vote. Since that time this method has been very generally extended.

Id.

³⁴ DUBOIS, *supra* note 14, at 3; *see also* LARRY C. BERKSON & RACHEL CAUFIELD, JUDICIAL SELECTION IN THE UNITED STATES 1 (2005), http://www.ajs.org/js/berkson_2005.pdf.

³⁵ Hanssen, *supra* note 17, at 445.

³⁶ *Id.* at 446.

³⁷ PRESSER ET AL., *supra* note 13, at 358; *see also* Hanssen, *supra* note 17, at 446; Niles, *The Popular Election of Judges in Historical Perspective*, in THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 523, 526 (1966). (“The debates on an elective judiciary were brief; there was apparently little need to discuss the abuses of the appointive system, or its failures, or why election would be better. A few delegates argued cogently for the retention of the old system, and indeed forecast the evils if the judiciary fell under political domination. . . . But the spirit of reform carried the day.”)

³⁸ PRESSER ET AL., *supra* note 13, at 358.

cerns over the independence of the judiciary—showcased a major swing in favor of judicial accountability. In short, policymakers and contemporary voters were willing to risk the politicization of the judiciary to ensure that judges were held accountable.

Despite the widespread use of partisan elections throughout the nineteenth century, partisan election has been in a decades-long decline.³⁹ Today, “the principal argument of proponents is that partisan election is the only method by which the accountability of judges can be ensured” and that “judges, like legislators, make law and, therefore, should be selected and retained in the same manner as are legislators.”⁴⁰ Critics counter that requiring judicial candidates to campaign has an unseemly impact upon the tone and tenor of many state judiciaries.⁴¹ As a result, more “balanced” selection methods have gained increasing acceptance in recent years.⁴²

C. THE SHIFT TOWARD NONPARTISAN ELECTIONS

By the end of the nineteenth century, weaknesses in the partisan election model were already apparent and the need to further refine judicial selections was clear.⁴³ “The experience with partisan elections had shown that an elected court, instead of being rendered independent of incumbent politicians, simply became responsive to the same political forces that dominated legislatures.”⁴⁴ In 1878, “the American Bar Association came out strongly against partisan judicial elections on the grounds that judges were subject to undue and damaging political pressure.”⁴⁵ The solution adopted in many states was to rely on nonpartisan elections as many felt “[w]hat was necessary was to insulate judges” from political pressures.⁴⁶ Nonpartisan elections attempt to isolate vot-

³⁹ BERKSON & CAUFIELD, *supra* note 34, at 2.

⁴⁰ Webster, *supra* note 13, at 17.

⁴¹ Phillips & Poll, *supra* note 10; Geyh, *supra* note 15, at 43.

⁴² BERKSON & CAUFIELD, *supra* note 34, at 3.

⁴³ DUBOIS, *supra* note 14, at 7 (explaining Missouri Supreme Court Justice Fred Williams’ view of his career in a partisan election state: “I was elected in 1916 because Woodrow Wilson kept us out of war—I was defeated in 1920 because Woodrow Wilson hadn’t kept us out of war.”); Ryan L. Souders, Note, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 544 (2006) (explaining state implementing partisan election was no “panacea” for their problems with the judiciary); *see also* BERKSON & CAUFIELD, *supra* note 34, at 2 (explaining that under partisan election “[t]he notion of a judiciary uncontrolled by special interests had simply not been realized. It was in this context that the concept of nonpartisan elections began to emerge.”); Marie A. Falinger, *Can a Good Judge Be a Politician? Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433 (2005).

⁴⁴ Hanssen, *supra* note 17, at 450.

⁴⁵ *Id.* at 450; *see also* LARRY C. BERKSON ET AL., JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 1, 4 (1981) (explaining that as early as 1873 Cook County, Illinois removed information about party affiliations from the judicial election ballot).

⁴⁶ Hanssen, *supra* note 17, at 450.

ing decisions from party labels, as these voting cues can be misleading and can be a “threat to public confidence in judicial neutrality.”⁴⁷ In creating and implementing this method, policymakers, for the first time, attempted to fashion a crude balance between the recognized objectives of accountability and independence.

Despite concerns about the effectiveness of this model—particularly in limiting the politicization of elections, nonpartisan election quickly became a popular alternative.⁴⁸ Current proponents of this method argue that “such a system permits the people to retain their right to vote for judges, while at the same time [the system also] reduc[es] the frequent turnover on the bench that occurs in many partisan election states”—which illustrates that some measure of independence may be obtained through this method of selection.⁴⁹ The main drawback to this approach relates to how effectively the model is able to isolate judges from political pressure—an open question in many jurisdictions and in the minds of many commentators.⁵⁰

D. THE RISE OF MERIT SELECTION

At the dawn of the twentieth century, merit selection was created in order to strike a more appropriate balance between judicial accountability and independence.⁵¹ Many states had serious concerns with the other methods as “[a]fter the Civil War . . . one party began to dominate the political process through mechanisms such as patronage politics and political machines.”⁵² Even the increased use of nonpartisan elections had done little to alleviate these concerns.⁵³ As a result, merit selection was

⁴⁷ Roy A. Schotland, *To the Endangered Species List, Add Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1415 (2003).

⁴⁸ AMERICAN JUDICATURE SOCIETY, *supra* note 23, at 3.

⁴⁹ Webster, *supra* note 13, at 25.

⁵⁰ Schotland, *supra* note 47, at 1397; Martin I. Kaminsky, *Available Compromises for Continued Judicial Selection Reform*, 53 ST. JOHN'S L. REV. 466, 490 (1979); see also BERKSON & CAUFIELD, *supra* note 34, at 3 (“As early as 1908 members of the South Dakota Bar Association indicated dissatisfaction with how the idea was working in their state. By 1927, Iowa, Kansas, and Pennsylvania had already tried the plan and abandoned it.”). This source also notes that “the major objection [to nonpartisan election] was that there was still no real public choice. New candidates for judgeship were regularly selected by party leaders and thrust upon an unknowledgeable electorate, which, without the guidance of party labels, was not able to make reasoned choices.” *Id.*

⁵¹ RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR* 8–9 (1969) (explaining the organized bar’s dissatisfaction with judicial elections).

⁵² Peter P. Olszweski, Sr., *Who’s Judging Whom? Why Popular Elections Are Preferable to Merit Selection Systems*, 109 PENN ST. L. REV. 1, 4 (2004).

⁵³ Southwick, *supra* note 18, at 219 (explaining that “most commentators contend that, far from being an improvement upon partisan elections, nonpartisan elections are an inferior alternative to partisan elections because they possess all of the vices of partisan elections and none of the virtues.”); see also Schotland, *supra* note 47, at 1397–99 (explaining issues related to nonpartisan election).

the alternative developed by the era's judicial reformers.⁵⁴ Dean Roscoe Pound, who famously made the argument for reform in a 1906 address to the American Bar Association, is traditionally given credit for providing the reform movement its early momentum.⁵⁵ Pound's message was simple and clear: "Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench."⁵⁶ In 1913, Albert M. Kales, a law professor at Northwestern University and Director of Research for the American Judicature Society, built upon Pound's arguments and developed merit selection—which, although slightly modified through subsequent scholarship and practice, is still utilized to this day.⁵⁷

In 1940, Missouri became the first state to actually utilize this selection system (as a result, merit selection is commonly referred to as the "Missouri Plan").⁵⁸ Missouri passed this reform through popular referendum as voters were concerned with the level of corruption within the state judiciary, and focused on curbing the power of Kansas City's Pendergast Machine.⁵⁹ Many states soon adopted this reform; in fact, this movement has had such vigor that over two-thirds of states now select at least some judges through merit selection.⁶⁰

To understand how merit selection achieves a balance between accountability and independence, one must first understand how a system of merit selection typically operates. In general, merit selection utilizes three main steps: 1) evaluation and selection of candidates by a state nominating commission; 2) gubernatorial approval and selection of a

⁵⁴ WATSON & DOWNING, *supra* note 51, at 82–83.

⁵⁵ See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906); see also Hanssen, *supra* note 17, at 451–52; WATSON & DOWNING, *supra* note 51, at 8. For another early condemnation of other forms of judicial selection, see William H. Taft, *The Selection and Tenure of Judges*, 38 A.B.A. REP. 418 (1913).

⁵⁶ See Pound, *supra* note 55, at 415.

⁵⁷ See ALLAN ASHMAN & JAMES J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 11 (1974) (explaining the creation of merit selection and the subsequent modifications proposed by other scholars—such as substituting the governor as the official making the final determination rather than the Chief Justice).

⁵⁸ Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 2 (1994).

⁵⁹ WATSON & DOWNING, *supra* note 51, at 82–83 (explaining the allocation of judicial positions prior to the Missouri Plan and how "[t]his system came to an abrupt end with the adoption of the Missouri Plan.").

⁶⁰ Marsha Puro et al., *An Analysis of Judicial Diffusion: Adoption of the Missouri Plan in the American States*, PUBLIUS, Fall 1985, at 85, 86; AMERICAN JUDICATURE SOCIETY, *MERIT SELECTION: THE BEST WAY TO CHOOSE JUDGES?* 1, 3 (2005), http://www.ajs.org/js/ms_descrip.pdf. But see Seth Andersen, *Examining the Decline in Support for Merit Selection*, 67 ALB. L. REV. 793 (2004) (explaining the merit selection movement has lost some of its previous momentum).

candidate; and 3) periodic retention elections.⁶¹ The first step, evaluation and selection of judicial candidates by a nominating committee, is vitally important to the success of the process.⁶² A judicial nominating committee operates as “a permanent nonpartisan commission of lawyers [and laypersons] that initially and independently generates, screens and submits a list of judicial nominees to an official who is legally or voluntarily bound to make a final selection from this list.”⁶³ Thus, the nominating committee is charged with determining the relative “merit” of judicial candidates—rather than the voting public—which provides judges a degree of independence from the political environment.⁶⁴ Once the state nominating commission has completed its task, the governor makes an appointment based upon the committee’s recommendations.⁶⁵ The candidate is then appointed to the judicial vacancy—typically for a relatively short probationary period—after which the public can voice its opinions on the judge’s performance and qualifications in retention elections.⁶⁶

This last step, holding regular retention elections, ensures that judges remain accountable to the electorate—as these votes continue even after the probationary period has passed.⁶⁷ In practice, a retention election operates as follows: “The sole question on which the electorate votes is: ‘Shall Judge ___ be retained in office?’ A judge must win a majority of the vote in order to serve.”⁶⁸ Some question the ability of retention elections to maintain judicial accountability, but it is clear that these votes do provide at least a limited role for public participation—a role designed to allow for judicial accountability and to remove politics from the selection calculus.⁶⁹

The balance struck between accountability and independence in merit selection jurisdictions also has a structural impact on judicial political speech.⁷⁰ In an elective system some degree of judicial political

⁶¹ WATSON & DOWNING, *supra* note 51, at 13–14.

⁶² ASHMAN & ALFINI, *supra* note 57, at 12 (explaining that the nominating commission is “the cornerstone of this process.”); *see also* WATSON & DOWNING, *supra* note 51, at 13–14.

⁶³ ASHMAN & ALFINI, *supra* note 57, at 11; WATSON & DOWNING, *supra* note 51, at 13–14.

⁶⁴ ASHMAN & ALFINI, *supra* note 57, at 60–69 (explaining the factors taken into account when considering the qualifications of a candidate for judicial service—background factors, professional skills, character, personality and motivations, and the opinions of interest groups regarding the candidate’s qualifications).

⁶⁵ WATSON & DOWNING, *supra* note 51, at 14.

⁶⁶ *Id.*

⁶⁷ *Id.* (explaining that the judge serves a one- or two-year probationary period, after which the judge runs unopposed on a retention ballot).

⁶⁸ BERKSON & CAUFIELD, *supra* note 34, at 5

⁶⁹ John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 863–68 (1990).

⁷⁰ *See infra* Part III.

speech is appropriate in order to inform voters of the qualitative choices presented at the ballot box—which directly relates to the system’s primary goal of holding judges accountable. In this sense, the choice of the elective system has fundamentally impacted the tenor of the campaigns in these jurisdictions. In comparison, under an appointive system, where independence is the primary goal, a judge would have little need or motivation to discuss disputed legal issues. This distinction relates directly to the role voters play within a merit system. In the latter case, a voter is voting on the *retention*—not the *selection*—of a candidate. Selection is carried out by the nonpolitical state nominating commission based on the merit and qualifications of the candidates. As a result, although a voter within a merit selection jurisdiction does have a need for information, this information should be primarily focused on the judge’s performance, rather than political or personal views. Voters, then, only require information relevant to their role as a procedural safeguard, and the incentives behind undesirable judicial speech are limited.

II. JUDICIAL CANONS AND THE AFTERMATH OF *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

A traditional nonstructural alternative to regulating judicial political speech has been to rely on ethical canons. Historically, ethical canons have allowed jurisdictions to control the conduct of judicial candidates throughout the selection process, particularly in elective systems where candidates have the strongest incentive to campaign aggressively.⁷¹ Of particular relevance is Canon 5 of the 1990 Model Code of Judicial Conduct, which regulates and restricts the political activities of judicial officers and candidates.⁷² Lately, however, state provisions based on Canon 5 have come under attack because many feel that this ethical obligation infringes upon a judge’s constitutional rights.⁷³ Several successful lawsuits have, at least arguably, eroded the viability of this ethical barrier.⁷⁴ To fully understand the effect of recent legal challenges on the overall field of judicial selections, it is necessary to understand the development of the canons, the impact of the Court’s decision in *White*, as well as the general contours of the post-*White* landscape.

⁷¹ JEFFREY M. SHAMAN ET AL., *JUDICIAL CONDUCT AND ETHICS* § 11.01 (3d ed. 2000).

⁷² *Id.*

⁷³ See James Bopp, Jr. & Anita Woudenberg, *An Announce Clause by Any Other Name: The Unconstitutionality of Disciplining Judges Who Fail to Disqualify for Exercising Their Freedom to Speak*, 55 *DRAKE L. REV.* 723 (2007); Terry Carter, *The Big Bopper*, A.B.A. J., Nov. 2006, at 31 (detailing Mr. James Bopp’s efforts in attacking judicial canons in many states). See generally Plymouth Nelson, *Don’t Rock the Boat: Minnesota’s Canon 5 Keeps Incumbents High and Dry While Voters Flounder in a Sea of Ignorance*, 28 *WM. MITCHELL L. REV.* 1607 (2002).

⁷⁴ See Phillips & Poll, *supra* note 10 (explaining the litigation at the circuit court level in the aftermath of *White*); see also Carter, *supra* note 73, at 31.

A. THE PRE-WHITE WORLD

The earliest judicial canons developed as a method of defining the parameters of acceptable judicial conduct, thus helping to preserve the oft-mentioned balance between judicial accountability and independence.⁷⁵ Ethical canons governing the conduct of lawyers were developed at the turn of the century by the American Bar Association (ABA) (although the first three attempts to implement its provisions in 1908, 1909, and 1917 all failed).⁷⁶ In 1922, Chief Justice William H. Taft chaired a commission charged with the development of similar ethical guidelines for judicial officers which were eventually adopted by the ABA in 1924.⁷⁷ Nearly all states have now adopted some variant of the ABA model canons, and the ABA periodically revisits these strictures to adjust to court decisions and perceived shortcomings.⁷⁸ The 1990 Model Code revisions specifically addressed issues of judicial conduct, particularly within the context of judicial elections.⁷⁹ Canon 5(A) provided that a judge or judicial candidate may not act as a leader within a political organization, publicly endorse or oppose any candidates' campaign for political office, make speeches on behalf of a candidate, attend political gatherings, solicit funds, or make contributions to political campaigns or organizations.⁸⁰ Canon 5(C), however, modified this restriction for jurisdictions utilizing partisan judicial elections—a recognition that such elections are markedly different—and provided an additional list of ac-

⁷⁵ SHAMAN ET AL., *supra* note 71, § 11.01.

⁷⁶ A.B.A. Joint Comm'n to Evaluate the Model Code of Judicial Conduct, Background Paper, <http://www.abanet.org/judicialethics/about/background.html> (last visited Feb. 11, 2008).

⁷⁷ *Id.* Interestingly, the motivation for this model code was the conduct of United States District Court Judge Kennesaw Mountain Landis who was hired as Commissioner of Baseball—drawing a salary almost five times greater than his judicial compensation for this task—and yet remained on the federal bench). *Id.*

⁷⁸ SHAMAN ET AL., *supra* note 71, § 11.01; Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667, 692 (2001) (explaining that all states—with the exception of Montana—have adopted some form of judicial canons); *see also White*, 536 U.S. at 786 (noting that states, however, did not adopt these provisions quickly and have not always implemented all of the provisions recommended by the ABA); Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667, 692 (2001) (explaining that all states—with the exception of Montana—have adopted some form of judicial canons).

⁷⁹ MODEL CODE OF JUDICIAL CONDUCT CANON 5 (1990); *see also* SHAMAN ET AL., § 11.02 (discussing additional restrictions on judicial campaign conduct imposed under the Model Code of Professional Responsibility).

⁸⁰ MODEL CODE OF JUDICIAL CONDUCT CANON 5(A) (1990). These activities include: purchasing tickets to and attending political events, contributing to political organizations, identifying oneself as a member of a political party, speaking at political rallies on one's own behalf, and publicly endorsing or opposing other candidates for the same judicial office for which the candidate is campaigning. *Id.*

tivities in which a judge or a candidate for judicial office may engage.⁸¹ It is clear that the intention of these provisions was to limit the politicization of judicial campaigns while allowing states to maintain their respective choice of selection method.

B. *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

Against this restrictive ethical backdrop, in 2002 Gregory Wersal challenged Minnesota's Code of Judicial Conduct.⁸² Wersal, a candidate for Minnesota's Supreme Court,⁸³ challenged Minnesota's announce clause, which prohibited judicial candidates from announcing their views on disputed legal or political issues.⁸⁴ Wersal had made several public statements regarding decisions of the current court and had also discussed his views on constitutional interpretation and disputed issues such as abortion and crime control.⁸⁵ After a complaint was registered with the state's ethics board, Wersal withdrew from the election fearing ethical sanction, only to announce a new campaign for the state's highest court several months later.⁸⁶ Before beginning this second campaign, Wersal sought an advisory opinion from the State Lawyers Board asking whether the announce clause and other judicial canons would be enforced.⁸⁷ The State Lawyers Board could only provide a vague opinion as Wersal did not actually detail what he intended to say; this led to further legal challenge.⁸⁸ Eventually, the challenge wound its way to the Supreme Court where, in a sharply divided decision, the Court found Minnesota's announce clause unconstitutional.⁸⁹ Two opinions are par-

⁸¹ SHAMAN ET AL., *supra* note 71, § 11.04. These activities include: purchasing tickets for political gatherings, making contributions to political organizations, identifying oneself as a member of a political organization or party, speaking at political gatherings on one's own behalf, and publicly endorsing or opposing other candidates for the same judicial office for which the candidate is running. *Id.*

⁸² *Republican Party Minnesota v. White*, 536 U.S. 765 (2002). See generally SHAMAN ET AL., *supra* note 71, § 11.04. It is important to note, however, that the announce clause challenged in this case was not widely applied in state practice and its questionable constitutionality was recognized by even the ABA as the 1990 revisions to the Model Code dropped this provision. See Briffault, *supra* note 11, at 203; see also Kevin S. Burke, *An Opportunity for Leadership Is Lost*, 55 DRAKE L. REV. 611 (2007) (explaining the development of Minnesota's judicial canons and subsequent litigation).

⁸³ See Burke, *supra* note 82.

⁸⁴ *White*, 536 U.S. at 786; see also MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (2000).

⁸⁵ Layman, *supra* note 20, at 771.

⁸⁶ David Neil McCarty, Note, *Walk Before They Make Us Run: Republican Party of Minnesota v. White and the Need for Judicial Reform in Mississippi*, 23 MISS. C. L. REV. 51, 52-53 (2003).

⁸⁷ *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 859 (8th Cir. 2001).

⁸⁸ *Id.*

⁸⁹ *White*, 536 U.S. at 765. This case actually produced five separate opinions: Justice Scalia's majority opinion, concurring opinions by Justices Kennedy and O'Connor, and dissents from Justices Stevens and Ginsburg. *Id.*; see also Layman, *supra* note 20, at 771 (ex-

ticularly relevant to this Article: Scalia's majority opinion and O'Connor's concurrence.

1. *Scalia's Majority Opinion*

Scalia's majority opinion found that strict scrutiny, the standard of review reserved for fundamental rights, applied to this restraint on political speech.⁹⁰ As a result, Minnesota needed to prove that its announce clause was narrowly tailored toward obtaining a compelling state interest.⁹¹ Minnesota argued that the state's goal of preserving an impartial judiciary should qualify as a compelling state interest.⁹² Scalia however, found that Minnesota's interest in maintaining an impartial judiciary failed to save the announce clause.⁹³

To support this conclusion the majority analyzed three possible definitions of "impartiality."⁹⁴ According to Scalia, one possible definition is a "lack of bias for or against any party to the proceeding."⁹⁵ Using this definition, Scalia found Minnesota's announce clause was not narrowly tailored because the provision "does not restrict speech for or against particular *parties*, but rather speech for particular *issues*," and as a result, there is no actual bias present.⁹⁶ Scalia next considered impartiality's usage within the judicial context—the "lack of preconception in favor or against a particular legal view."⁹⁷ In the majority's view, this definition also failed to provide a compelling state interest as "[a] judge's lack of predisposition regarding the issues in a case has never been thought a necessary component of equal justice."⁹⁸ Scalia noted the utter impossibility of finding competent judges lacking any preconceived ideas regarding any topics related to legal doctrine.⁹⁹ Last, Scalia considered a general definition of impartiality connoting "open-mindedness," which, to Scalia, required that a judge be willing "to consider views that oppose

plaining that the Republican Party of Minnesota joined this case "arguing that its ability to assess a candidate was harmed by the prohibition of [judicial campaign] speech.").

⁹⁰ *White*, 536 U.S. at 774–75.

⁹¹ *Id.*

⁹² *Id.* at 775 (citing *Eu v. San Francisco County Democratic Comm.*, 489 U.S. 214 (1989)).

⁹³ *See id.* at 776 & 776 n.6 (discussing that although impartiality was offered as a compelling state interest, both Minnesota and the lower courts failed to give this term definition).

⁹⁴ *See id.* at 775–80.

⁹⁵ *Id.* at 775.

⁹⁶ *Id.* *But see* Brendan H. Chandonnet, *The Increasing Politicization of the American Judiciary: Republican Party of Minnesota v. White and Its Effects on Future Judicial Selection in State Courts*, 12 WM. & MARY BILL RTS. J. 577, 585 (2004) ("If a judge does announce his views on a legal issue he clearly does have a bias—a bias against all parties that present cases contrary to that position, regardless of a fact in the case.").

⁹⁷ *White*, 536 U.S. at 777.

⁹⁸ *Id.*

⁹⁹ *Id.* at 777–78.

his preconceptions, and remain open to persuasion, when the issues arise in a particular case.”¹⁰⁰ Even this important purpose, however, failed to save the announce clause as the provision was not actually adopted for this end.¹⁰¹ As a result, the Supreme Court struck down Minnesota’s announce clause as an unconstitutional restraint on the First Amendment rights of judges.¹⁰² As Scalia succinctly summarized:

[T]he 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 legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.¹⁰³

Scalia also explained the tensions between the judicial canons and First Amendment jurisprudence as “perhaps unsurprising, since the ABA, which originated the announce clause, has long been an opponent of judicial elections,”¹⁰⁴ and that “this practice [of creating judicial canons] relatively new to judicial elections and still not universally adopted, does not compare well with the traditions deemed worthy of our attention.”¹⁰⁵ The net effect of this opinion may be to give voice to the Court’s concerns regarding the constitutionality of many of the remaining judicial canons, although this remains an open question.¹⁰⁶

2. *O’Connor’s Concurring Opinion*

Going beyond Scalia’s First Amendment analysis, Justice O’Connor directly focused on the structural impact of judicial selection methods.¹⁰⁷ In O’Connor’s view, attempts to use judicial canons to promote judicial impartiality are constitutionally suspect.¹⁰⁸ O’Connor made it patently clear that judicial candidates “cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects,”¹⁰⁹ and that “relying on campaign contributions may leave judges feeling indebted to certain parties or interest groups

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 788.

¹⁰³ *Id.* (citing *Renne v. Geary*, 501 U.S. 312 (1991) (Marshall, J., dissenting)).

¹⁰⁴ *Id.* at 787.

¹⁰⁵ *Id.* at 786.

¹⁰⁶ *Developments in the Law—Voting and Democracy, Judicial Elections and Free Speech*, 119 HARV. L. REV. 1133, 1134 (2006) [hereinafter *Developments in the Law*].

¹⁰⁷ See *White*, 536 U.S. at 786.

¹⁰⁸ See *id.* at 788–89 (“But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case.”).

¹⁰⁹ *Id.* at 789.

[and] the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."¹¹⁰ O'Connor also noted the role of reforms in the area of judicial selections (including the Missouri Plan) in promoting judicial independence and impartiality and concluded that "[t]his system obviously reduces threats to judicial impartiality, even if it does not eliminate all popular pressure on judges."¹¹¹ According to O'Connor, the canons are not the best means of preserving judicial independence and impartiality; rather, this is an objective which should be fostered structurally though methods of judicial selection actually designed to achieve these goals.¹¹²

C. THE POST-*WHITE* LANDSCAPE

State ethics boards, interest groups, and lower courts have thus far disagreed on how to actually quantify *White*'s impact.¹¹³ The initial impact of the holding has been quite limited; although *White* plainly held Minnesota's "announce clause" unconstitutional, only nine states retained similar provisions because their constitutionality had long been suspect.¹¹⁴ *White* "specifically sidestepped [addressing] any of the other provisions included in Minnesota's Code of Judicial Conduct, including the 'commit' clause, the 'pledges or promises' clause, and restrictions on candidates' solicitation on campaign funds."¹¹⁵ As a result, there has been abundance of debate on *White*'s downstream impact on the remaining canons:¹¹⁶

The *White* line of cases has reopened major questions of institutional design that once seemed settled. States have pared back candidate speech restrictions, political parties and interest groups have entered the fray as never

¹¹⁰ *Id.* at 789–90; see also David Barnhizer, "On the Make": Campaign Funding and the Corrupting of the American Judiciary, 50 *CATH. U. L. REV.* 361, 379–80 (describing anecdotal evidence from lawyers suspecting their donations to judicial campaigns might impact their courtroom efforts).

¹¹¹ *White*, 536 U.S. at 791.

¹¹² See *id.* at 792.

¹¹³ See Cynthia Gray, *The Good News in Republican Party of Minnesota v. White*, 87 *JUDICATURE* 271 (2004) [hereinafter Gray, *Good News*] (stating that "[t]he states' reactions have ranged from capitulation out of a fear of being sued, giving up any attempt to require judicial candidates to campaign differently for other offices. . . , to continuing enforcement of narrower restrictions believing that the principles of judicial impartiality and independence should apply even to an elected judiciary"); see also Cynthia Gray, *The States' Response to Republican Party of Minnesota v. White*, 86 *JUDICATURE* 163 (2002) [hereinafter Gray, *States' Response*].

¹¹⁴ See Gray, *Good News*, *supra* note 113, at 163.

¹¹⁵ Rachel Paine Caufield, *In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Campaign Elections Are Changing*, 38 *Akron L. Rev.* 625, 639 (2006).

¹¹⁶ See generally *id.* at 639.

before, and judicial candidates have shown a new willingness to engage in campaign strategies like attack advertising that were once largely confined to legislative and executive races.¹¹⁷

A brief analysis of these diverse reactions to *White* can provide insight into the future viability of the remaining judicial canons.

1. *State Responses*

Although states responded very differently to *White*, most states “began to review limitations on free speech during judicial campaigns as prescribed in state judicial conduct codes.”¹¹⁸ Several states have issued broad statements affirming the validity of their state judicial canons, including Georgia, which stated that “going forward in this election season, the Commission will be vigilant” in enforcing the ethical canons.¹¹⁹ Other states have taken a more cautious approach, indicating that while they will continue to enforce the canons, the state will more narrowly interpret the provisions.¹²⁰ Alabama recently took this approach and withdrew an advisory opinion that suggested judges not respond to judicial surveys out of concern that the opinion may violate the post-*White* standards.¹²¹ Other states have taken more extreme action. “Among the most drastic alterations of a state code, North Carolina changed its code to repeal the ‘pledges or promises’ clause and to allow candidates greater freedom to endorse other candidates and directly seek campaign contributions.”¹²² Minnesota’s reaction, however, is perhaps the most interesting. Minnesota, long the epicenter of this debate, established a commission to evaluate the state’s remaining options shortly after the *White* holding.¹²³ This commission recently released its recommenda-

¹¹⁷ *Developments in the Law*, *supra* note 106, at 1140.

¹¹⁸ Ferris K. Nesheiwat, *Judicial Restraint: Resolving the Constitutional Tension Between First Amendment Protection of Political Speech and the Compelling Interest in Preserving Judicial Integrity During Judicial Elections*, 24 QUINNIPIAC L. REV. 757, 789 (2006); *see also* Caufield, *supra* note 115, at 645–46 (explaining other possible state responses—including the creation of advisory boards to advise judicial candidates, establishing looser canons with tighter recusal standards, public financing of judicial elections, and shifting selection methods).

¹¹⁹ *See* Gray, *States’ Response*, *supra* note 113, at 163–65 (stating that Georgia, Florida, Indiana, Kentucky, Missouri, and Ohio have also issued statements to this effect).

¹²⁰ *See id.*

¹²¹ *See id.*; *see also* Alabama Advisory Opinion 00-763 (2003).

¹²² Caufield, *supra* note 115, at 645–46. North Carolina’s approach is interesting in that the state has also elected to implement public financing of its judicial campaigns—“an alternative [which the state hopes will] preserve democratic accountability in the judiciary but eliminate the worst effects by limiting the influence of campaign contributions by special interests.” *Id.* at 646.

¹²³ Dane Smith, *Change Is Likely in Judges’ Selection*, STAR TRIB. (St. Paul), Feb. 19, 2007, at 1.

tions and advocated a structural change toward merit selection to avoid “the judicial-election excesses noted elsewhere.”¹²⁴ In the end, only one thing is clear from these divergent state responses—consensus on *White*’s impact has yet to materialize at the state level.

2. *Organizational Views*

Private organizations have also diverged in their assessment of *White* largely based upon institutional objectives. For example, the National Center for State Courts issued guidance explaining the narrowness of the *White* holding and stressing that the actual opinion addresses the constitutionality of only the announce clause.¹²⁵ This organization further asserted that the Court did not intend this decision to have any impact the pledges or promises clause, the partisan activities clause, and the commit clause under the ABA Model Rules.¹²⁶ Other organizations, however, have taken an alternative view of the holding and have utilized the *White* decision to distribute judicial surveys.¹²⁷ These organizations argue that in a post-*White* world, judges are allowed to answer such questionnaires, expressing the view that “to stop a judge from answering would be illegal.”¹²⁸

3. *The Lower Courts Respond*

Courts have also split on the issue of *White*’s impact.¹²⁹ Although Scalia made clear that *White* “neither assert[ed] nor [implied] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office,” he provided no guidance on how to draw this distinction.¹³⁰ A recent influential article focusing on developments in this area argues that future case law will hinge upon how courts address three interconnected issues: 1) whether strict scrutiny truly ap-

¹²⁴ Conrad deFiebre, *Retention Elections Proposed for Judges*, STAR TRIB. (St. Paul), Feb. 21, 2007, at 4B.

¹²⁵ NAT’L AD HOC ADVISORY COMM. ON JUDICIAL ELECTION LAW, REPUBLICAN PARTY OF MINNESOTA v. WHITE and the Canons Regulating Judicial Elections 1 (2002), <http://www.judicialcampaignconduct.org/ElectionLawWhiteMemo.pdf>.

¹²⁶ *Id.* at 2–3.

¹²⁷ See Caufield, *supra* note 115, at 641 (explaining the views of Kentucky’s Family Trust Foundation—“The current powers that be in Kentucky place restrictions on what a judicial candidate can say, which, in other worlds limits their free speech. . . . and that, in turn, limits the knowledge the voters need to make a wise decision.”); see also IOWANS CONCERNED ABOUT JUDGES, 2006 JUDICIAL VOTERS GUIDE QUESTIONNAIRE FOR JUDICIAL CANDIDATES (2006), <http://www.iowansconcernedaboutjudges.com/doc/Survey.pdf>; FAMILY ACTION COUNCIL OF TENNESSEE, *supra* note 9.

¹²⁸ See, e.g., IOWANS CONCERNED ABOUT JUDGES, *supra* note 127.

¹²⁹ *Developments in the Law*, *supra* note 106, at 1134 (explaining that “*White* perplexed courts (and candidates) across the nation.”).

¹³⁰ *Id.* (citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 783 (2002)).

plies to judicial canons;¹³¹ 2) how courts define “impartiality”;¹³² and 3) whether recusal can serve as an effective remedy (for example, can a judge provide their views several issues but recuse themselves every time one of those issues arises?).¹³³ At least one court, however, has already upheld a canon against a constitutional challenge in the post-*White* era.¹³⁴ In *In re Raab*, New York’s “pledges and promises clause” was challenged in light of the *White* holding.¹³⁵ In upholding the canon, the New York Court of Appeals rejected this argument, finding that while the restriction did merit the application of strict scrutiny, the canon was sufficiently distinct from the announce clause in *White* to pass constitutional muster.¹³⁶

On the other hand, many commentators argue that although *White* stated that a distinction remains between races for political and judicial office, in actuality, no true boundary remains.¹³⁷ This thesis has been born out by many of the subsequent legal challenges which continue to be considered by the courts.¹³⁸ Three recent cases provide a representative sample of the ongoing litigation in this area.

In *Weaver v. Bonner*, the Eleventh Circuit considered the constitutionality of several provisions under Georgia’s Code of Judicial Conduct.¹³⁹ In this case, Georgia’s Special Committee on Judicial Election sanctioned a judicial candidate for an advertisement discussing his opponent’s viewpoints; the advertisement in question arguably violated a prohibition on “making false and misleading statements.”¹⁴⁰ The Eleventh Circuit found that the provision and related sanction were unconstitutional in light of the *White* decision.¹⁴¹ The Eleventh Circuit, in fact,

¹³¹ *Id.* at 1141 (explaining that strict scrutiny may not be the proper standard for evaluating judicial canons—particularly those beyond the announce clause in *White*).

¹³² *Id.*

¹³³ *Id.*; see also Caufield, *supra* note 115, at 639–44 (explaining such an approach was specifically proposed in Kennedy’s concurrence to *White*). Compare Phillips & Poll, *supra* note 10, at 707 (advocating recusal as a possible solution to judicial speech issues), with Bopp & Woudenberg, *supra* note 73, at 724 (arguing against the recusal proposal).

¹³⁴ *In re Raab*, 793 N.E.2d 1287 (N.Y. 2003); see also *In re Kinsey*, 842 So. 2d 77 (Fla. 2003) (upholding canons prohibiting Florida’s “pledges and promises clause” and “commit clause”).

¹³⁵ *In re Raab*, at 1289.

¹³⁶ *Id.* at 1290.

¹³⁷ See Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735 (2002) (stating that “the First Amendment protects [judges] right to express their views.”).

¹³⁸ See also Ross G. Currie, *The End of Nonpartisan Judicial Elections and the Rise of the Politicary: The Eighth Circuit Strikes Down Judicial Campaign Regulations in Republican Party of Minnesota v. White*, 51 VILL. L. REV. 665, 673–74 (2006); Caufield, *supra* note 115, at 639–44.

¹³⁹ *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

¹⁴⁰ *Id.* at 1316.

¹⁴¹ *Id.* at 1319.

even expressed its doubts that any difference truly remains between judicial and political elections after *White*.¹⁴² In a similar holding, a New York district court in *Spargo v. New York State Commission on Judicial Conduct* found that a state canon regulating judicial political conduct was overbroad.¹⁴³ As a result, a sanction imposed upon a judicial candidate under the canon was also invalidated.¹⁴⁴

More recently, *Republican Party of Minnesota v. White (White II)* addressed, on remand, the constitutionality of the state's remaining judicial canons after the Court's *White* decision—the partisan activities (prohibiting activity within political organizations) and the solicitation (prohibiting the personal solicitation of campaign contributions) clauses of Minnesota's Code of Judicial Conduct.¹⁴⁵ The Eighth Circuit followed the Supreme Court's lead in applying strict scrutiny to find these provisions unconstitutional.¹⁴⁶ The Eighth Circuit found that the professed interest of maintaining an impartial and independent judiciary could potentially be a compelling interest, but the prohibition was still unconstitutional as it was not narrowly tailored to this end.¹⁴⁷

Although the case law in this area has yet to settle, most commentators have noted that “[i]n all likelihood, lower courts will continue to deregulate judicial election speech; [and that] few trends point in the other direction.”¹⁴⁸ As a result, the deregulation of judicial campaign speech appears somewhat inevitable, and attempts to reformulate the judicial canons by the ABA may be for naught.¹⁴⁹

4. ABA's Reaction—Reworking the Model Canons?

The ABA Working Group on the First Amendment and Judicial Campaigns has been working to develop a revised set of model judicial canons to adapt to the changing legal climate in this area.¹⁵⁰ In 2003:

Following *White*, the ABA concluded that . . . [the current] speech restrictions were vulnerable to further First Amendment attacks, and [as a result], adopted major revisions to the Model Code's campaign provisions. The

¹⁴² *Id.* at 1321.

¹⁴³ *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003).

¹⁴⁴ *Id.* at 92.

¹⁴⁵ *Republican Party of Minnesota v. White (White II)*, 416 F.3d 738 (8th Cir. 2005) (en banc).

¹⁴⁶ *Id.* at 744; see also *Developments in the Law*, *supra* note 106, at 1134.

¹⁴⁷ *White II*, at 754–56.

¹⁴⁸ *Developments in the Law*, *supra* note 106, at 1143.

¹⁴⁹ Caufield, *supra* note 115, at 645 (explaining that [i]n light of *White* and cases spawned by *White*, states will be in a continual state of uncertainty regarding the constitutionality of their speech restrictions.”).

¹⁵⁰ Gray, *States' Response*, *supra* note 113, at 163.

revisions to Canon 5 eliminate the commitments clause by folding it into the “promises clause,” and attempt to narrow the combined restriction’s scope by limiting its application only to certain “pledges, promises, or commitments.”¹⁵¹

Additionally, the revisions “for the first time in a century mandated, in certain instances, the disqualification of an elected judge based on her campaign statements.”¹⁵² This greatly expanded the scope of this clause and “attempt[ed] to accomplish what amounts to an end-run around *White*.¹⁵³ Even these changes may not be sufficient. Additional modifications are being evaluated at the ABA’s mid-year meeting in an attempt to respond to the post-*White* conditions.¹⁵⁴

At this juncture, it is very difficult to precisely chart the future of the judicial canons—but it does not seem likely that the canons will continue to play a predominant role in the regulation of future judicial campaigns.¹⁵⁵ In fact, if the current trend of deregulation continues, no restrictions on the speech of judicial candidates may remain.¹⁵⁶ In such instance, if a state is truly concerned with controlling the tenor of judicial selections elective systems may not remain a viable option. As a result, merit selection’s ability to preserve the societal balance between accountability and independence and to depoliticize the voter’s role may be the only answer to the problems states face in *White*’s aftermath.¹⁵⁷

III. WHAT INFORMATION SHOULD A JUDGE PROVIDE IN THE MERIT SELECTION CONTEXT AFTER *WHITE*?

While *White* recognized the need for the public to be an informed participant in the selection of judges, it did not address the larger ques-

¹⁵¹ Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1081 (2004).

¹⁵² *Id.* at 1072–73.

¹⁵³ *Id.* (explaining that the 2003 revisions required that judges disqualify themselves “where a judge or judicial candidate makes ‘any public statement that commits, or appears to commit, the judge with respect to an ‘issue’ or ‘controversy’ in a particular case.’”).

¹⁵⁴ Press Release, Am. Judicature Society, ABA to Adopt AJS Proposal to Strengthen Model Code of Judicial Conduct, <http://www.ajs.org/ajs/publications/Judicatories/2007February/modelcode.asp> (explaining that most of the revisions related to the non-*White* issues—but that the “ABA also held the ground against arguments that restrictions on judges’ political conduct cannot be justified after *Republican Party of Minnesota v. White*, rejecting efforts to eliminate almost all restrictions on the political and campaign conduct of all judges, even those who are not elected.”).

¹⁵⁵ See Brian Morris, *Free Speech in Judicial Elections*, 27 MONT. L. REV. 5 (2002).

¹⁵⁶ See generally Marla N. Greenstein, *The New Right to Judicial Free Speech: A New Threat to Judicial Independence*, 42 JUDGES’ J. 34 (2002).

¹⁵⁷ But see Lambert, *supra* note 14, at 8 (arguing for nonstructural reform as “[w]hatever views to the contrary policymakers and well-meaning citizens may have, judicial elections are here to stay, and we must make the best of the system we have.”).

tion of what information voters should actually possess. An examination of the informed voter concept, however, is crucial to unlocking the answer to many of the post-*White* concerns. Additionally, an examination of this concept may provide a platform from which voters can gain access to information that will allow them to meaningfully participate in the selection process. More importantly, however, it will allow the individual to be the kind of informed voter contemplated by the particular selection or retention process in which they participate.

The primary rationale of *White* is clear. If a state gives the public a role in the selection of judges, it cannot then impose restrictions that deprive the public of information needed to be an informed voter. This need for the voter to be informed gives rise to the right of judges to inform. Implicit in the *White* holding is that the information at issue is part of the checklist of an informed voter. While some types of information may be suitable for an individual voter in an elective process contemplated by the Court in *White*, the concept of an informed voter may change based on the nature of the particular voting process. Thus, an informed voter may require different information under different selection and retention systems.

White did not specifically address the concept of an informed voter, nor did it examine the proposition that the personal, legal, and political views of judges are relevant voter information because they tend to influence judicial decision-making. Yet, while *White* did not explicitly weigh in on this proposition, it has been the subject of longstanding legal and political debates.

Many judges express the popular notion that personal views do not play a role in formal judicial decision-making and that those charged with the responsibility to help select judges do not need to be concerned about the personal views of judges. Chief Justice John Roberts expressed this belief at his Senate confirmation hearings in 2005, in explaining his refusal to explain his personal views on a number of issues.¹⁵⁸ Under this view, judicial decisions are merely a product of a subculture where judges rely on deductive reasoning based on established legal principles.¹⁵⁹

¹⁵⁸ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 178 (2005).

¹⁵⁹ ROBERT A. CARP ET AL., *JUDICIAL PROCESS IN AMERICA* 290–96 (7th ed. 2007) (describing the subculture of legal reasoning); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 *CASE W. RES. L. REV.* 179, 181 (1987) (describing “the use of deductive logic to derive the outcome of a case from premises accepted as authoritative”).

Other judges and legal scholars have found this proposition to be a myth.¹⁶⁰ While judicial decision-making primarily involves the process of legal reasoning, research shows the presence of a second influential component that explains the basis for judicial decisions in those close cases where no precedent is available to direct the final outcome.¹⁶¹ In those instances, a judge's personal views and background inevitably seep into the decision-making process.¹⁶² This is not a new concept. Well over a century ago, Justice Oliver Wendell Holmes, Jr. expressed the same concept when he penned his venerable phrase, "The life of the law has not been logic; it has been experience."¹⁶³ Within that phrase, he captured the notion that "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share in their fellow-men have had a good deal more to do than syllogism in determining the rules by which men should be governed."¹⁶⁴ While Holmes exposed this subtle component of decision-making as "the secret root from which the law draws all the juices of life," he also acknowledged it was something "judges most rarely mention, and always with an apology."¹⁶⁵

The Roberts-Holmes dichotomy can be viewed both as a solution to the concerns of *White* and as support for its rationale. By eliminating personal views of judges as a selection criterion, the Roberts approach actually undermines the rationale in *White* for removing restrictions on the speech of judicial candidates. If the personal views of judges are not a part of the judicial decision-making process, then the voter does not require this information. In other words, under the Roberts approach there is no impetus to release the information to the voter in the first place.

The Holmes' approach can be viewed to support the proposition that the personal views of judges would be relevant within the context of an unrestrained selection process. The impact of personal views in the decision-making process is clearly supported by research that has consistently shown a relationship between the political party affiliation of a judge and the outcome of many types of judicial decisions.¹⁶⁶ In the end many factors play a role in judicial decision-making. The personal views

¹⁶⁰ See, e.g., Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision-Making*, 86 B.U. L. REV. 1069, 1070–72 (2006).

¹⁶¹ See generally RICHARD J. RICHARDSON & KENNETH N. VINES, *THE POLITICS OF FEDERAL COURTS* (1970) (an empirical study of politics and decision making in the federal district courts).

¹⁶² *Id.*

¹⁶³ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 35.

¹⁶⁶ CARP ET AL., *supra* note 159, at 297–304.

of a judge tend to surface by necessity when formal legal reasoning fails to produce a clear decision. In these cases, judges fall back on their personal views to color in the shades of gray and paint the ultimate conclusion.¹⁶⁷

While the debate over whether the personal views of a judge actually play a role in judicial decisions is best resolved by clear analysis of the empirical evidence, it is only a preliminary question to the larger debate: whether personal views, regardless of whether they influence decision-making, should be a criterion upon which to select judges. The type of system used to select judges in the respective jurisdiction usually determines this larger debate. If the public has open authority to select a judge in an elective system, then the public is free to consider any and all factors, in the same way as the President is free to nominate federal judges, subject to Senate approval. In this way, a voter may want to know the personal views of judges so the voter can vote for the candidate perceived to be of like mind. The elective process actually contemplates this will occur. Yet, the debate is decidedly different in those states utilizing merit selection.

The purpose of merit selection is to remove judges from the political process; the criteria for a candidate's nomination must be tied solely to merit, or professional competence, with no consideration given to "political affiliation."¹⁶⁸ Other than acting as representatives on state nominating commissions, the public plays no direct role either in the nomination or selection of judges. The retention vote serves as an institutional safeguard—similar to the democratic system of checks and balances found throughout the nation's democratic institutions. Although judges are accountable to both the law and codes of judicial conduct (when and if applicable), under merit selection they are also accountable to the public. Yet there is nothing to suggest that the apolitical process of selecting judges under a merit selection process ends after appointment to the bench or that politics returns to the accountability component after appointment. As a result, the adoption of merit selection by a state is a clear public expression of the concept that the judicial system is best served when judges are removed from the political arena. Injecting politics into a retention election contradicts this expression. Instead, retention, when properly viewed, should only be seen as a means for the public to remove judges who have failed to live up to their performance-based expectations. Those who select a judge can only forecast how a candidate will translate into a judge. A retention voter can look back and consider the judge's actual performance on the bench.

¹⁶⁷ See *id.* at 319–26.

¹⁶⁸ See generally IOWA CODE § 46.14 (2007).

Accordingly, the adoption of merit selection is a giant step towards eliminating any need for a retention voter to know the personal views of a judge, and, in turn, the need for a judge to exercise the right to express personal views on political and legal issues. Information relevant to a retention election relates to professional competency and performance on the bench. Yet, the narrowed scope of the retention process does not totally solve the post-*White* concerns; it does not completely remove the personal views of a judge as a subject of voter interest or concern. Just as in a pre-*White* world, the personal views of judges and voters occasionally muddy the process, and can even serve to undermine the merit selection process.

First, a judge could make his or her personal views a topic of legitimate public interest by using them to improperly decide cases in the face of clear contrary law. This is actually a professional competency issue, however, and is best flushed out by the appellate or disciplinary processes, before it can become legitimate voter information. Additionally, this can be a complex issue requiring carefully reasoned legal analysis. As a result, voter knowledge of the content of the personal view at issue is not the focus. Instead, the focus is the use of personal views in the face of contrary legal principles.

Second, a voter can make the personal, political, and legal views of a judge a retention issue by attacking a judge for deciding a case contrary to a voter's personal views. While a voter has the freedom to take this approach, this is a hypocritical misuse of the checks and balances power given to the public. Just as the personal views of a judge should not drive the judicial decision-making process, the personal views of the voter also should not be a focus in retention elections. Both views are inappropriate as a driving mechanism for judicial decisions because no individual's view—either judge or voter—is above the law.

Third, a group or organization can also attempt to inject the personal views of a judge into a retention election by labeling a judge's decision or group of decisions in a politically charged manner. This practice too should have no place in a retention election for the same reasons as an individual who attacks a judge for deciding a case contrary to the personal views of the voter.

The last two circumstances can be very damaging to the merit selection process.¹⁶⁹ Large scale participation at this level undermines the foundation of the process by transforming the retention vote into the very process sought to be eliminated by merit selection. Yet, it is important to observe that the responsibility given to the public to participate in the

¹⁶⁹ See, e.g., Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 *FORDHAM URB. L.J.* 1053, 1057 (2002).

retention process at least impliedly imposes a responsibility on voters to act and think differently than where they participate in a general partisan election. Without public allegiance to the separation of the two separate and distinct voting roles, merit selection in a politically charged society risks failure. The problem is that this important characteristic of merit selection was never expressly implemented into the merit selection model. Thus, targeted campaigns that demand allegiance to certain political and social views by judges on the retention ballot have surfaced for two reasons. First, the process has not educated the public about its role as a retention voter. Second the process is subject to the inherent shortcomings of human nature.

It is one thing to point out how a voter or political action group interferes with the proper function of the checks and balances of a selection system by injecting irrelevant considerations into the process, but experience demonstrates the difficulty of persuading either camp otherwise. Actually achieving any degree of separation is another issue entirely. In a merit selection state the need for a judge to discuss his or her personal views on political or legal issues ought to be mostly limited to those instances where the public misuses the retention process and utilizes personal views as voting criterion. In such as situation, the *White* decision serves a helpful purpose by giving a judge the right to fight back. Additionally, the judge's very response to an attack may provide the voting public another basis to assess the judge's temperament and qualifications for the position. To give one example, a judge who responds to a political attack in an unprofessional manner demonstrates to voters that the judge lacks the temperament necessary for continued service on the bench. Yet, the preferred solution may not be found in responding to voters in a retention election. While the public has the prerogative to engage in this rhetoric, the ultimate solution lies in educating the public about the role of the retention voter, and about the criteria and information that retention voters should consider. Two shortcomings of the merit selection process are that, in most instances, the system has failed to include a component to educate the voter on its role in the retention process and it has failed to provide the information necessary for the public to make informed decisions on individual judges. Without these components, it is understandable that the public has looked to traditional voting factors like personal views when making retention votes.

A. INFORMATION EXPLAINING HOW MERIT SELECTION OPERATES

A vital corollary to the informed voter concept within merit systems is the public must be educated that such votes are of a considerably different character and quantum than elections within the standard political context. Retention votes are not merely a case of picking between prof-

ferred candidates. The vote, in reality, operates as a referendum on the individual judge's ability and conduct. To use another example, this vote is intended to play a role similar to that of a worker's performance evaluation within the standard employment context. This is a distinction, however, that many voters tend to overlook. As a direct consequence, voters and interest groups often fail to realize that a retention vote should be based on the "merit" of a judge and upon a judge's entire record of service. Admittedly, however, this type of information is not always available or understood. There is a gap in the merit selection process as it is currently constituted: there is no meaningful system of voter education to explain both the merit selection process and the unique role of the retention voter.

In reality, this has been the principal shortcoming associated with merit selection systems from the beginning, and the lack of an educational component has rendered this reform effort incomplete. Without information as to how the vote is supposed to function, it is little wonder that voters have associated retention election with the normal elective process and have acted accordingly. This is an unrecognized problem of major importance. Any state utilizing merit selection must develop some form of educational component. There are several ways that this could be achieved: (1) through the efforts of the bench and bar; (2) through the efforts of the works of private organizations such as the American Judicature Society; or (3) through an organized public service campaign conducted by a governmental entity. This last method is the most desirable because such a format will provide added authority and credibility to the educational efforts. A publicly funded and organized educational campaign is also desirable as the reeducation effort will, in reality, not meet with immediate success. To achieve meaningful progress will take time and perhaps innovative programming. An example of the form of public programming envisioned by this Article would be an effort to integrate information about merit selection into the state's high school curriculum. Explaining to students how merit selection operates and how the voter's role is different within this context may provide meaningful long-term results. On the other hand, efforts carried on by private groups or the bench and bar, while not to be discouraged, may be met with some degree of skepticism and resistance by other interest groups or worse, the public at large.

In sum, educating retention voters about their intended role as a limited check on the judiciary will allow this system to function as originally intended. Additionally, such an educational campaign may illustrate to voters and interest groups that the removal of a judge will not necessarily bring about the desired results even if the interest group succeeds in opposing a candidate's retention—the same nonpolitical process

will appoint the defeated judge's successor. The merit selection concept, at its most pure, is designed to remove the idea that the personal views of judges have any role within the judiciary. Allowing such a system to function without an educational component simply allows such views to factor into voting (albeit in less direct fashion), an outcome repugnant to the entire scheme and concept. If, however, voters and interest groups are educated as to how the process works, the strategies of interest groups should adjust to focus on another aspect of the political process when attempting to influence policy outcomes, allowing merit selection to properly preserve the tenuous balance between accountability and independence objectives.

B. INFORMATION RELATED TO INDIVIDUAL JUDGES

In light of the narrow circumstances in which judges would need to exercise their right to discuss their personal views in merit selection jurisdictions, many post-*White* concerns are no longer of concern. Thus, the question turns to what information is relevant and should be disclosed to voters. The starting point is the concept of merit, the statutory foundation of the judicial selection process that utilizes retention voting.

Merit refers to worthiness, or the commendable qualities by which something is evaluated.¹⁷⁰ In large part, merit selection of judges refers to those abilities and qualities that make the legal system function in a manner able to achieve the goal of justice. A legal system can be constructed with a host of rules and procedural safeguards to help produce justice, but the only true guarantee, in the end, lies in the "personality of the judge" selected to operate the system.¹⁷¹ "Even in a government of laws, men [and women] make the decisions."¹⁷² Thus, merit selection attempts to capture those human qualities that best serve the legal system and characterize the judicial role. The ability of a person selected to be a judge to sustain these qualities into the future then becomes the important focus of an informed retention voter in a merit selection state.

The general qualities and virtues of a judge are readily understood, and have been the subject of considerable commentary.¹⁷³ Essentially,

¹⁷⁰ See generally Leo A. Romero, *Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election*, 30 N.M. L. Rev. 177, 189–90 (2000) (providing the criteria utilized by New Mexico's performance evaluation commission in establishing merit).

¹⁷¹ Maurice Rosenberg, *The Qualities of Justices—Are They Strainable?*, in HANDBOOK FOR JUDGES 5, 5 (George H. Williams & Kathleen M. Sampson ed., 1984) (quoting Ehrlich, *Freedom of Decision*, 9 MODERN LEGAL PHILOSOPHY SERIES 65 (1917)).

¹⁷² *Id.*

¹⁷³ See, e.g., Norman Dorsen, *The Selection of U.S. Supreme Court Justices*, 4 INT'L J. CONST. L. 652 (2006); Harold J. Krent, *Foreword: The Legacy of Chancellor Kent*, 74 CHI.-KENT L. REV. 3, 8 (1998).

these qualities can be culled from the Model Code of Judicial Conduct, particularly Canon 3.¹⁷⁴ In essence, they do not venture far from those recognized by Socrates—some 2400 years ago: “To hear courteously, to answer wisely, to consider soberly, and to decide impartially.”¹⁷⁵ The difficulty under merit selection lies in measuring and evaluating these qualities for the retention voter.

In a basic sense, the qualities of a judge are derived from two sources: what the judge brings to the bench and what the judge takes in when placed in this role. Under merit selection, a selection commission can often only rely on the first source, and must predict to a great extent how the character and qualities of the person will translate into judicial performance. A retention voter, on the other hand, has the benefit of both sources. With proper performance and evaluation standards in place the retention component retains worthy judges and removes judges who fall short of the selection commission’s expectations. Thus there is a critical need to define both the scope and type of information that should be provided to retention voters in order to measure judicial performance in a concrete manner. It is important to reiterate that a retention voter never actually selects a judge. Instead, the voter’s responsibility is only to periodically monitor the judicial performance of judges and to remove substandard judges—judges who are then replaced by other judges by the same apolitical merit selection process. Under this type of retention process, concrete evaluation standards and criteria are essential to its effective operation and to its very credibility.

While one could point to many qualities that society should value in judges, the most useful criteria for retention voters are those that are readily quantifiable. Voters must be able to meaningfully evaluate the criterion identified as desirable in a judge. For each judge placed on the retention ballot, information relating to these qualities should be gathered, cataloged, and disseminated to retention voters.

Some commonly recognized qualities are decisiveness, promptness, and industriousness because a lazy or dilatory judge is a poor judge.¹⁷⁶ In fact, the Model Code of Judicial Conduct requires judges to dispose of the business of the court promptly.¹⁷⁷ One way to transform this quality into an effective evaluation tool for a retention voter is to provide specific information about each judge that tracks the timeliness of the judge’s decisions. In many states, trial judges are required to file monthly reports disclosing cases in which no ruling or decision has been

¹⁷⁴ ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 3 (1990).

¹⁷⁵ Rosenberg, *supra* note 171, at 4.

¹⁷⁶ Edward J. Devitt, *Ten Commandments for the New Judge*, in HANDBOOK FOR JUDGES 33, 36 (George H. Williams & Kathleen M. Sampson eds., 3d ed. 1984).

¹⁷⁷ ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 3(B)(8) (1990).

filed within sixty days after the case's submission.¹⁷⁸ The report must also disclose the reason for the delay. Of course, there are times when delay is justified, but the sixty-day rule establishes a general institutional criterion that can be used to evaluate the judge's industriousness and promptness. The monthly reports can also be utilized as a comparative tool to show how an individual judge's compliance record compares with similarly situated judges.

Other judicial reports can provide similar information relating to other desirable judicial qualities. Many states require judges to file annual reports that disclose the receipt of outside income and gifts, as well as the source of the gift or income.¹⁷⁹ While judges are permitted to teach, write, and engage in other activities unrelated to law, the source of the income or gift received by a judge could potentially impact a judge's impartiality, and annual reports allow the public to scrutinize a judge's gift practices. Similar information can be obtained by analyzing a judge's continuing education efforts—as judges must attend a minimum amount of continuing legal education and also disclose the sponsors of the conferences attended. Although this report can relate to the desirable quality of judicial competency, identifying the sponsor of an event can reveal if a judge tends to limit his or her source of continuing education to events sponsored by particular groups or associations. Ultimately, similar to gifts from special interest groups, this information can play a role as a selection criterion.

Information can also be derived from the record of disciplinary actions taken against a judge. Most states have judicial disciplinary systems that ultimately disclose founded ethics complaints against judges. An informed voter should both be aware of and have access to nonconfidential information related to all founded disciplinary action against a judge.

Yet another potential source of information stems from judge's written decisions. Judges leave behind a long trail of decisions over the course of their careers, and this large body of thought and analysis would seemingly be a fertile source of information for a retention voter. The problem, however, is finding a method able to quantify a judge's past decisions into a fair, workable tool for voters within the merit selection context. Some scholars have attempted to study the past decisions of appellate judges in order to draw conclusions about the general ap-

¹⁷⁸ See, e.g., IOWA CT. R. 22.10 (2006).

¹⁷⁹ See, e.g., FLA. CODE OF JUDICIAL CONDUCT, Canon 6(B)(2) (2000); see also IOWA CT. R. 22.26 (2006); MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(5) (explaining that a judge is required to disclose financial information).

proaches and political preferences of these judges.¹⁸⁰ Yet, this type of information is generally unwanted in a merit selection and retention process. The legitimate inquiry for a retention voter in this area would be whether a judge has placed personal ideology before the law in making legal decisions. This, however, is a complex question requiring legal understanding and as such is generally an inappropriate inquiry.¹⁸¹ Instead, it is a legal question governed by the code of judicial conduct, and can only be properly used by a retention voter once decided by a court in the context of judicial review, or judicial discipline.¹⁸² In the end, any effort to gather voter information through studies of particular judicial decisions will only lead to inappropriate discussion and debate.

In contrast, appellate review of trial court decisions can be used as a helpful guide for a retention voter. An important quality of a judge is overall competency. In a general sense, a trial judge's record of reversal of decisions on appeal or review by the appellate courts can provide a window into the judge's general competency as a decision-maker. Appellate courts normally review court decisions to determine if they were decided correctly, and a reversal can signal that the trial judge was in error. Of course, the reversal of a particular decision on appeal may not necessarily relate to professional competency of the decision-maker, and judges occasionally err—especially when the decision involves a difficult issue in an unclear area of law or a prompt response in the heat of a trial. Additionally, principles of judicial restraint can limit the decision-making choices of a judge in some instances, such as when a judge is faced with a challenge to judicial precedent. However, a general relationship between the rate of reversal of a trial judge and the judge's overall competency emerges when a judge's record on appeal over time is compared to the record of all judges, and falls far enough below a standard deviation as far as the average rate of reversal. For example, an affirmance rate of 50% for a trial judge compared to an affirmance rate

¹⁸⁰ Ward Farnsworth, *The Role of Law in Close Cases: Some Evidence from the Federal Court of Appeals*, 86 B.U. L. REV. 1083, 1084 (2006); see also CARP ET AL., *supra* note 159, at 320 n.22 (noting the body of empirical data revealing a link between political affiliation and judicial behavior).

¹⁸¹ There is a fine line between legal error in decision-making and actual misconduct (i.e. subordinating the law in favor of personal views). Generally, the motive of the judge must be discerned in order to make this distinction. See Jeffery M. Sherman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1, 9–11 (1998); see also *Cleveland Bar Ass'n v. Cleary*, 754 N.E.2d 235 (Ohio 2001) (providing an example of a judge placing personal views above the law; in this case, a judge used a nonstatutory sentencing factor—personal views on abortion—in a sentencing decision).

¹⁸² See *In re Holien*, 612 N.W.2d 789, 793 (Iowa 2000) (providing an example of a judge failing to follow statutory guidance); see also *In re Judges of Mun. Ct. of Cedar Rapids*, 130 N.W.2d 553, 554 (Iowa 1964) (providing the standard “A judge has a right to be wrong as far as our discipline by this court is concerned except as his decision may be reversed or writ sustained.”)

of 80% for all trial judges would be significant enough deviation to conclude a judge is performing below a normal standard of professional competency. This information does not explain why a particular judge is wrong more often than other similarly situated judges, but the reason is not needed for the information to be a useful indicator of judicial performance.

There are other types and sources of information available in each merit selection state that could be used in a fair and understandable manner to help make retention voters informed. The growth of court administration within our nation's court systems now makes it more feasible than ever to interpret the often opaque work of a judge and transform it into a multitude of objective statistics that could be useful to retention voters to assess individual judicial performance. This statistical information should be explored and ultimately disseminated to the public, as long as the statistics are confined to fair and comparative analysis. Statistics should only be used to expose judicial performance that falls well outside the range of standard performance. As is discussed in Part IV, judicial surveys and evaluations by lawyer groups and state programs have emerged as helpful voter tools. Ultimately, this information should replace the customary voter preoccupation with the personal views of candidates and serve to combat the main fear of the *White* decision: that it will undermine the basic judicial principles of impartiality and independence. In a partisan election state, the *White* decision cannot undermine those bedrock principles any more than the election process itself. In that respect, *White* actually takes an honest, forthright approach: if the voting process contemplates that the voter will rely on the personal views of a judge as a criterion to cast a vote, then the judges have a right to provide the voter with information about their personal views. Yet, *White* does not affect merit selection in the same manner because merit selection and retention largely rejects the notion of personal views, and relies on merit-based criteria. Once the public is educated about its role and has a means to acquire merit-based information, the concerns mostly disappear, the system works as contemplated, and the important principles of impartiality and independence are maintained. This goal, however, is dependent upon a system that will disseminate this information to the public in a clear and fair manner.

IV. PROVIDING VOTER INFORMATION— MERIT SELECTION'S MISSING COMPONENT

It is clear that the retention component of merit selection can best operate as a procedural safeguard when voters have access to relevant

information.¹⁸³ The task of providing accurate and reliable information has taken on new importance as interest groups are become increasingly active in the area of judicial selections.¹⁸⁴ This is not an easy task; especially as the type of information necessary for a retention voter to make an informed decision on the retention of an individual judge is not easily accessible, and the information related to the function of a retention system is also lacking in most instances.¹⁸⁵ As a result, the desirability of some form of evaluation program is patently clear.¹⁸⁶ This Part addresses how organizations and states have developed mechanisms to evaluate judges and, in turn, provide relevant information to voters. To this end, organizations have been established in two distinct forms: 1) as subdivisions of the organized bar; or 2) as officially sanctioned subdivisions of the state government.¹⁸⁷ In short, the purpose of this Part is to make a brief argument that a state sponsored judicial performance evaluation program should be a necessary component of merit selection.

A. BAR EVALUATIONS

Overall, “the earliest forms of performance evaluation were often bar association surveys of members as to their views on the qualities judges possess for reelection or retention election purposes.”¹⁸⁸ Eventually, these bar surveys evolved to provide information on more specific and measurable criteria and to give a more measured view of judges’

¹⁸³ MARLA N. GREENSTEIN ET AL., *Improving the Judiciary Through Performance Evaluation*, in THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 225, 227 (Gordon M. Griller & E. Keith Scott, Jr. eds., 2002) (explaining that “[j]udicial performance evaluation programs are often directed at providing unbiased objective information to the public to assist in assessing judges’ qualifications when deciding whether to support the judges’ retention in office.”).

¹⁸⁴ *Id.* at 234 (explaining that “[i]f the judicial performance evaluation is credible and respected, that credibility may effectively counter attacks on judges that are not founded on established judicial qualities.”).

¹⁸⁵ Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375, 1378 (2001) (noting “an increasing lack of voter differentiation among judges on the same ballot. Voters can and do, albeit extremely rarely, single out individual judges for defeat, but analysis of average affirmative voters for all judges on the same ballot shows that ‘within a district the typical judge’s affirmative vote differs very little from that of the other judges in the district.’”).

¹⁸⁶ *Id.* at 1378 (explaining that “[j]udicial performance evaluation programs, therefore, can be premised at least in part of the need to provide voters with more specific information on each judge” which “will allow [voters] to make individualized decisions rather than voting all up or down on multiple retention candidates.”).

¹⁸⁷ See Penny J. White, *supra* note 169, at 1064–68 (explaining briefly a third method—media polls—“efforts by newspapers to evaluate judges based on surveys developed and administered by the media. . . . [t]hough possibly well intended, these programs suffer from the same evils that haunt bar polls including unreliability, insufficiency sampling, and unknowledgeable evaluators.”).

¹⁸⁸ GREENSTEIN ET AL., *supra* note 183, at 225.

fitness for reelection.¹⁸⁹ An example of this type of evaluation is the Iowa Bar Plebiscite—an evaluation administered prior to each judicial retention election cycle.¹⁹⁰ The Iowa Bar Plebiscite is distributed to all members of the Iowa Bar several months before an election and addresses a large range of issues related to the judge's service and relative merit.¹⁹¹ The response of the organized bar is then distributed to the state's voters.¹⁹² The Iowa Bar Plebiscite, in short, provides voters an insight into the collective view of the organized bar regarding the merit of sitting judges.¹⁹³

The bar survey system, however, is not without detractors as many "critics argue that bar polls do not accurately reflect the best interests of the citizenry."¹⁹⁴ Problems can arise within this context. For example, not all of the lawyers participating in the poll may actually practice before the specific judge being evaluated—which weakens the poll's value as the votes of those familiar with an individual judge are diluted by those wholly ignorant of the judge's qualifications.¹⁹⁵ Conversely, problems can also arise if lawyers are familiar with a particular judge, as lawyers may vote purely based upon their personal experience with the judge—rather than upon the judge's overall qualifications or other "objective, appropriate criteria."¹⁹⁶ There is also some concern that the law-

¹⁸⁹ See, e.g., THE IOWA STATE BAR ASS'N, 2006 JUDICIAL PLEBISCITE (2006). The Iowa Bar Plebiscite evaluates most judges on the following criteria: 1) knowledge and application of the law; 2) perception of factual issues; 3) punctuality for court proceedings; 4) attentiveness to arguments and testimony; 5) management and control of the courtroom; 6) temperament and demeanor; 7) clarity and quality of written opinions; 8) promptness of rulings and decisions; 9) avoids undue personal observations or criticisms of litigants, judges, and lawyers from the bench or in written opinions; 10) decides cases on the basis of applicable law and fact, not affected by outside influence; 11) is courteous and polite with litigants, lawyers and court personnel; 12) treats people equally regardless of race, gender, age, national origin, religion, sexual orientation, socio-economic status or disability. *Id.* at 1–2. These criteria vary somewhat depending on the level of court—accounting for the different roles played by judges in a state court system. *Id.*

¹⁹⁰ See IOWA JUDICIAL BRANCH, 2006 JUDICIAL VOTER GUIDE: A GUIDE TO IOWA'S RETENTION ELECTIONS (2006), http://publications.iowa.gov/archive/00004163/01/Condensed_Version.pdf (explaining the Iowa Bar Association's Plebiscite). Iowa's Judicial Branch also publishes a Voter's Guide—providing information about the retention process and the biographical information of each judge up for retention prior to each election. *Id.*

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ *Id.*

¹⁹⁴ Roll, *supra* note 69, at 867.

¹⁹⁵ White, *supra* note 169, at 1065; see also Kelsey Beltramea, *Judicial Review, Iowa's Very Low Key Election*, THE DAILY IOWAN, Oct. 31, 2006, at 10 (quoting Iowa Sixth District Judge Amanda Potterfield on the issue of the representativeness of the bar survey even within the legal community—"[t]he plebiscite is a good thing, but it's not completely representative, because not everyone is able to participate"—referring to the fact that only members of the Iowa Bar Association are eligible to vote and not all members of the legal community maintain membership).

¹⁹⁶ White, *supra* note 169, at 1064–65.

yers involved in the actual voting may fear retaliation.¹⁹⁷ Additionally, “voters . . . have received . . . [bar association] evaluations with some degree of skepticism, viewing bar associations as trade unions with specialized concerns that would influence their recommendations.”¹⁹⁸ Bar surveys are also unlikely to carry out educational efforts on the two fronts necessary to ensure merit selection is operating properly—as although information on individual candidates is often provided, information explaining the merit process is severely lacking. As a result, although bar surveys can provide voters with valuable information, this form of survey is still an incomplete solution to the problem of providing relevant information to voters within a retention system.

B. STATE JUDICIAL PERFORMANCE EVALUATION PROGRAMS

In response to many of the shortcomings associated with the bar evaluations, several states have adopted state sponsored judicial performance evaluation programs.¹⁹⁹ In contrast to bar evaluations, these “programs . . . are established by law or court order, and are funded through the legislature or the judicial branch,” which gives these programs an additional degree of legitimacy.²⁰⁰ Additionally, judicial performance evaluation programs often incorporate the viewpoints of non-lawyers and include the voices of “litigants, witnesses, jurors, court staff, probation officers, social service case workers, and law enforcement officers,” which help to increase the program’s acceptance with the voters of the state.²⁰¹ Commentators note that these evaluation programs can “also educate and remind the electorate that good judging involves objective, identifiable criteria, not allegiance to a political philosophy or alliance with popular sentiment.”²⁰² This is perhaps the most meaningful function that a judicial performance evaluation program can play because evaluation programs can remind a retention voter of their role as a substantive check, rather than political actor, and the factors their vote should be based upon. Despite the clear benefits provided by state sponsored judicial performance evaluation programs, currently just six merit

¹⁹⁷ *Id.*

¹⁹⁸ GREENSTEIN ET AL., *supra* note 183, at 227.

¹⁹⁹ David C. Brody, *Judicial Performance Evaluations by State Governments: Informing the Public While Avoiding the Pitfalls*, 21 JUST. SYS. J. 333, 333–34 (2000) (explaining that “several states have implemented judicial performance evaluation (JPE) programs designed, in part, to provide information to the electorate.”).

²⁰⁰ Andersen, *supra* note 185, at 1376; Brody, *supra* note 199, at 334 (explaining that “the programs also play the vital role of increasing the level of access given to the public on the functioning of the court system, and thereby raise the public’s confidence in the judiciary.”).

²⁰¹ Brody, *supra* note 199, at 335.

²⁰² White, *supra* note 169, at 1077; *see also* Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 202 (2007).

selection jurisdictions—Alaska, Arizona, Colorado, New Mexico, Tennessee, and Utah—have implemented this type of program.²⁰³

Although state sponsored judicial performance evaluation programs vary, these entities all strive to achieve the same result: providing relevant and reliable information to the state's voters.²⁰⁴ Thus, it may be instructive to examine Colorado's Commission on Judicial Performance as an example of one state's program. Colorado's program consists of an overall state commission and twenty-two judicial district commissions able to evaluate the judges at each respective level of the state's judiciary.²⁰⁵ Each commission consists of ten members who are appointed according to the state statute which governs this program.²⁰⁶ These commissions are in charge of gathering information from a variety of sources including a random sampling of the attorneys practicing before the judge and other community members regularly interacting with the judiciary.²⁰⁷ As far as evaluative factors, Colorado's program evaluates judges based on integrity, communication skills, promptness and a number of other factors related to the judge's qualifications and performance.²⁰⁸ After this information is gathered, the commission is charged with making a formal recommendation as far as a judge's retention and then disseminating this information to the public in the form of a "bluebook" mailed to all voters prior to a retention election.²⁰⁹ Despite the obvious expense associated with this form of commission, Colorado has decided that value exists in providing for an informed decision regarding judicial retention. While it is true that Colorado has perhaps gone the farthest in their attempt to fulfill the ideal of a state-sponsored evaluation program, a more pure form of this entity would obtain truly "measurable" data such as timeliness of decisions and provide this information (along with information on the role of voters within the merit system) to the voters rather than by making a formal recommendation. Such a program would allow informed voters to directly pass judgment on this data.

In a post-*White* world, state sponsored evaluation programs may play a heightened role. Recent scholarship suggests that evaluation pro-

²⁰³ Andersen, *supra* note 185, at 1375–76; *see also id.* at 1376 (attributing the lack of progress in expanding this method to "[c]oncerns about the fairness of survey methodologies and evaluation commission procedures, as well as general reticence among many judges to subject themselves to an evaluation process that may be seen as a threat to decisional independence, have helped to stall the expansion of retention evaluation programs.").

²⁰⁴ Kourlis & Singer, *supra* note 202, at 203–06.

²⁰⁵ Commissions on Judicial Performance, <http://www.cojudicialperformance.com> (last visited Feb. 7, 2007).

²⁰⁶ *Id.* (stating which state officials appoint members to the committees and what proportion of membership should be attorney vs. non-attorney).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

grams can provide a counterbalance to the pressure on voters to “‘hold judges accountable’ for politically unpopular outcomes in specific cases, or to vote for judicial candidates based on those candidates’ personal opinions on hot-button political issues.”²¹⁰ According to this research, “Widespread use of JPE programs can dilute this threat to judicial independence by shifting public focus away from political positions or particular case outcomes and toward the process of adjudication.”²¹¹ In short, judicial performance evaluation programs can ensure that a retention vote fulfills its intended role and allow merit selection to operate as the state intended when adopting this form of selection method.

In addition to the evaluation programs’ role in providing information on individual judges, an added role for state sponsored evaluation programs should be to explain how merit selection functions and how this system is “different” from political votes. Realistically, this reeducation will not be an easy task. Educational efforts will take years to make significant progress. The enormity of this task, however, does not diminish its importance or necessity. A state sponsored evaluation program may have to be creative to ensure that this message is received. As a result, evaluation programs would be well served to implement innovative programming such as incorporating information about retention voting into statewide high school curriculums as well as holding informational meetings with the media before retention elections. Only a state sponsored judicial evaluation program, trusted by the state citizenry as an impartial provider of relevant information, is likely to have the clout and persistence necessary to carry out such a program of long-term voter education. Such efforts, however, can only serve to reinforce and strengthen the role of merit selection in striking an appropriate balance between accountability and independence in state judicial selections.

CONCLUSION

In 1933, judicial independence and impartiality were strongly tested in Judge Bradley’s small Iowa courtroom. Due to the personal courage of this jurist, however, the integrity of the judicial branch was left unquestionably inviolate. In a large sense, merit selection was developed to ensure that the judicial branch could continue to retain this degree of integrity and a measure of distance from the political activities of the elected branches. In the post-*White* era, the threat of unrestricted judicial campaign speech, which could eliminate the former distinction between judicial and political campaigns, entirely remains. Judicial canons, once able to provide a measure of control, have largely been left ineffective in

²¹⁰ Kourlis & Singer, *supra* note 202, at 202.

²¹¹ *Id.*

the wake of recent court decisions deregulating judicial campaigning. As a result, an alternative method of regulation is highly desirable. Merit selection once again provides a nonpolitical solution to the problems presented by the other forms of judicial selection as adoption of merit selection's retention election component—a procedural safeguard rather than a qualitative vote—allows a state to maintain a meaningful balance between judicial accountability and independence in the post-*White* world.

