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Charles Gardner Geyh

Methods of judicial selection & their impact on judicial independence

Within the legal community judicial independence is understood, not as an intrinsic good or an end in itself, but as a means to achieve other ends.¹ If judges are independent – if they are insulated from political and other controls that could undermine their impartial judgment – it is thought that judges will be better able to uphold the rule of law, preserve the separation of powers, and promote due process of law.² Scholars, judges, and lawyers often acknowledge that judicial independence has institutional and decisional dimensions: institutional independence concerns the capacity of the judiciary as a separate branch of government to resist encroachments from the political branches and thereby preserve the separation of powers; decisional independence, in contrast, concerns the capacity of individual judges to decide cases without threats or intimidation that could interfere with their ability to uphold the rule of law.³

Properly understood then, judicial independence is circumscribed by the

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purposes it serves: decisional independence, for example, does not mean freedom from all external constraints, but only those constraints that interfere with a judge's ability to uphold the rule of law. Indeed, some forms of independence from decisional constraint, such as the freedom to decide cases for the benefit of friends or in exchange for bribes, are antithetical to the rule-of-law values that judicial independence is

1 The ideas in this essay were first presented at the 2007 conference on The Debate over Judicial Elections and State Court Judicial Selection, convened by the Sandra Day O'Connor Project on the State of the Judiciary at Georgetown University Law Center. A modified version of this essay appears in *The Georgetown Journal of Legal Ethics* 21 (4) (Fall 2008). Thanks to Bert Brandenburg, Barry Friedman, Steve Burbank, and Roy Schotland for their comments on an earlier draft of this essay and to Ted Brassfield for his research assistance.

2 Stephen B. Burbank and Barry Friedman, "Reconsidering Judicial Independence," in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Burbank and Friedman (Thousand Oaks, Calif.: Sage Publications, 2002), 9, 11–14.

3 Charles Gardner Geyh, *When Courts & Congress Collide: The Struggle for Control of America's Judicial System* (Ann Arbor: University of Michigan Press, 2006), 6–7.

supposed to further. And so, if judicial independence is to achieve its goals, it must operate within specified constraints. It must, in other words, be tempered by judicial accountability.

Like judicial independence, judicial accountability is not an end in itself. It, too, serves other ends: to promote the rule of law, institutional responsibility, and public confidence in the courts. And like judicial independence, judicial accountability has multiple forms: institutional accountability mechanisms hold judges answerable collectively for their conduct as a separate branch of government, for example by subjecting court budgets to legislative oversight; behavioral accountability mechanisms hold individual judges to account for their conduct on and off the bench, for example by subjecting them to discipline for being abusive to litigants or accepting inappropriate gifts from lawyers who appear before them; and decisional accountability makes judges answerable for their judicial rulings, for example by subjecting their decisions to appellate review.⁴ As to decisional accountability, however, suitable mechanisms are ideally limited to those that promote the rule of law by correcting judicial error without obliterating decisional independence by subjecting judges to threats or controls that could cause them to disregard the law and implement the preferences of those who threaten or control them.

The perennial policy struggle is to strike an optimal balance between judicial independence and accountability, to ensure that judges are independent enough to follow the facts and law

without fear or favor, but not so independent as to disregard the facts or law to the detriment of the rule of law and public confidence in the courts. The American Bar Association's Model Code of Judicial Conduct, some variation of which has been adopted by almost every state supreme court, seeks to structure judicial conduct to preserve this balance. The 2007 Code tells judges that they "shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary";⁵ "shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially";⁶ "shall not be swayed by public clamor or fear of criticism";⁷ "shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment";⁸ and "shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge."⁹

In the context of state judicial selection, the struggle to balance independence and accountability has played itself out over the course of more than two centuries, as five distinct methods of selecting judges – each striking the balance in different ways – have vied for preeminence. In the fledgling states, all judges were selected by one of two methods: gubernatorial appointment with legislative confirmation (five states) or legisla-

4 Charles Gardner Geyh, "Rescuing Judicial Accountability from the Realm of Political Rhetoric," *Case Western Reserve Law Review* 56 (2006): 911.

5 ABA Model Code of Judicial Conduct (American Bar Association, 2007).

6 *Ibid.*, Rule 2.2.

7 *Ibid.*, Rule 2.4(A).

8 *Ibid.*, Rule 2.4(B).

9 *Ibid.*, Rule 2.4(C).

tive appointment (eight states).¹⁰ The colonial courts had been unhappily dependent on the crown, and the new states were committed to curbing their judiciaries' dependence on the executive branch – which is not to say that the new states were committed to an independent judiciary. Several states subjected their judges to a variety of legislative branch controls, including reappointment, which led to a series of independence-threatening confrontations with state legislatures during the 1780s that troubled the framers of the U.S. Constitution enough for them to embed in Article III tenure and salary protections for federal judges.

During the Jacksonian Era of the 1820s and 1830s, populist calls for judicial accountability initiated a movement to select judges via a third method: partisan judicial elections. Although the early catalyst for partisan judicial elections may have been a desire for greater accountability, the partisan election movement did not take hold until after the Jacksonians lost influence, led by reformers who argued that elected judges who derived their authority from the people would be more independent-minded than handpicked friends of governors, or jurists subject to the beck and call of legislatures. Indeed, University of Virginia law professor Caleb Nelson found that the impetus for the judicial election movement was a desire to promote judicial independence from the political branches, rather than to increase democratic accountability for judicial decisions.¹¹ Mississippi broke the ice in 1832,

10 Anthony Champagne and Judith Haydel, "Introduction," in *Judicial Reform in the States*, ed. Champagne and Haydel (Lanham, Md.: University Press of America, 1993), 3.

11 Caleb Nelson, "A Reevaluation of Scholarly Explanations for the Rise of the Elective Ju-

and by 1909 thirty-five states either entered the Union with judiciaries selected by partisan election or had converted to partisan elections from appointive systems.

In the early twentieth century, elected judiciaries were increasingly viewed as incompetent and corrupt. During the Progressive Era, worries that partisan elections led to the selection of less-than-capable and less-qualified judges who were beholden to party bosses culminated in a fourth form of judicial selection: the nonpartisan election. By 1930, twelve new states had adopted nonpartisan elections as the selection method for their judiciaries.

In the minds of some, however, nonpartisan elections left voters with precious little information upon which to cast an informed ballot, which led to the selection of less-capable and less-qualified judges. In the minds of others, contested elections – partisan or not – failed to divorce judges sufficiently from the political process.¹² In 1913, a fifth method of judicial selection was devised: a "merit selection" system, in which judges were appointed by the governor from a pool of candidates whose qualifica-

diary in Antebellum America," *American Journal of Legal History* 37 (1993): 190. See also Kermit L. Hall, "Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920," *American Bar Foundation Research Journal* 9 (1984): 345; F. Andrew Hanssen, "Learning About Judicial Independence: Institutional Changes in the State Courts," *Journal of Legal Studies* 33 (2004): 445–448; Roy A. Schotland, "Myth, Reality Past and Present, and Judicial Elections," *Indiana Law Review* 35 (2002): 661–662.

12 Charles Sheldon and Linda Maule, *Choosing Justice: The Recruitment of State and Federal Judges* (Pullman, Wash.: WSU Press, 1997), 6–7.

tions had been reviewed and approved by an independent commission. Judges so appointed would then run unopposed later in periodic retention elections, in which voters would decide whether the judge in question should be retained for another term. Missouri adopted the first merit selection plan in 1940, and by 1989 twenty-three states had commission-based appointive systems (with and without retention elections) to select some or all of their judges.

More recently, the merit selection movement has stalled. Constitutional amendments to establish merit selection systems in Florida, Michigan, Ohio, and South Dakota have been rejected by voters, and reformers in other jurisdictions have struggled unsuccessfully to place merit selection proposals on their ballots, while in some merit selection states there have been calls for a return to contested elections.¹³

Meanwhile, nonpartisan elections have enjoyed a renaissance. Arkansas, Florida, Georgia, Kentucky, Louisiana, and North Carolina moved from partisan to nonpartisan election systems in the past thirty years. And in 2003 the American Bar Association retreated from its previous position of exclusive support for merit selection, to a more nuanced series of positions, one being that “[f]or states that retain contested elections as a means to select their judges, all such elections should be non-partisan and conducted in a non-partisan manner.”¹⁴

13 Matthew Streb, “Judicial Reform and the Future of Judicial Elections,” in *Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections*, ed. Streb (New York: New York University Press, 2007), 205–206.

14 *Justice in Jeopardy: Report of the Commission on the 21st Century Judiciary* (American Bar Association, 2003), 76–77. The position of the Com-

Today, the American Judicature Society reports¹⁵ that, at the supreme court level, four states select judges by gubernatorial appointment, two by legislative appointment, eight by partisan election, thirteen by nonpartisan election, and twenty-three by merit selection. At the intermediate appellate level, two states select judges by gubernatorial appointment, two by legislative appointment, six by partisan election, eleven by nonpartisan election, and eighteen by merit selection. Finally, at the trial level, three states select judges by gubernatorial appointment, two by legislative appointment, nine by partisan election, eighteen by nonpartisan election, fourteen by merit selection, and four by a combination of methods. (Even in states that employ contested elections, judges are often initially appointed by governors to fill the unexpired terms of retiring incumbents.)

Each of the five methods of judicial selection described above had its heyday at a different point in American history. Consensus on the optimal method of judicial selection has been elusive. Many have asserted that this is because there is no perfect method of judicial selection – or, more harshly, because there is no good method of judicial selection.¹⁶ A more charitable explanation may be that the objective of a good selection system – an optimal balance between judicial

mission on this point was subsequently adopted by the American Bar Association.

15 Data discussed in this paragraph are drawn from <http://www.ajs.org/js/JudicialSelectionCharts.pdf>.

16 See, for example, Champagne and Haydel, “Introduction,” in *Judicial Reform in the States*, ed. Champagne and Haydel, 15–16; also *Justice in Jeopardy*, 69.

independence and accountability – is an ever-moving target that generates perennial calls for reform. In recent years, the reform engine has been fueled by a series of developments that have politicized state judicial elections in arguably unprecedented ways.

Partisan judicial elections can be relatively sleepy affairs in states where a single political party is predominant and the outcome of judicial races is all but assured. Conversely, as Alan Tarr, a political scientist at Rutgers University, observes, where party competition is intense and parties establish clear ideological identities, the intensity tends to spill over into judicial elections. In recent years, significant two-party competition has become commonplace in states and regions that traditionally were within the control of only one party:

One of the most dramatic changes during the latter half of the twentieth century was the spread of two party competition throughout the nation. Many states that at one time were dominated by a single party, particularly in the South and New England, now regularly conduct highly competitive elections.¹⁷

Studies of judicial reform in North Carolina and Texas link recent selection reform efforts there to the intensification of two-party competition for judicial office.

As caseloads increased throughout the twentieth century, states sought to relieve docket pressures on their supreme courts by establishing intermediate courts of appeals and making their supreme courts' appellate jurisdiction discretionary. Armed with the discre-

17 G. Alan Tarr, "State Judicial Selection and Judicial Independence," Appendix D, in *Justice in Jeopardy*, 5.

tion to set their own agendas, supreme courts have increasingly allowed the intermediate courts of appeals to have the final word in garden-variety disputes, in which appellate review is limited to correcting trial-court errors, and confined their dockets to more controversial cases in which the law is unclear and their primary mission is to "say what the law is." The net effect has been to highlight the policy-making role that state supreme courts play when filling gaps in constitutional and statutory law and making common law.¹⁸

Legal historian Emily Van Tassel explains a related development: "The politicization of state constitutional decision-making coincides with the 'new Federalism' of the Reagan era and the willingness of many state appellate courts to look to their own constitutions for guidance in many areas of law previously left to the federal constitution."¹⁹ That, in turn, has served to "raise the profile of state court judges and make control over state judgeships seem more significant to a greater range of interest groups than in the recent past."²⁰ To the extent that judges are perceived as making constitutional policy when called upon to interpret their constitutions in new and different ways, it may blur the distinction between judges and legislators in the public mind and intensify calls to hold judges politically accountable for their decisions.

18 Paul Carrington, Daniel Meador, and Maurice Rosenberg, *Justice on Appeal* (St. Paul, Minn.: West Publishing Company, 1976), 150.

19 Emily Van Tassel, "Challenges to Constitutional Decisions of State Courts and Institutional Pressures on State Judiciary," Appendix E, in *Justice in Jeopardy*, 3.

20 Ibid.

As two-party competition has intensified and the political profile of state supreme courts has elevated, campaign spending in judicial races has increased. Average campaign spending in contested supreme court races has increased from \$364,348 in 1990 to \$892,755 in 2004.²¹ In 2000, judicial candidates in supreme court races raised \$45 million;²² in 2002, they raised \$29 million; and in 2004, they raised \$42 million.²³ While these numbers appear to vary wildly, when “outlier” races in Alabama, Illinois, and West Virginia are excluded, spending in the fourteen remaining states that held supreme court elections in 2004 increased by 163 percent since 2002, and in 2002 spending increased by 167 percent since 2000.²⁴ Between 2004 and 2006, average spending on advertising in supreme court races increased from \$1.5 million to \$1.6 million; and in that time, the median amount raised increased from \$201,623 to \$243,910.²⁵

When it comes to fund-raising, the focus of attention has been on supreme court races, where competition for judicial office has been stiffest. Even so, a survey of over 2,400 judges conducted

in 2001 found that 45 percent of lower-court judges felt under pressure to raise money for their campaigns during election years, as compared to 36 percent of high-court judges. In the 2005–2006 election cycle, for example, trial lawyers and corporate interests in a southern Illinois race combined to give more than \$3.3 million to two candidates for a seat on the state court of appeals, quadrupling the state record. Madison County, Illinois, witnessed a \$500,000 trial-court campaign, and a Missouri trial-court judge was defeated after an out-of-state group poured \$175,000 into a campaign to defeat him.

Coinciding with the introduction of big-league spending in judicial campaigns and with heightened two-party competition is the advent of big-league interest-group involvement, in the form of direct contributions to judicial candidates and independently organized campaigns in support of or opposition to the candidates. The lion’s share of interest-group spending has been on a cluster of issues, traveling under the umbrella of “tort reform,” that concern judicial rulings on issues relating to punitive damages, products liability, medical malpractice, and insurance liability. Plaintiffs’ bar and labor unions, aligned with Democratic candidates, have been pitted against the defense bar and business, aligned with Republicans. Thus, in 2006 the two highest sources of contributions were business interests and lawyers, with 44 percent of all funds donated by the former and 21 percent by the latter. Outside of groups devoted to the tort reform issue, there have been other interest groups that have actively sought to defeat incumbents (sometimes successfully) because of an opinion a judge wrote or joined on such issues as capital punishment, criminal sentencing, abor-

21 Chris Bonneau, “The Dynamics of Campaign Spending in State Supreme Court Elections,” in *Running for Judge*, ed. Streb, 63.

22 *The Politicization of the Judiciary* (Common Cause of Ohio, 2005).

23 *2004 State Supreme Court Election Overview* (Justice at Stake Campaign, March 9, 2005).

24 Rachel Paine Caulfield, “The Foreboding National Trends in Judicial Elections,” conference paper available at http://www.keepmnjusticeimpartial.org/caulfield_ia_judges_conference.pdf (June 24, 2005), 2.

25 James Sample, Lauren Jones, and Rachel Weiss, *The New Politics of Judicial Elections 2006* (Washington, D.C.: Justice at Stake, 2007), 3.

tion, gay rights, education funding, and water rights.

As James Gibson, a political scientist at Washington University, notes, “The use of attack ads in judicial elections is a relatively new phenomenon.”²⁶ In 2004 and 2006, approximately 20 percent of all ads were negative. With increased spending in judicial campaigns and increased interest-group involvement has come a greater emphasis on negative advertising. In a 2001 poll of judges, 54 percent of trial judges and 54 percent of supreme court justices reported that the conduct and tone of judicial campaigns had gotten worse in the preceding five years. Until quite recently, interest groups and political parties were responsible for the bulk of negative television advertising: 90 percent as of 2004. But in 2006 the candidates themselves sponsored 60 percent of the negative advertising.

Since the 1970s, codes of judicial conduct have imposed significant restrictions on judicial speech and association during judicial campaigns. First, judges have been subject to restrictions on what they can say about issues that may come before them as judges: the 1972 Model Code of Judicial Conduct forbade judges from announcing their positions on disputed issues (the Announce Clause), while the 1990 and 2007 Model Codes prohibit judicial candidates from making pledges, promises, or commitments. Second, the codes restrict a judge’s political activities: for example, judges must not serve as officers in, contribute to, or make speeches on behalf of political organizations; they must not publicly oppose or en-

dorse other candidates; and they must not solicit campaign funds other than through their campaign committees. By limiting what judges can say and do in election campaigns, codes of conduct seek to prevent judicial candidates from becoming fully embroiled in the political process and from turning judicial races into referenda on their express or implied plans to decide future cases in specific ways.

In *Republican Party of Minnesota v. White*, the U.S. Supreme Court invalidated the Announce Clause, holding that judicial candidates have a First Amendment right to state their views on issues that may come before them later, as judges.²⁷ In the aftermath of *White*, the American Bar Association made modest adjustments to its Model Code of Judicial Conduct in 2003: it deleted a clause that subjected judges to discipline for appearing to make commitments (but made apparent commitments a new basis for disqualification) and retained the general prohibitions on pledges, promises, commitments, and political activities.

Beginning in 2003, the ABA’s Joint Commission to Evaluate the Model Code of Judicial Conduct revisited the Model Code’s restrictions on campaign speech and conduct, as part of a larger project to revise the entire Code. The Commission considered three possible courses of action.²⁸ First, it considered embracing the spirit of *White* by deregulating campaign speech and conduct generally, as North Carolina had done. Second, it considered the midrange op-

27 536 U.S. 765 (2002).

26 James Gibson, “Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and ‘New Style’ Judicial Campaigns,” *American Political Science Review*, forthcoming; draft on file.

28 I served as coreporter to the Commission and was in attendance at all Commission meetings. The views expressed here, however, are my own and are not necessarily shared by the Commission or its members.

tion of retooling the political activities canon to accommodate some specific post-*White* rulings of the lower courts, which would require the Commission to eliminate several restrictions on political activities and narrow significantly, if not eliminate, the Pledges, Promises, and Commitments Clause. Third, it considered the conservative approach of limiting the reach of *White* to its holding and staying the course pending further clarification of *White* from the Supreme Court.

A majority of the Commission remained concerned that the impact of *White* on judicial campaigns was deleterious and was reluctant to deregulate campaign speech and conduct beyond what was required by the letter of the Supreme Court's holding. After lengthy deliberations spanning nearly four years, the Commission effectively chose the third option described above, retaining existing restrictions on campaign speech and conduct in the political activities canon. Instead, the Commission focused its efforts on restructuring new Canon 4 (former Canon 5) to improve clarity and specificity, as the ABA's Report to the House of Delegates explained:

Much of the material in Canon 5 was retained, but was reorganized along several axes. The reorganized Canon 4 differentiates more clearly between sitting judges who are and are not also judicial candidates and nonjudges who become candidates. Canon 4 continues to differentiate between judicial candidates running for public elections and those seeking appointment, and, within the former category, it further differentiates between partisan, nonpartisan and retention elections.²⁹

29 ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Report No.

In the aftermath of *White*, judicial candidates have challenged remaining restrictions on their campaign speech and conduct in the lower courts, and while the results have been somewhat mixed, the trend has favored the challengers. Several courts have invalidated the Pledges and Promises Clause, while others have struck down restrictions on political activities. The U.S. Court of Appeals for the Eighth Circuit, revisiting other issues presented by the *White* case on remand from the Supreme Court, held that Minnesota could not discipline judicial candidates for engaging in partisan activities (notwithstanding Minnesota's purported interest in preserving the nonpartisan character of its judicial elections) or bypassing their campaign committees and soliciting funds directly from groups.³⁰

Since 2002, when *White* was decided, interest groups on the political left and right have capitalized on the decision by submitting questionnaires to the candidates that solicit the candidates' views on a range of issues likely to come before them as judges and that the candidates ignore at their peril. Indeed, some interest groups have been explicit about supporting only those candidates that respond.

Judicial elections were originally introduced primarily to promote judicial independence by liberating judges from the control of governors and legislators, but they have since morphed into tools that serve primarily to promote judicial accountability. There seems to be a general consensus that the recent developments described above are making judi-

200, Revised Model Code of Judicial Conduct (February 12 – 13, 2007).

30 416 F.3d 738 (8th Cir. 2005) (en banc).

cial elections look and feel more like conventional political branch races, in the sense of being more competitive and costly, with more interest groups taking sides in more acrimonious contests, and more candidates taking positions on the often policy-laden issues that the candidates will be called upon to resolve as office-holders. Where the consensus breaks down is as to whether these developments are welcome and which judicial selection system is best suited to counter or accommodate them.

Contemporary proponents of partisan judicial elections proceed from the premise that, in a democratic republic, voters should choose the public officials who govern them and hold them accountable for their performance in office. Underlying this premise is the general assumption that judges are not significantly different from other public officials, or are not different in ways that warrant a different system of selection. A related assumption is that voters in judicial and political branch races are comparably motivated and equipped to distinguish good candidates from bad – or at least that voters in judicial races are not so unmotivated and ill-equipped as to undermine the legitimacy of the choices they make.

In an article I wrote several years ago, I questioned whether voters in judicial elections were adequately motivated and informed to hold judges accountable in a meaningful way, by pointing to data showing that a substantial majority of the public did not vote in judicial races and was unfamiliar with the candidates. Recent research suggests that my concern was well-founded in traditional, less-competitive races. Available data confirm an often substantial “roll-off” in judicial races, in which voters who come to the polls vote in executive and legislative branch races but not in judi-

cial. The roll-off is commonly attributed to a lack of information about the candidates; indeed, in a poll of American voters conducted in 2001, 73 percent reported that they had only some or a little information about judicial candidates, while 14 percent reported having none.³¹ In their study of judicial elections in the news, Brian Schaffner and Jennifer Segal Diascro, political scientists at American University, conclude, “We should not be surprised to find citizens lacking information about judicial races” because “citizens turning to newspapers for information on state supreme court campaigns will find a dearth of coverage on these contests.”³²

It can be argued, however, that more competitive judicial races, particularly in a post-*White* environment, are increasing voter interest and information levels enough to hold judges meaningfully accountable. In a comparison between two Ohio Supreme Court races, political scientists Laurence Baum and David Klein found that the voter roll-off rate was twice as high for the low visibility race as for the hotly contested one (although they also found that in the hotly contested race, voters acquired only a slender grasp of the issues at stake).³³ Melinda

31 Martin P. Wattenberg, Ian McAllister, and Anthony Salvanto, “How Voting is Like Taking an SAT Test: An Analysis of American Voter Rolloff,” *American Politics Quarterly* 28 (2000): 234; Lawrence Baum and David Klein, “Voter Responses to High-Visibility Judicial Campaigns,” in *Running for Judge*, ed. Streb, 140–141; Poll of American Voters, conducted by Greenberg, Quinlan, Rosner Research Inc. (Justice at Stake Campaign, 2001).

32 Brian Schaffner and Jennifer Segal Diascro, “Judicial Elections in the News,” in *Running for Judge*, ed. Streb, 115, 134.

33 Baum and Klein, “Voter Responses to High-Visibility Campaigns,” in *Running for Judge*, ed. Streb.

Gann Hall, a political scientist at Michigan State University, observes, “Without the excitement generated by hard-fought campaigns from contending candidates, information upon which to cast votes is poor, and voters are disinterested and unmotivated to participate.”³⁴ Now that judicial elections have become noisier, nastier, and costlier, we have more challengers and more defeated incumbents, leading Hall to conclude, “When we consider tangible indicators of electoral accountability, we see that, under most situations, supreme court elections perform quite well, particularly in the last decade or so.”³⁵ Rachel Paine Caulfield, a political scientist at Drake University, found that in the post-*White* era, states that have deregulated judicial speech the most “are seeing a change in how candidates promote themselves and how they attack their opponents,” leading her to conclude that “it is entirely possible that judicial candidates in these states will increasingly rely on the ability to distinguish themselves from their opponents based on controversial issue positions.”³⁶ Schaffner and Diascro concur that, after *White*, “candidates may be more likely to speak out on a wider array of topics during campaigns, a dynamic that would produce more news for reporters to cover,” which they view as a welcome development “if judicial elections are to compel accountability in the judiciary.”³⁷

34 Melinda Gann Hall, “Competition as Accountability in State Supreme Court Elections,” in *Running for Judge*, ed. Streb, 166.

35 *Ibid.*, 183.

36 Rachel Paine Caulfield, “The Changing Tone of Judicial Campaigns as a Result of *White*,” in *Running for Judge*, ed. Streb, 34, 55–56.

37 Schaffner and Diascro, “Judicial Elections in the News,” in *Running for Judge*, ed. Streb, 136.

Recent data thus reveal that the brave new world of expensive, high-profile, hotly contested judicial races creates greater voter interest, puts incumbents at higher risk of defeat, and to that extent promotes unvarnished, specifically political “accountability.”³⁸ And since competition is the most intense in partisan races, the argument concludes, it is in partisan races that judicial accountability of this kind will be promoted most effectively.

The critical question is whether this is the kind of accountability that we want judicial elections to promote. If, as a significant segment of the political science community believes, independent judges are essentially unconstrained policymakers who decide cases by acting on their personal preferences or attitudes, then the answer would seem to be yes, because elections will produce public policies that better represent the citizenry by creating incentives for judges to pay attention to citizen preferences when deciding highly visible and publicly salient issues.

If, on the other hand, as the mainstream legal community believes, independent judges do their best to follow the law, flexibly defined (consistent with the legal model described at the beginning of this paper), then the answer is presumably no, because elections create incentives for judges to set the law to one side and pay attention to citizen preferences when deciding cases. Indeed, the judge who openly defers to the electorate’s preferences when deciding cases exposes herself to discipline and removal for violating multiple rules in the Code of Judicial Conduct: the duty

38 Hall, “Competition as Accountability in State Supreme Court Elections,” in *Running for Judge*, ed. Streb, 166.

not to be swayed by public clamor or fear of criticism; the duty to uphold and apply the law and perform all duties of judicial office impartially; and the duty to act at all times in a manner that promotes public confidence in the independence and impartiality of the judiciary. The attitudinal model of judicial decision-making that drives the thinking of many political scientists is only now beginning to be challenged in a serious way by scholars within the legal community,³⁹ and the implications for judicial selection are considerable.

Devotees of nonpartisan elections proceed from the assumption that judges are different from other elected officials in ways that justify a different selection process: whereas governors and legislators may follow partisan agendas, judges must follow the law. Those who favor nonpartisan elections worry that recent politicization of judicial races has made politicians of judges, whose election increasingly turns on their currying favor with contributors, interest groups, and voters by signaling in advance how they are likely to rule on hot-button legal issues that may come before their courts. They argue, however, that the worst excesses have occurred in partisan election states, where judicial candidates are, by definition, partisans and where competition for judicial office has been most intense.

Data confirm that partisan races are, on average, more heated than nonpartisan. The spending difference between partisan and nonpartisan races is stark: between 1990 and 2004, average spending in contested nonpartisan elections was \$549,160, as compared to \$885,177

in partisan races. Overall, the percentage of supreme court races in which the incumbent ran unopposed has been 16.9 percent higher in nonpartisan contests. And between 1980 and 2000 defeat rates for incumbents in nonpartisan races were 7.3 percent as compared to 23 percent in partisan races. One explanation for this data, however, may be that nonpartisan races are less politicized because they furnish voters with insufficient information to promote competitive races; partisan affiliation can serve as a rough proxy for the candidate's views on a range of issues that furnish voters with information they deem relevant to casting an informed ballot. That said, nonpartisan races have recently become much more competitive affairs. In the 1980s, 40.8 percent of nonpartisan judicial elections were contested, as compared to 62.5 percent in the 1990s. (In partisan races, the percentage of contested races increased from 58.8 percent to 83.1 percent.) And a recent study conducted by Matthew Streb found that so-called nonpartisan races may not be as nonpartisan as commonly assumed:

How involved are party organizations in nonpartisan judicial campaigns? The answer appears to be that they are quite involved. While parties are not equally active in all aspects of nonpartisan judicial elections (and not necessarily active in every election cycle), they seem to be especially important in terms of GOTV efforts and increasing name recognition, candidate recruitment, candidate endorsements, coordinating campaigns with candidates, and even raising and contributing money.⁴⁰

39 Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge and New York: Cambridge University Press, 1993); Barry Friedman, "Taking Law Seriously," *Perspectives on Politics* 4 (2006): 261.

40 Streb, "Partisan Involvement in Partisan and Nonpartisan Trial Court Elections," in *Running for Judge*, ed. Streb, 96, 102.

Of greater concern, perhaps, is the impact of *White* on the future of nonpartisan elections. If candidates are held to have a constitutional right to announce their partisan affiliations and engage in partisan activities in nonpartisan races, as the U.S. Court of Appeals ruled in *White* on remand, the practical differences between partisan and nonpartisan elections may gradually disappear. We have already seen, in states such as Michigan and Ohio, where a nominally nonpartisan general election is preceded by an openly partisan primary election process, that the resulting contests can be every bit as heated as in conventional partisan election states. In light of data indicating that when, in response to *White*, states relax campaign speech regulations, candidates alter their campaign speech to capitalize on the relaxed requirements, it is reasonable to predict that the same will occur if partisan activities restrictions are lifted.

Advocates of merit selection, like proponents of nonpartisan election, proceed from the premise that a judge's duty to follow the law makes judges sufficiently different from other public officials to warrant a different method of selection. The two camps part company, however, over the relative merits of contested elections. Supporters of merit selection operate on three assumptions. First, contested elections are not a good way to ensure the selection of capable and qualified judges. Second, contested elections are inimical to judicial independence because they put judges at risk of losing their jobs for making decisions that are unpopular with voters who are incapable of discerning when a judge has followed the law, committed an honest error, or made an illegitimate power grab. Third, politicization of judicial selection in hotly contested races dimin-

ishes public confidence in the courts. A system in which governors appoint judges from a pool of candidates prequalified by an independent commission, they maintain, is better suited to ensure that judges are selected on the basis of merit. To accommodate entrenched public preferences for judicial elections, merit selection systems typically provide for retention elections that proponents assume, by virtue of being non-competitive, are less likely to become highly politicized, independence-threatening affairs that diminish public confidence in the courts.

Available data undercut the assumption that merit selection systems produce "better" judges. A study conducted in the 1980s comparing the résumés of judges chosen in contested elections and in merit selection systems found no significant differences: they possess comparable legal and judicial experience, and elected judges were no more likely than their merit-selected counterparts to have partisan political backgrounds.⁴¹ (Recent research reveals, too, that there is no meaningful difference between the systems in terms of the racial or gender diversity of the judges selected.⁴²) That said, it is more difficult to quantify intangibles that could support the conclusion that merit-selected judges are "better" qualified, such as whether, on aver-

41 Henry Glick and Craig Emmert, "Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges," *Judicature* 70 (1987): 231–235.

42 Mark Hurwitz and Drew Noble Lanier, "Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts," *State Politics and Policy Quarterly* 3 (2003): 345. For earlier research, see Malia Reddick, "Merit Selection: A Review of the Social Scientific Literature," *Dickinson Law Review* 106 (2002): 740–741.

age, they possess a more judicial temperament, are predisposed to be more impartial and independent, or think about the judicial role in less partisan or otherwise political ways. A California study, for example, compared judges initially appointed to those initially elected and found that between 1990 and 1999, 29.8 out of every thousand judges initially appointed had been disciplined, as compared to 43.6 out of every thousand judges who had been initially elected.⁴³

Recent data appear to corroborate the assumption that elected judges are more likely to align their decision-making with popular preferences than appointed judges, and to that extent are less independent. In their study of state supreme court review of capital cases, political scientists Paul Brace and Brent Boyea found “compelling but circumstantial evidence that state supreme court judges in capital cases may vote with an eye toward the next election,” and that “appointed judges and judges that are retiring all exhibit a higher propensity to overturn capital convictions than elective judges who are not retiring,”⁴⁴ leading Brace and Boyea to a conclusion worth quoting at length:

In the end, the patterns revealed here indicate that judicial elections expose judges to public sentiment and, on this very salient issue at least, they respond by adjusting their voting in a manner that is consistent with public opinion. On this particular issue too, elections serve to recruit judges who share the public’s values. Elections thus function in a manner

43 Commission on Judicial Performance, Summary of Disciplinary Statistics (State of California, 1990–1999), 13.

44 Paul Brace and Brent Boyea, “Judicial Selection Methods and Capital Punishment in the American States,” in *Running for Judge*, ed. Streb, 186, 193–194, 197.

commonly valued in some democratic theories, producing elite responsiveness to mass opinions. When it comes to judicial elections, however, our findings may give pause to those who value judicial impartiality, particularly when it comes to a matter of life and death.⁴⁵

Research reveals that in merit selection systems, politics can play a role in selecting members of nominating commissions, in the deliberations of such commissions, and in the judges that governors ultimately choose from the approved candidate pool. In response, the American Bar Association has developed standards for judicial selection that underscore the importance of preserving the independent, nonpartisan character of judicial nominating commissions.⁴⁶ To conclude from these developments, however – as some have – that merit selection systems simply move the politics of judicial selection from the ballot box to a back room misses an important point: the primary threat to independence arises at the point of reselection, when judges are put at risk of losing their jobs for unpopular decisions that they previously made. And on that score there is ample support for the conclusion that, with notable exceptions, the prospect of an incumbent losing her seat in a retention election because of isolated, unpopular decisions is quite low. Whereas 23 percent of incumbent supreme court justices lost reelection bids in partisan elections between 1980 and 2000, and 7.4 percent lost in nonpartisan races, the failure rate in retention elections was only 1.8 percent. And between 1964 and 1998 only 52 of 4,588

45 *Ibid.*, 199.

46 Report of the Commission on State Judicial Selection Standards (American Bar Association, 2000).

candidates in retention elections were not retained.⁴⁷

Finally, there is support for the conclusion that highly politicized judicial races diminish public confidence in the courts. In his Kentucky-based study, James Gibson found that “when groups with direct connections to the decision-maker give contributions, legitimacy suffers substantially.”⁴⁸ He likewise found that when candidates use attack ads, legitimacy is adversely affected, albeit to a lesser degree. Gibson also explored the impact of candidate positioning on public confidence and found none, adding that “even promises to decide cases in specific ways have no consequences at all for the legitimacy of the institution” – although his conclusion on this point may overgeneralize from the answers he received to a narrowly focused question.

I have argued elsewhere that the optimal system for judicial selection is one in which judges are appointed by governors from a pool of commission-approved candidates, with or without legislative confirmation, who, once appointed, are not subject to reselection (via reappointment, retention election, or contested election).⁴⁹ Such arguments operate from the premise that an appointive system alone promotes judicial independence by ensuring that a judge will not be put at risk of losing her job for making unpopular decisions that comport with the law as the judge

reads it. Proponents of appointive systems assume that accountability is better promoted by means other than the ballot box: appellate review, constitutional amendment, adverse publicity, intrajudicial disciplinary processes, and, of course, prospective accountability fostered by the appointment process itself.

Although few judges actually lose their retention bids in merit selection states, the real issue is whether judges nonetheless fear defeat at the ballot box and act on that fear by deciding cases differently than they otherwise would. Malia Reddick, director of research and programs for the American Judicature Society, reports on a 1991 survey of judges who recently stood for retention, in which three-fifths of respondents reported that “retention elections had a pronounced effect on their behavior on the bench”; only 14 percent believed that retention elections gave them independence from the voters, while “the remaining judges perceived themselves as responding to their environment.”⁵⁰

As far as other accountability-promoting mechanisms are concerned, the model codes of judicial conduct include rules directing judges to be “faithful to” or to “uphold and apply” the law.⁵¹ These rules have been used more often than one might suppose to discipline and sometimes remove judicial officers who chronically or flagrantly disregard the rule of law in a range of contexts.

47 Larry Aspin, “Trends in Judicial Retention Elections, 1964 – 1998,” *Judicature* 83 (1999): 79.

48 James Gibson, “Challenges to the Impartiality of State Supreme Courts,” 17; see also, Charles Gardner Geyh, “Why Judicial Elections Stink,” *Ohio State Law Journal* 64 (2002): 54 – 55.

49 *Ibid.*; also *Justice in Jeopardy*, 70 – 74.

50 Malia Reddick, “Merit Selection,” 739 – 740, which discusses Larry Aspin and William Hall, “Retention Elections and Judicial Behavior,” *Judicature* 77 (1994): 306.

51 ABA Model Code of Judicial Conduct, Canon 3B(2) (1990); Model Code of Judicial Conduct, Rule 2.2 (2007).

Ultimately, which of the various systems for judicial selection is “best” depends upon what one is looking for. If one is looking for a system that maximizes democratic accountability, then available data suggest that partisan elections will ordinarily be optimal. Conversely, if one is looking for a system that maximizes judicial independence, simple appointment (with or without a nominating commission) that does not subject incumbents to a reselection process, will usually be the best bet. Nonpartisan election and merit selection/retention election systems seek to strike a balance between these relative extremes, with nonpartisan election systems placing somewhat greater emphasis on democratic accountability and merit selection/retention elections opting for somewhat greater independence.

Arguments over the relative merits of democratic accountability and judicial independence may be deeply normative, but turn in large part on an unresolved empirical question of considerable importance: whether independent judges follow the law and, if so, how and to what extent. If the answer is no, as many political scientists believe, then the primary justification for judicial independence disappears. If law does not constrain judges in any meaningful way – if independent judges are essentially rogue policy-makers – the norms of a democratic republic dictate that judges be brought under greater popular control, so that the preferences judges act upon are better aligned with their “constituents.” Conversely, if, as most judges and lawyers believe, the answer is to some significant extent yes – if independent judges do indeed take law seriously – then judicial independence is back in the game. To study this question demands a more serious interdisciplinary effort than has occurred to date – and

that is no mean feat. Too many political scientists and lawyers look at each other and shake their heads, so captured by the predispositions of their respective disciplines that they are unable or unwilling to take the other seriously.⁵² For those who have been struggling to preserve and promote an independent judiciary, however, the time has come to confirm the empirical foundations upon which their case rests, or rethink their premises.

I share New York University law professor Barry Friedman’s impressionistic sense that, outside the political science subfield of attitudinal model scholars, “most likely there is agreement that attitudes and law both play a role – the question is how much, and more particularly, how much law can constrain. To state it differently, the question is not so much whether law plays a role, as what role it plays.”⁵³ If so, then judicial independence remains a value worth preserving. But the operative question continues to be how much independence in relation to democratic accountability is optimal? Put another way, when (if ever) does the cost of enabling judges to act upon their political preferences or attitudes by insulating them from democratic accountability exceed the benefits of protecting them from threats to their tenure that compromise their capacity to adhere to the rule of law?

These are big questions that call for big choices between selection systems. Constitutional reform culminating in changes on this order of magnitude is a rare event. It can be a worthy goal and

52 For an excellent discussion of the divide that separates academic lawyers and political scientists, see Friedman, “Taking Law Seriously.”

53 *Ibid.*, 264.

one well worth pursuing (as I have argued elsewhere), but not at the expense of ignoring shorter-term remedies that can make a bad system better in the interim. For those seeking to promote an independent judiciary in the teeth of recent developments, more modest reforms proposed by scholars and organizations include:

- Increasing the length of judicial terms, to reduce the frequency with which judicial tenure is put at risk;⁵⁴
- Encouraging candidates to adopt voluntary campaign standards, to reduce negative campaigning and thwart the impact of *White*;⁵⁵
- Continuing to defend existing ethical restrictions on judicial campaign conduct against constitutional challenge, at least until the Supreme Court clarifies the limits of *White*;⁵⁶
- Developing more comprehensive judicial evaluation programs to provide voters in retention elections with more

meaningful information about incumbents that reorient voter focus toward behavioral, rather than decisional, accountability;⁵⁷

- Increasing public knowledge about the role of the judiciary in American government, which has been shown to increase public support for judicial independence;⁵⁸
- Taking judicial discipline seriously, as a means to underscore an important way in which judges who behave badly are properly held accountable;⁵⁹
- Public financing of judicial campaigns at the appellate level, to reduce the influence of money on judicial races;⁶⁰
- Expanding use of voter guides as a means to inform voters better about the candidates.⁶¹

54 Roy A. Schotland, "The Crocodile in the Bathtub . . . and Other Arguments to Extend Terms for Trial Judges," *California Courts Review* 10 (Fall 2005); "Call to Action: Statement of the National Summit on Improving Judicial Selection," *Loyola of Los Angeles Law Review* 34 (2001): 1355.

55 Charles Gardner Geyh, "Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism," in *Bench Press: The Collision of the Courts, Politics, and the Media*, ed. Keith Bybee (Stanford: Stanford Law and Politics, 2007). See also, The Constitution Project, Higher Ground Standards of Conduct for Judicial Candidates; at http://www.constitutionproject.org/pdf/The_Higher_Ground_Standards_of_Conduct_for_Judicial_Candidates.pdf.

56 Geyh, "Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism," in *Bench Press*, ed. Bybee.

57 Seth Andersen, "Judicial Retention Evaluation Programs," *Loyola of Los Angeles Law Review* 34 (2001): 1375.

58 James Gibson and Gregory Caldeira, "Knowing About Courts," Paper for the 2nd Annual Conference on Empirical Legal Studies; on file.

59 *Justice in Jeopardy*, 58 – 59.

60 The Report of the Commission on Public Financing of Judicial Campaigns (American Bar Association, 2002); but see Michael Malbin and Thomas Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* (Albany, N.Y.: Rockefeller Institute Press, 1998), which questions the viability of public financing.

61 "Call to Action," 1357.