

# Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections

*Rachel Paine Caufield*<sup>1</sup>

[Judges] rule on the basis of law, not public opinion, and they should be totally indifferent to pressures of the times.<sup>2</sup>

– Warren E. Burger

You can have many different selection systems, but the bottom line has to be a system that, once the judge takes office that judge will feel that he or she is to decide the case without reference to the popular thing or the popular will of the moment.<sup>3</sup>

– Stephen Breyer

## I. INTRODUCTION

It is hardly novel to suggest that judicial elections, including retention elections, illustrate profound and irreconcilable tensions in the American governmental scheme.<sup>4</sup> The guiding political philosophy of liberal democracy dictates that judges be insulated from popular will and therefore remain free to adhere to the law, regardless of how unpopular such adherence may be. Complete independence would permit judges to be reckless in their use of the law as a tool of power. Complete accountability would render the rule of law, and the protections it affords to political minorities and others who lack political power, nonexistent. This elusive ideal of “judicial independence” has been overwhelmingly endorsed by American citizens who consistently report that judges should be faithful to the law and should remain “above

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1. Rachel Paine Caufield is Associate Professor of Politics and International Relations at Drake University in Des Moines, Iowa. She also serves as Research Fellow to the Elmo B. Hunter Citizens Center for Judicial Selection at the American Judicature Society.

2. Quoted in Charlotte Saikowski, *The Power of Judicial Review*, CHRISTIAN SCI. MONITOR, Feb. 11, 1987, at 18.

3. Interview by Bill Moyers with Stephen Breyer, Justice, United States Supreme Court, on Frontline (Nov. 23, 1999), available at <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html>.

4. See, e.g., Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555 (1988); Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1 (1992).

politics.”<sup>5</sup> Yet, even as we recognize that the judicial branch serves a distinct function within a democratic governmental system, we also fear any unchecked power, including judicial power.

It is unlikely that most Americans spend much time or energy contemplating these theoretical dilemmas. A Gallup poll found that 69% of American citizens report having a “great deal” or “a fair amount” of trust and confidence in the federal judiciary.<sup>6</sup> At the same time, a survey found that 60% of those polled in 2008 said that Supreme Court Justices have their own political agenda, and only 23% believe they remain impartial.<sup>7</sup> Similarly, a 2002 survey of Pennsylvania voters found that 70% thought it “very important” that a judge be “independent of politics,” yet 70% thought it “very important” that judges be “representative of the values of their community.”<sup>8</sup> That these two commitments to judicial independence and judicial accountability so easily and commonly take root side by side is evidence of our collective ability to reconcile divergent philosophical ideals.<sup>9</sup> There is, by any account, a mismatch between the judicial ideal and the democratic impulse.

Albert Kales was well aware of this mismatch as he put forward the plan that we now refer to as “merit selection.”<sup>10</sup> By creating a diverse and ideologically balanced commission to review applications and make recommen-

5. For example, 84% of respondents in a 2005 national poll strongly agreed with the statement “we need strong courts that are free from political influence.” Belden, Russonello, and Stewart, *Access to Justice and Constitutional Rights Versus Political Pressure: Defining the Battle for the Courts, Executive Summary and Communications Recommendations from a National Survey*, in JUSTICE AT STAKE, SPEAK TO AMERICAN VALUES: A HANDBOOK FOR WINNING THE DEBATE FOR FAIR AND IMPARTIAL COURTS 13-22 (2006).

6. Jeffrey M. Jones, *Low Trust in Federal Government Rivals Watergate Era Levels*, GALLUP NEWS SERV., Sept. 26, 2007, available at <http://www.gallup.com/poll/28795/Low-Trust-Federal-Government-Rivals-Watergate-Era-Levels.aspx>.

7. *60% Believe Supreme Court Justices Have Their Own Political Agendas*, RASMUSSEN REPORTS, June 16, 2008, available at [http://www.rasmussenreports.com/public\\_content/politics/mood\\_of\\_america/60\\_believe\\_supreme\\_court\\_justices\\_have\\_their\\_own\\_political\\_agendas](http://www.rasmussenreports.com/public_content/politics/mood_of_america/60_believe_supreme_court_justices_have_their_own_political_agendas).

8. Belden, Russonello & Stewart, *Quality Counts: Making the Case for Merit Selection* (Mar. 2002) (unpublished manuscript, on file with author). These divergent but equally compelling ideas, and the high support expressed for both independence and accountability, mirror what Charlie Geyh has termed the “axiom of eighty”:

Eighty percent of the public favors electing their judges; eighty percent of the electorate does not vote in judicial races; eighty percent is unable to identify the candidates for judicial office; and eighty percent believes that when judges are elected, they are subject to influence from the campaign contributors who made the judges’ election possible.

Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 43 (2003).

9. See Shapiro, *supra* note 4, at 1560-62.

10. Larry Berkson, updated by Rachel Caufield, *Judicial Selection in the United States: A Special Report*, AM. JUDICATURE SOC’Y, Aug. 2004, [http://www.judicialselection.us/uploads/documents/Berkson\\_1196091951709.pdf](http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf).

dations,<sup>11</sup> the initial selection of a judge was to be based exclusively on the legal merit of the individual rather than partisan loyalties, public approval, or political ability. By instituting periodic, uncontested retention elections,<sup>12</sup> the public would have an opportunity to evaluate sitting judges and remove those who fail to satisfy public expectations of faithful adherence to the law, ensuring a measure of public accountability divorced from the vagaries of partisan politics. The plan was thought to be a compromise between judicial independence and judicial accountability, balancing the two incompatible political goals in a workable (though undeniably imperfect) compromise.

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11. The commission, as we know it today, evolved significantly from Kales's original proposal, in which a body of judges would recommend individuals to an elected chief justice, who would make the appointment. In 1926, Harold Laski built upon the original proposal to suggest that the commission be composed of a supreme court judge, the state's attorney general, and the president of the state bar association. Thus, Laski was the first to specifically include lawyers and (at least potentially) non-lawyers in the nominating process. It was not until 1931, seventeen years after Albert Kales initially suggested a new way to select judges, that lay commission members were explicitly included. This came about as the result of one editorial in *The Panel*, published by the Grand Jury Association, which said, "[T]he article quoted does not disclose the nature or source of the proposed commission, which is the keystone of the project. But we assume that it is to be an unofficial and unsalaried commission composed of delegates from the bar and various citizen organizations." See Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure – Its Historical Development*, in JUDICIAL SELECTION AND TENURE: SELECTED READINGS 29, 34-36 (Glenn R. Winters ed., 1973).

12. Kales, in his 1914 book entitled *Unpopular Government in the United States*, was the first to propose a judicial selection system that included some form of "nominating" body (though it was to be made up entirely of judges) and regular retention elections. Though the "Kales Plan" is a forerunner to merit selection plans in place today, the only component that remains entirely true to Kales's original proposal on the topic is retention elections. Regarding retention, Kales wrote,

The appointment might be for a probationary period – say three years – at the end of which time the judge must submit at a popular election to a vote on the question as to whether the place which he holds shall be declared vacant. This is not a vote which puts anyone else in the judge's place, but a vote which can at most only leave the place to be filled by the appointing power. Such a plan must necessarily promote the security of the judge's tenure if at the popular election his office be not declared vacant. After surviving such a probationary period his appointment should continue for – let us say – six or nine years. At the end of that time the question might again be submitted as to whether his place should be declared vacant.

*Id.* at 31-33 (quoting ALBERT KALES, *UNPOPULAR GOVERNMENT IN THE UNITED STATES* (1914)).

## II. THE DEBATE OVER RETENTION ELECTIONS

Nearly a century after Kales proposed the merit selection and retention system, today's retention elections remain controversial in both theory and practice.<sup>13</sup> The unavoidable conflict between the ideal of judicial independence and the ideal of democratic accountability is institutionalized in these "clumsy institutions."<sup>14</sup> To imagine that this conflict will be resolved in any practical way is to ignore the deep foundational importance of these two ideals. To state the conflict simply, we ask that judges be held accountable to the law by the voters. In doing so, we implicitly accept several problematic implications of this arrangement. First, we accept that there is a role for public input, even if that means diminished independence for our judges and judicial institutions. Second, we accept that the vast majority of voters lack the legal knowledge to hold judges accountable to the law. Absent the requisite legal knowledge to ascertain whether a judge has followed the law in any strict sense, voters must rely on information that is easily available and understood. Third, we realize that no system of judicial selection is perfect, and the inherent tension that exists in retention elections characterizes all judicial elections.

Before addressing the ways that we can attempt to resolve the difficulties of judicial elections, it is worthwhile to assess retention elections on their face. By introducing retention elections as a central component of the merit selection (and retention) system, Kales, the American Judicature Society, and the American Bar Association believed that judges would remain accountable even absent contested elections.<sup>15</sup> Critics often charge that retention elections are ineffective in achieving an appropriate level of accountability. These charges generally come in one of two forms.<sup>16</sup> First, one common critique is that few judges actually lose a retention vote, and, therefore, retention elections do not serve their intended purpose of removing those judges who are either out of step with public opinion or, more troubling, proving to be in-

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13. Though the selection of judges has also generated intense and unyielding controversy, I leave that argument to my fellow contributors and restrict attention to retention elections.

14. Shapiro, *supra* note 4, at 1560-62. Louis Michael Seidman goes further to elucidate what he terms "ambivalence" toward the principles of independence and accountability and the contradictions engendered by this ambivalence, particularly within the context of judicial review. See Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571 (1988).

15. I use the terms "contested" or "contestable" elections to mean any electoral system (partisan or nonpartisan) in which sitting judges are confronted with a challenger.

16. For a general discussion of the critiques against retention elections, see William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340 (1987).

competent jurists.<sup>17</sup> A second critique argues that merit selection, coupled with retention elections, removes public input by “taking away the right to vote.”<sup>18</sup> In other words, some argue that retention elections do not foster the same kind of meaningful public choice that contestable elections offer.

The first charge relies on an assumption that elections are only serving their intended function when they remove incumbents from office. It is true that most incumbent judges who are subject to retention will win another term in office. Of the 6306 state court judges who were up for retention between 1964 and 2006, only fifty-six (less than 1%) were defeated.<sup>19</sup> But there is nothing inherently wise or virtuous about removing sitting judges from office. Nor is the value of an election dictated by the outcome. It is worth remembering the high rates of reelection for U.S. House incumbents. By constitutional design, members of the U.S. House are supposed to be the most direct representatives of the public will. In the case of House incumbents, there are no philosophical conflicts between the function of the office and the accountability to the public’s policy wishes – the two are directly and explicitly related. Yet House incumbents are often reelected at a rate that is nearly comparable to state judges standing in retention elections. In the 1998 congressional elections, for example, only 6 of 401 House incumbents (1.5%) lost their seat.<sup>20</sup> Although this high rate of reelection for House incumbents

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17. It is worth noting that, even among some supporters of merit selection and retention, a failure to adhere to public opinion is often assumed (implicitly or explicitly) to be a valid reason for voting against a sitting judge.

18. This language is often used by opponents of merit selection. Leading up to the 2000 elections that included local ballot initiatives to institute merit selection for Florida district court judges, an article in the *Florida Bar News*, for example, was titled *Don’t Eliminate the Right to Elect Florida’s Trial Judges*. See [http://www.childrensjustice.org/elected\\_judges.htm](http://www.childrensjustice.org/elected_judges.htm). One activist in Louisiana writes that

any attempts to change from an elected system of selecting our judges to a merit selection system will require a vote of the people. So in order to come about, the voters of this state would have to voluntarily relinquish their right to vote for judges. Why would we do that?

See <http://centrallapolitics.blogspot.com/2008/09/merit-selection-of-judges-is-not-way-to.html>. Similarly, the Associate Editor of the *Capital Times* in Madison, Wisconsin, argues, “Advocates for the backroom appointment of judges – a scheme that goes by the misnomer ‘merit selection’ – claim that taking away the power of the people to elect jurists will ‘remove politics’ from the process.” See <http://www.madison.com/tct/column/460146>.

19. Larry Aspin, *Judicial Retention Election Trends 1964-2006*, 90 JUDICATURE 208, 210 (2007). Of the fifty-six judges who were defeated in retention elections, 51.8% of them served in Illinois, which is the only state to require a 60% threshold to retain a judicial seat. *Id.*

20. On average, over 95% of House incumbents are reelected every two years. See PAUL S. HERRNSON, CONGRESSIONAL ELECTIONS: CAMPAIGNING AT HOME AND IN WASHINGTON (2007). While 1998 was particularly favorable to incumbent lawmakers, it is not an extreme outlier. See *id.*

has garnered attention and concern among scholars, there has been no assumption that the electoral mechanism itself has failed, that political parties should be more (rather than less) involved, or that more public campaign speeches or special interest money and advertising would improve the system.<sup>21</sup> Yet opponents of retention elections seem to suggest that these features of contested elections would not only improve the accountability of the judiciary but would so dramatically improve accountability as to warrant the intrusion into the unique role of the judiciary within a liberal democracy.<sup>22</sup>

Similarly, some critics of merit selection and retention elections allege that contested elections provide a means for voters to choose who will serve as a judge (the incumbent or the challenger), and this ensures that the judge will be more directly aligned with the interests of the public. Furthermore, critics argue that, even if the incumbent loses a retention election, the replacement will be chosen through a merit selection process, with little public input or control over the process, further minimizing the promise of representative jurists.<sup>23</sup> Those who favor contested elections, therefore, often base their claim on the premise of increased voter choice within a representative democracy. But even in those states that use contested elections, the vast majority of judicial seats are uncontested; voters have no choice but to retain an incumbent judge, regardless of job performance. Since 2000, 78% of contestable circuit court elections in Missouri have been uncontested. In Kansas, 85% of all elections for district court and magistrate positions have been uncontested.<sup>24</sup> In Louisiana, 74% of judicial elections from 2000-2002 were uncontested, with only 13% of incumbents facing a challenger in their bid for

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21. There are, of course, suggestions that gerrymandering, campaign finance rules, and the “perks” of the office disproportionately favor incumbents and that these factors should be the subject of increased scrutiny. But the experience of House incumbents confirms that high reelection rates are not, in and of themselves, a result of the unique nature of retention elections.

22. See, for example, William Jenkins, Jr., *Retention Elections: Who Wins When No One Loses?*, 61 JUDICATURE 79, 85 (1977), where he writes, “Thus, the system of merit retention protects the incompetent or lazy judge as well as the courageous, highly dedicated, and skilled jurist and therein lies the heart of the criticism of merit selection.” This could be said of nearly any election where incumbents do well (including House and Senate elections, state legislative elections, or local elections).

23. Most states that use retention elections also use a commission-based “merit-selection” process. Thus, in these states, a judge who loses a retention election will be replaced by a new judge appointed through that process. Two states (Illinois and Pennsylvania), however, use a combination of contested elections and retention elections, where a judge initially reaches the bench through a contested election and later runs in a yes or no retention election. See AM. JUDICATURE SOC’Y, METHODS OF JUDICIAL SELECTION: SELECTION OF JUDGES, available at [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm).

24. See AM. JUDICATURE SOC’Y, CHOOSING JUDGES: SOME FACTS, Oct. 2008, available at <http://www.ajs.org/ajs/publications/Judicatories/2008/October/Choosing%20Judges.pdf>.

reelection.<sup>25</sup> Even more, the Public Affairs Research Council of Louisiana makes special note of the fact that ten non-incumbents won an initial term on the bench without offering voters any other choice.<sup>26</sup> At the very least, retention elections provide voters with the option of voting an incumbent judge out of office should the incumbent judge's job performance warrant removal.<sup>27</sup> To dedicated adherents of judicial accountability, the guarantee that voters will have the *opportunity* to evaluate a sitting judge and make a collective decision about whether to retain a judge should make retention elections preferable to uncontested contestable elections.

Critics of retention elections are quick to dismiss their effectiveness in guaranteeing judicial accountability, either because incumbents are only rarely removed from office or because voters deserve a greater role in the process. These critiques, however, fall flat. While retention elections may be imperfect mechanisms of accountability, the alternative – contestable (and contested) judicial elections – fares no better at achieving a balance between independence and accountability.

### III. THE DISADVANTAGES OF COMPETITIVE ELECTIONS

In the current political environment, retention elections have a number of commendable features, particularly in comparison to competitive elections. The “new politics of judicial elections” have become the norm across the country in those states that use partisan and nonpartisan contestable elections.<sup>28</sup> Over the past decade or more, judicial elections have drawn considerable attention from special interest groups and campaign contributors hoping to influence the outcome. From 1994 to 1998, candidates raised a combined \$73.5 million; from 1998 to 2004, the total reached \$123 million.<sup>29</sup> Candidate spending for a single Supreme Court of Illinois seat in 2004 totaled more than \$9.3 million.<sup>30</sup> In 2006, five of the ten states that held privately

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25. Data collected by the American Judicature Society (on file with author).

26. PUB. AFFAIRS RESEARCH COUNCIL OF LA, *PAR Says Merit Selection of Judges Should Be Considered*, Apr. 24, 2003, <http://www.la-par.org/article.cfm?id=49&cateid=2> [hereinafter *PAR*].

27. Ideally, a retention election should allow voters to evaluate the performance of a judge and remove those who are not faithfully performing their job responsibilities. This should be distinguished from the opportunity to remove a judge for purely political reasons, whether a controversial decision that does not accord with public opinion but does follow the law or inflated claims made by special interest groups that the judge is “activist,” “out of touch with the public,” or “soft on crime.”

28. See Rachel Caufield, *Judicial Elections: Today's Trends and Tomorrow's Forecast*, 46 *JUDGES' J.* 6 (2007).

29. DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURT HAS REACHED A “TIPPING POINT” – AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL* 13 (2005).

30. *Id.* at 14.

financed supreme court elections broke state fundraising records, with spending for Alabama candidates alone totaling \$13.4 million.<sup>31</sup> Compare this with the (still relatively) staid nature of retention elections. While candidates in contestable elections raised a combined \$157 million between 1999 and 2006, judges standing in retention elections raised a paltry \$1.5 million during the same time frame.<sup>32</sup>

What is perhaps most disconcerting about the rising campaign spending totals is that, like other elections, the judicial candidate who spends the most money tends to win a seat on the bench. As the Public Affairs Research Council of Louisiana reports,

Campaign success is clearly linked with campaign spending. Judicial campaign finance reports from 2000 to 2002 show that 68% of the elections during that period were won by the candidate that reported the largest total expenditures. On average, winning judicial candidates spent over \$40,000 (34%) more than their second place challengers.<sup>33</sup>

This trend has been consistent for the past several election cycles. In Minnesota, six of seven contested district court elections in 2006 were won by the candidate who spent more money. In Arkansas, the highest-spending candidate won sixteen of twenty-two circuit court races in 2008. From 2002 to 2006, the highest-spending candidate won eleven of fourteen contested Nevada district court elections.<sup>34</sup> According to the *Los Angeles Times*, one Nevada state judge said, “The one standard for a judicial candidate in Nevada today is ‘How much money can you raise?’”<sup>35</sup>

Candidate spending is only one feature of these newly politicized judicial campaigns. Recent judicial campaigns have become more political and more contentious, featuring heavy involvement by special interest groups, a barrage of television advertising, and more issue-oriented campaign speech. Interest groups, seeking to have like-minded candidates elected to the state bench, have invested heavily in contestable judicial elections across the country. The U.S. Chamber of Commerce kick-started this trend in 2000, when it spent \$6 million across eight states to air television ads to affect judicial cam-

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31. JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006: HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS – AND HOW AMERICANS ARE FIGHTING BACK 15* (2007).

32. *Id.* at 59-60.

33. *PAR*, *supra* note 26.

34. Data collected by the American Judicature Society (on file with author).

35. Michael J. Goodman & William C. Rempel, *In Las Vegas, They're Playing with a Stacked Judicial Deck*, *L.A. TIMES*, June 6, 2006, available at <http://articles.latimes.com/2006/jun/08/nation/na-vegas8?pg=5>.

paigns.<sup>36</sup> In 2000, television advertising appeared in four of the eighteen states that held contested supreme court elections;<sup>37</sup> by 2006, a record \$16 million was spent to air ads in ten of the eleven states that held contested supreme court elections.<sup>38</sup> In Washington's 2006 supreme court campaign, 100% of the television ads were aired by three independent groups (i.e., groups not affiliated with any campaign organization).<sup>39</sup>

The advertising was not limited to a candidate's qualifications for judicial office. In most cases, negative ads were tailored to exploit voters' emotions based on one or two court decisions. In Washington, the following ad aired in 2006:

He was adorable. Stevie had just turned three years old before he was beaten and tortured to death. The Andress decision let my son's killer walk free after serving less than a third of his murder sentence. You could have a convicted murderer released on the Andress decision next door and you wouldn't even know it. If Justice Alexander hadn't voted for this decision this wouldn't have happened. Judge Alexander is way out of touch with this issue. I'm here supporting John Groen because John Groen is for victims and their families.<sup>40</sup>

This ad was run not by John Groen's campaign, but by a nonaffiliated group. Many candidates, however, are openly adopting overtly political messages. The U.S. Supreme Court's decision in *Republican Party of Minnesota v. White*<sup>41</sup> and subsequent lower federal court decisions have limited the extent to which a state can restrict judicial candidate campaign speech, thereby permitting a new style of candidate who overtly uses political issues to win election to the bench.<sup>42</sup>

The 2006 campaign of Alabama Supreme Court Justice Tom Parker was particularly telling in this respect. Parker made a name for himself when he attacked his colleagues for following the precedent of the U.S. Supreme

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36. DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS 28 (2001); see also Caufield, *supra* note 28 at 7.

37. GOLDBERG ET AL., *supra* note 36, at 13-14.

38. SAMPLE ET AL., *supra* note 31, at 3.

39. *Id.* at 12-13.

40. *Id.* at 13.

41. 536 U.S. 765 (2002).

42. Am. Judicature Soc'y, *Judicial Independence, Judicial Selection, and the First Amendment in the Post-White Era*, 91 JUDICATURE 135 (2007); Rachel Paine Caufield, *In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625 (2005).

Court and reversing a death sentence for a juvenile.<sup>43</sup> Parker alleged that his colleagues “passively accommodate[d] – rather than actively resist[ed] – the unconstitutional opinion of five liberal justices on the U.S. Supreme Court.”<sup>44</sup> He then used the issue to propel his campaign to challenge Chief Justice Drayton Nabers in the primary election. In doing so, he ran the following campaign ad:

[Announcer]: Nine years ago a vicious thug raped and repeatedly stabbed a pregnant woman leaving her and her unborn child to die. Convicted of rape and murder Renaldo Adams was sentenced to death, but now Adams is off death row thanks to Chief Justice Drayton Nabers and the Alabama [S]upreme Court using a 5 to 4 decision based on foreign law and unratified UN treaties.

[Parker]: Alabama courts need to stand up for American [l]aw, not foreign law. Some things are worth fighting for.

[Announcer]: Tom Parker for Chief Justice. Fair, balanced, unafraid.<sup>45</sup>

Parker lost his primary bid, but, in the course of the 2006 campaign, Alabama voters were subjected to a record-breaking 17,830 television advertising spots.<sup>46</sup>

Spending and advertising by candidates and interest groups is not necessarily a negative development. In fact, it has been suggested that these new tactics are better able to inform voters in judicial elections and therefore actually further democratic goals.<sup>47</sup> We should be careful before reaching that conclusion. Spending and advertising that rely on blatant political manipulation and narrow special interest agendas are inconsistent with the role of the judiciary in a democratic society. While candidates for legislative and executive positions may benefit from an open marketplace where they can define their own political agenda (as well as their opponent’s) relative to that of the public and ask for voters’ support, judges can and should serve a different function. In fact, voters themselves want judges to serve a different function.

Lacking enforcement mechanisms, courts are dependent on elected officials and public goodwill for their institutional legitimacy. When voters are exposed to campaigns that blur the distinction between the job of a judge and

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43. Parker had recused himself from the case because he had assisted in the prosecution of Renaldo Adams, the defendant. *SAMPLE ET AL.*, *supra* note 31, at 4.

44. *Id.*

45. *Id.* at 4-5.

46. *Id.* at 5.

47. CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* (2009).

the job of a legislator,<sup>48</sup> public confidence in the fairness and impartiality of the judicial system is diminished. Increasingly, voters are expressing concern that campaign contributions compromise the impartiality of their judges. Justice At Stake reports that 71% of Americans believe that campaign contributions have at least some influence on judges' decisions and that 82% fear that the *White* decision will result in more pressure from special interest groups for judicial candidates to take positions on social and political issues.<sup>49</sup> The Annenberg Center for Public Policy Research reports,

[L]iving in a state that holds partisan judicial elections is negatively related to the belief that the courts are interpreting the law and not legislating from the bench, and is negatively related to the belief that the courts are fair and impartial in their rulings. Living in a state that holds partisan judicial elections also leads to higher agreement with the statement that "judges are just politicians in robes."<sup>50</sup>

Even in Minnesota, a state that elects its judges in nonpartisan elections and has yet to witness a single judicial election with substantial advertising or campaign funding, 59% of citizens said that campaign contributions affect judicial decision-making.<sup>51</sup>

Relevant information may be helpful to voters, but overt politicization is not. When judicial candidates tread into the muck and mess of political campaigns – whether they do so willingly or are pushed in by unaffiliated groups – the stature, integrity, and dignity of the office are compromised, which ultimately harms citizens, judges, lawyers, business, government, and all those who value the rule of law.

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48. The Annenberg Public Policy Center reports that 75% of poll respondents say that representing the views of the people of their state applies to both state judges and state legislators; 91% believe that state judges have the job of interpreting the laws of the state and the state constitution, while 87% believe that this is the responsibility of state legislators. Survey details are available at [www.annenbergpublicpolicycenter.org](http://www.annenbergpublicpolicycenter.org). ANNENBERG PUBLIC POLICY CENTER, PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS: 2007 ANNENBERG PUBLIC POLICY CENTER JUDICIAL SURVEY RESULTS (2007), [http://www.annenbergpublicpolicycenter.org/Downloads/20071017\\_JudicialSurvey/Judicial\\_Findings\\_10-17-2007.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf).

49. Justice At Stake Campaign, March 2004 Survey Highlights: Americans Speak Out On Judicial Elections (2004) (on file with author).

50. ANNENBERG PUBLIC POLICY CENTER, *supra* note 48.

51. Minnesotans Support Efforts to Remove Special Interests from Judicial Elections (unpublished manuscript, on file with author).

## IV. RETENTION ELECTIONS

Even if they offer substantial advantages, judicial retention elections still suffer significant deficiencies, particularly when viewed in the context of the conflict between the judicial ideal and the democratic impulse. If we are to honor both values, we must assure not only that retention elections afford the *opportunity* to evaluate the performance of judges but also that voters are actually capable of doing so in a meaningful way that respects the function of the judiciary. The clashing values of an independent judiciary and public accountability can never be reconciled, but if we are to attempt to bring the two into an uneasy partnership, then the best way to do so is to foster public participation that is consistent with the rule of law. Empirical analyses of voter behavior in retention elections have consistently demonstrated a lack of knowledge about candidates and judges, as well as a lack of understanding about the operation and role of the judiciary.<sup>52</sup>

There may be some disagreement about what criteria are most appropriate as the basis for a voter's decision in a retention election. Some organized groups have argued that voters deserve to know about a judge's "judicial philosophy" – particularly as it applies to some of today's most contentious social and political issues – because of the role that judges may play in deciding cases that will alter policy on these issues.<sup>53</sup> But to allege that judges should universally be assessed based on whether they adhere to political agendas and public opinion is anathema to the unique role that we ask judges to play in refereeing these social and political questions. It is also a testament to the mainstream acceptance of legal realism.<sup>54</sup> Even if we accept the realist

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52. This lack of information is not unique to retention elections but is true of all judicial elections. Regarding nonpartisan elections in Washington and Oregon, see Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Contested, Nonpartisan Judicial Elections: A Responsible Electorate or a Problematic Public?*, 36 W. POL. Q. 241 (1983).

53. For example, James Bopp, Jr., who has successfully litigated a number of cases urging courts to loosen restrictions on judicial candidates' campaign speech, including *Republican Party of Minnesota v. White*, said, "Voters need information on the judicial philosophy of the candidates . . . . It takes campaigns and judicial free speech to ferret out judges that are prepared to legislate from the bench." Bopp has previously worked with the Christian Coalition, the National Right to Life Committee, the Federalist Society, and the Christian Broadcasting Network. See Scott Michels, *Judicial Elections Turn 'Bitter, Nasty' and Pricey*, ABC NEWS, June 19, 2007, <http://abcnews.go.com/TheLaw/story?id=3292991&page=1>.

54. In the political science community, the proposition that judges rely nearly exclusively on their personal political preferences, an intellectual cousin of legal realism, has become the dominant paradigm for studying judicial behavior. This is termed the "attitudinal model." See JEFFERY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); JEFFERY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

argument that judges' personal backgrounds and experiences *may* have some influence on their behavior on the bench, this does not imply that we must accept the normative position that they *should* be subject to evaluation by the same political criteria as candidates for legislative or executive positions.<sup>55</sup> High quality jurists of any background may develop their legal philosophy in part based on personal experience, and, in so doing, they may develop competing legal interpretations. If there were only one right answer to any legal dispute, the judge would be unnecessary – but legal questions are subject to legal interpretation on some points. To assert, however, that this explicitly makes judicial decisions the equivalent of legislative decisions or that judges are acting as political or ideological agents of the citizens neglects the very real constraints that all judges, regardless of judicial philosophy, face. In the vast majority of cases, bright-line legal rules, judicial precedent, group decision-making dynamics, and the potential for reversal on appeal will restrict the influence of any individual judge's philosophy.

For their part, voters indicate that they are skeptical of pulling judges into politics. Ninety-four percent (94%) of respondents in a national Justice At Stake Campaign survey agreed with the statement that “we need strong courts that are free from political influence,” and 62% said that they believe courts should be accountable only to the Constitution.<sup>56</sup> Yet high profile campaigns, driven by big money and special interests, undermine public faith in the ability of judges to separate their rulings from the electoral process.

#### A. *Creating a “Responsible Electorate” in Retention Elections*

Most judicial elections – partisan, nonpartisan, and retention – are low-information affairs.<sup>57</sup> Studies have indicated that partisan judicial elections

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55. See, e.g., James L. Gibson, *Nastier, Nosier, Costlier – and Better*, MILLER-MCCUNE, July 14, 2008, <http://www.miller-mccune.com/politics/nastier-noisier-costlier---and-better-495>. Only the most extreme arguments of legal realism or “attitudinalism” would suggest this result, as it presupposes that law has no (or virtually no) role to play in any judicial decision-making and, therefore, that it is entirely appropriate to use contentious political issues to evaluate judges in the same way that we evaluate legislators and executives. Although political scientists have found consistent support for the attitudinal model, researchers tend to limit their study to voting by U.S. Supreme Court Justices in highly salient issue areas. By contrast, state court judges face far more constraints on their decision-making behavior.

56. JUSTICE AT STAKE CAMPAIGN, *SPEAK TO AMERICAN VALUES: A HANDBOOK FOR WINNING THE DEBATE FOR FAIR AND IMPARTIAL COURTS* (2006).

57. This is not unique to retention elections. Even in contested elections, voters frequently report little or no information about judicial candidates. See Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1241 (2008). Among retention elections, a 1980 survey in Florida found that more than 50% of those polled did not know the names of even one incumbent judge who would

tend to hinge on a candidate's party affiliation,<sup>58</sup> and voters often cast ballots based on candidate name, gender, race, or ethnicity.<sup>59</sup> The lack of information is even greater in retention elections, largely because the typical voting cues are not available to voters. In retention elections, it is telling that judges across any one jurisdiction or state typically receive very similar vote shares, which indicates that voters do not distinguish between judges in these elections.<sup>60</sup> Research has suggested, furthermore, that retention elections are based not on the merits or performance of individual judges but on national levels of political trust.<sup>61</sup> Typically, those incumbents who do lose retention elections are local trial court judges, judges with whom voters are more likely to have interacted.<sup>62</sup>

But most voters do not interact with appellate judges and, even in trial court races, have little information to assess whether judges are making a good faith effort to apply the law and whether their manner in the courtroom is efficient, respectful, and dignified. For example, only 34% of Pennsylvania retention voters said that they felt they had "some" or "a great deal" of information about candidates for appellate judge elections.<sup>63</sup> One important indication of the lack of voter knowledge in retention elections is the extremely high rate of "ballot roll-off," where a voter will cast a vote in prominent races that appear at the top of the ballot and will neglect to vote in judicial races. As Chris Bonneau and Melinda Gann Hall found, variation in ballot roll-off is related to campaign-specific factors, and more voters participate in judicial elections when they are contested, competitive, and partisan (although this constitutes a very small number of judicial elections).<sup>64</sup> Across all state supreme court elections from 1990-2004, they found that approx-

appear on the ballot. John M. Scheb, II, *Is Anyone Listening?: Assessing Bar Influence on Merit Retention Elections in Florida*, 67 JUDICATURE 112, 115 (1983).

58. Dubois has suggested that even nonpartisan races may hinge on inferred partisanship based on the candidate's name. PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980).

59. See Norman L. Greene, *Perspectives from the Rule of Law and International Economic Development: Are There Lessons for the Reform of Judicial Selection in the United States?*, 86 DENV. U. L. REV. 53, 99-100 (2008).

60. See Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643, 681-82 (2002).

61. For example, Larry Aspin finds a correlation coefficient of .82 between indices of political trust and the affirmative vote in retention elections. Larry Aspin, *Judicial Retention Election Trends: 1964-2006*, 90 JUDICATURE 208, 208 (2007).

62. Kenyon N. Griffin & Michael J. Horan, *Merit Retention Elections: What Influences the Voters?*, 63 JUDICATURE 78 (1979). For example, Griffin and Horan note that only one of the thirteen judges who lost retention in 1978 served on an appellate court. *Id.*

63. Belden, Russonello & Stewart, *supra* note 8.

64. Melinda Gann Hall & Chris W. Bonneau, *On the Nature of Ballot Roll-off in Contemporary State Supreme Court Elections*, in IN DEFENSE OF JUDICIAL ELECTIONS 20-48 (2009).

imately 22% of all voters who participate in other elections fail to vote in judicial elections.<sup>65</sup>

With a few notable exceptions, retention elections have generally remained untouched by the recent changes in partisan and nonpartisan elections. For example, the average spending per state in the fourteen states that held retention elections in 2006 was just under \$4000;<sup>66</sup> spending in the seventeen states that held contested partisan or nonpartisan elections in 2006 averaged \$1,967,309.<sup>67</sup>

Yet the “notable exceptions” are worth some examination, as they can be instructive about the informational environment in retention elections. The most widely studied example is the defeat of California Supreme Court Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso in 1986 – the first time California voters ousted a chief justice in a retention election. The campaign against Bird, Grodin, and Reynoso focused on their voting behavior in a series of capital punishment cases, labeling them as “soft on crime.”<sup>68</sup> Although a campaign consultant who worked with Bird in early 1985 had urged her to characterize her opponents as “special interests,” she ended up running only two campaign advertisements, both of which emphasized the traditional notion of judicial independence and the unique role of the courts within a democratic society.<sup>69</sup> Similar attacks were waged against Tennessee Justice Penny White and Nebraska Justice David Lanphier in 1996. In both cases, interest groups were responsible for waging an opposition campaign focused on issue-based claims targeting specific judicial decisions to provoke public frustration.<sup>70</sup> In neither case, of course, was the public qualified to assess the legal merits of the decisions (nor were they asked to do so).

Although these politicized retention elections are occasionally successful, the overwhelming majority of retention elections remains remarkably free of money and interest-group influence. As Aspin says, “In the typical reten-

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65. *Id.* at 7 & tbl.1.

66. Pennsylvania is the only state to hold all judicial elections in odd-numbered years. In 2005, the sitting supreme court justices were attacked for approving a legislative and judicial pay raise. One justice was removed in the 2005 retention elections as a result. This was an expensive retention campaign, and if the 2005 Pennsylvania retention election is included as part of the 2006 campaign cycle, then the average spending per state rises to \$66,592. See generally Shira J. Goodman & Lynn A. Marks, *Lessons from an Unusual Retention Election*, available at <http://aja.ncsc.dni.us/courtrv/cr42-3and4/CR42-3GoodmanMarks.pdf>.

67. See SAMPLE ET AL., *supra* note 31, at 59-60.

68. John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 349-50 (1987).

69. *Id.* at 350.

70. Traciell V. Reid, *The Politicization of Judicial Retention Elections: The Defeat of Justices Lanphier and White*, in AM. JUDICATURE SOC'Y, RESEARCH ON JUDICIAL SELECTION 1999 (1999).

tion election, non-judge specific factors (e.g., political trust) play large roles, whereas judge-specific variables (e.g., a judge's controversial act, organized campaign against retention, negative recommendation from a judicial performance commission) play large roles when judges are defeated."<sup>71</sup> If retention elections are to serve their intended function – to provide a measure of public accountability within a system that attempts to insulate the judiciary from the detrimental effects of political pressure – then voters must be able to participate in a meaningful way apart from individualized campaigns that advance narrow political agendas. If we accept the value of accountability *and* we accept the role of elections in maintaining accountability and providing a check against judicial wrongdoing, then we must assess ways to disseminate information to voters in order to enable the voters to participate in a way that will preserve the integrity of the judicial system.

Nineteen states currently use retention elections to determine whether incumbent judges will remain on the bench.<sup>72</sup> Among those nineteen states, various tools have been used to disseminate information about sitting judges. Most scholarly analysis has focused on bar polls and judicial performance evaluation programs. But voter guides (whether produced by state officials or private entities), judicial questionnaires, and the media can also provide information to voters who seek to learn about their judges and make a reasoned judgment of whether the judge should remain in office. To determine which informational tools are most effective, we must survey the mechanisms that are currently in effect and evaluate their relative strengths and weaknesses.

### B. *The Role of the Bar*

A good deal of research has examined the role of the organized bar in assessing the performance of sitting judges. The bar's efforts usually take the form of bar polls. These polls, often conducted by small local bar associations, are more commonly used in those states that utilize competitive partisan or nonpartisan elections.<sup>73</sup> A number of bar associations, however, seek to collect and disseminate information about how attorneys rate a judge prior

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71. Aspin, *supra* note 61, at 210.

72. Nine states (Alaska, Colorado, Illinois, Iowa, Nebraska, New Mexico, Pennsylvania, Utah, and Wyoming) use retention elections for all of their judges; another three states (Arizona, Kansas, and Missouri) use retention elections for all appellate courts and some general jurisdiction trial courts; and seven states (California, Florida, Indiana, Maryland, Oklahoma, South Dakota, and Tennessee) use retention elections for their appellate courts but not their general jurisdiction trial courts. See AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS 4-11 (2008), [http://www.judicialselection.us/uploads/documents/Judicial\\_Selection\\_Charts\\_1196376173077.pdf](http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf).

73. Errol E. Meidinger, *Bar Polls: What They Measure, What They Miss*, 60 JUDICATURE 468, 470 (1977).

to retention elections.<sup>74</sup> The sophistication with which they do so varies greatly. Although some bar associations seek out representative samples of attorneys, most do not.<sup>75</sup> Some bar polls limit respondents to those lawyers who have appeared before a judge, but this often leads to low response rates and a reliance on self-selection.<sup>76</sup> Some state and local bar associations distill the responses to make recommendations on whether individual judges should be retained while others report only raw data that may be difficult for voters to interpret.<sup>77</sup>

Bar polls may offer some important insight into the job performance of sitting judges insofar as they rely on the expertise of members of the legal community who are familiar with legal procedures and arguments. Lawyers should, ideally, possess the professional capacity to assess a jurist's abilities without resorting to personal opinion, partisan affiliation, or sound-bite politics.<sup>78</sup> For these reasons, it is not unreasonable to think that the bar is uniquely qualified to provide information to the public regarding judicial performance; expert assessment, in turn, can convey valuable performance-related information to voters who are seeking to determine whether a judge's performance merits another term on the bench.

Just as the methodology can differ greatly, so too can the methods of dissemination of results. Most bar associations that conduct polls make the results available to the voters via a website. Most also release the results to local media outlets. In some cases, the bar may produce a unique voter pamphlet with information about the judicial branch and the judicial selection

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74. For example, the Iowa State Bar uses its judicial plebiscite (available online at [http://www.iowabar.org/NEWSROOM.nsf/\\$about!OpenAbout](http://www.iowabar.org/NEWSROOM.nsf/$about!OpenAbout)), and the Nebraska State Bar Association publicizes the results of its judicial evaluation survey (available online at <http://www.nebar.com/displaycommon.cfm?an=1&subarticlenbr=78>).

75. Meidinger, *supra* note 72, at 470.

76. In a number of states (regardless of the method of retention used by the state), bar association polls have very low response rates. Steven Flanders attributes this to the length and complexity of the survey instrument, as well as attorneys' hesitance to participate on principle. See Steven Flanders, *Evaluating Judges: How Should the Bar Do It?*, 61 JUDICATURE 304, 305 (1978).

77. Guterman and Meidinger distinguish between public service polling, where the bar is primarily engaged in public education, and special interest polling, where the bar is taking a specific position on the outcome of the election. AM. JUDICATURE SOC'Y, IN THE OPINION OF THE BAR: A NATIONAL SURVEY OF BAR POLLING PRACTICES 5-14 (1977).

78. *But see* Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 690 (2009) (attempting to show that the "lawyer class" might have political beliefs that differ from the general population); Michael E. DeBow, *The Bench, the Bar, and Everyone Else: Some Questions About State Judicial Selection*, 74 MO. L. REV. 777, 778 (2009) (suggesting that lawyer self interest may color judicial nominations).

and retention process, but these resources are often published separately from bar polls.<sup>79</sup>

What is remarkable about bar surveys, however, is how ineffective they are at influencing the vote in judicial elections. Most voters are unaware of the results, and, even when the bar actively campaigns against a sitting judge, judges rarely lose retention elections. The most widely cited examples of this are the 1976 Arizona retention elections, when the state bar association opposed retention for three sitting judges. Although 69% of voters were aware of the bar's position opposing retention, the three judges each won retention by wide margins.<sup>80</sup> Similarly, Scheb's study of Florida retention elections from 1978 to 1982 reveals that even well-publicized bar poll results had no appreciable effect on the result of retention elections.<sup>81</sup>

While members of the bar undoubtedly offer more legal expertise and more regular courtroom interaction with judges than the average voter, the bar's efforts to collectively assess the performance of judges in a meaningful way have generally fallen on deaf ears. A combination of inadequate measurement instruments and survey methods, uneven distribution, and public distrust has impeded the bar's ability to offer informed commentary and advice to voters who seek to cast an informed vote in retention elections. Lawyers have a unique and useful perspective to offer in the evaluation process. Given the limitations of bar polls, however, efforts to temper the voice of the bar by adding input from other participants in the judicial process and well-informed citizens and providing for systematic distribution of results may yield more effective mechanisms of assessment. Retention elections, as public events that demand public participation, will benefit from broader evaluation processes.

### C. *The Role of State Governments*

In some states, the government funds voter guides, judicial performance evaluations, or both. These may be separate resources, but some states combine them to produce a state-funded voter guide that provides the results generated by a state-conducted judicial performance evaluation. Each is considered separately.

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79. For example, the Nebraska Bar Association publishes its "Judging Our Judges Guidelines" with links to the results of the Bar Association's "Judicial Performance Evaluation" survey of attorneys. Both are available online at <http://www.nebar.com/displaycommon.cfm?an=1&subarticlenbr=78>.

80. See Jenkins, *supra* note 22; John A. Stookey & George Watson, *Merit Retention Elections: Can the Bar Influence Voters?*, 64 JUDICATURE 235, 236-39 (1980).

81. Scheb, *supra* note 57, at 116-17. Scheb goes so far as to say, "In the social sciences it is difficult to find variables that are so clearly uncorrelated [as bar poll ratings and the margin of victory]!" *Id.* at 117.

## 1. Judicial Performance Evaluations

In some states, a formal process of evaluating judges has been established.<sup>82</sup> These programs differ from bar surveys in substantial ways. First, the evaluation of judicial performance is conducted by a broad-based panel of lawyers and citizens under the auspices of the state government.<sup>83</sup> Second, most judicial performance evaluation programs survey not only practicing attorneys who have appeared before a judge but also jurors, witnesses, social service and law enforcement personnel, court staff, and others with direct experience with a sitting judge.<sup>84</sup> Third, the committee uses a set of criteria established by court rule or statute. Fourth, in most states that have established judicial performance evaluation programs, judges are reviewed even if they are not standing for retention, allowing regular feedback to foster self-improvement.<sup>85</sup>

Because state-funded judicial performance evaluation programs are specifically designed to provide information to voters, it is particularly important that voters are aware of the commission, understand the commission's job, and have confidence in the process and outcome. Performance evaluations can provide voters with information that is both reliable and broadly representative of all court users. One advantage of performance evaluations is that

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82. Several states use performance evaluation only for self-improvement purposes, but only states with retention elections have adopted performance evaluation programs that disseminate the information to voters. Those states are Alaska, Arizona, Colorado, Kansas, Missouri, New Mexico, Tennessee, and Utah. In Oklahoma, Chief Justice Yvonne Kauger established the Oklahoma Judicial Performance Commission in 1997 with the assistance of the state bar association. The commission only released results for the 1998 election cycle and was subsequently dissolved. See AM. JUDICATURE SOC'Y, METHODS OF JUDICIAL SELECTION: RETENTION EVALUATION PROGRAMS, [http://www.judicialselection.us/judicial\\_selection/methods/judicial\\_performance\\_evaluations.cfm](http://www.judicialselection.us/judicial_selection/methods/judicial_performance_evaluations.cfm).

83. Many commissions also include judges. See KEVIN M. ESTERLING & KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS (1998).

84. Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375, 1376-77 (2001). Several state judicial performance evaluation programs also allow or require the commission to interview the judge. See *id.*; AM. JUDICATURE SOC'Y, *supra* note 82.

85. For example, in Massachusetts, judges are appointed to age seventy, with no reelection or retention election. AM. JUDICATURE SOC'Y, *supra* note 82. State judges are, however, regularly evaluated by the Supreme Judicial Court's Judicial Performance Evaluation Committee, which requests that lawyers, court employees, and jurors submit their feedback on each judge. The information is used for self-improvement purposes. See Press Release, Supreme Judicial Court, Supreme Judicial Court's Judicial Performance Evaluation Committee Seeks Response in Evaluation of Judges in Berkshire, Hampden, Hampshire, and Franklin Counties (Feb. 25, 2008), <http://www.mass.gov/courts/press/pr022508b.html>.

they insulate the process from political manipulation. By utilizing a broad-based commission and a broad-based survey strategy, performance evaluation programs allow the public to receive information that is divorced from any specific interest or group. There are, nonetheless, concerns that, even with the procedural safeguards built into commission-based evaluation systems, these programs may inhibit judicial independence. As Griffin writes, "If a judge's right to remain a judge is dependent (or only influenced) by the will of a committee of 10 to 15 other people, sooner or later judicial behavior will be affected."<sup>86</sup>

Judges' reactions to these programs differ across the states. In Alaska and Colorado, over 75% of judges believed that the system provided meaningful information to voters, and over two-thirds of Utah judges agreed with this sentiment.<sup>87</sup> In contrast, Arizona judges were less certain, with only 44% of judges expressing confidence that the judicial evaluation reports provided meaningful information.<sup>88</sup> One study concluded that judges' perceptions are frequently influenced by the degree to which they feel that they have an opportunity to meet with and respond to the findings of the commission.<sup>89</sup>

Unlike bar association surveys, research indicates that voters do use the information obtained through performance evaluations. A 1998 study by the American Judicature Society found that 62.5% of voters in Denver, Colorado, who received the evaluation information found the information to be helpful in determining their vote (only 11% reported that they did not use the information at all).<sup>90</sup> Likewise, in Salt Lake City, Utah, 57% of respondents said that the information was helpful, and 18.5% said that they did not use the information.<sup>91</sup> Voters in Phoenix, Arizona, were the most responsive to the state's performance evaluation program, with nearly 27% reporting that their voting behavior was based exclusively on the information provided and 39% saying that the information helped them decide how to vote (while 27% reported that they did not use the information at all).<sup>92</sup> Across the board, voters

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86. ESTERLING & SAMPSON, *supra* note 83, at 6 (quoting Jacqueline R. Griffin, *Judging the Judges*, 21 LITIG. 5 (1995)). Esterling and Sampson report that Utah judges were particularly concerned about this prospect, with fully one-half of Utah judges reporting that "the evaluation process undermines my independence as a judge." *Id.* at 44.

87. ESTERLING & SAMPSON, *supra* note 83.

88. *Id.* at 43. Of the four state programs examined in this report, Arizona had the most recently adopted performance evaluation program (1992). *Id.* In contrast, Alaska's program was adopted in 1976, Colorado's in 1988, and Utah's in 1986. Therefore, judges had little experience with the performance evaluation system at the time of the survey.

89. *Id.*

90. *Id.*

91. *Id.*

92. As the study's oldest judicial performance evaluation program, Alaska had 19% of voters saying the information was the only basis for their decision, 46.9%

have indicated that judicial performance evaluations increase their propensity to vote in judicial retention elections, help them determine how to vote, provide them with greater confidence about the quality of judicial candidates, and improve judicial accountability.<sup>93</sup>

## 2. Voter Guides

Judicial performance evaluation programs, because they are specifically designed to provide information to voters in retention elections, will only be effective if their reports are well distributed among the public. But even in states that do not utilize a commission to perform performance evaluations of sitting judges, the state may choose to distribute information about sitting judges to voters. When coupled with performance evaluations, these state-based resources allow biographical information and the results of the commission's report to be widely distributed to citizens. When not coupled with performance evaluations, even a voter guide with basic biographical and background information, or a statement from the judge or judicial candidate (or both), can still provide some basis for voters' decisions. Every state that utilizes retention elections either has both a judicial performance evaluation program and a state-funded voter guide or has neither a judicial performance evaluation program nor a state-funded voter guide.<sup>94</sup> In other words, if a state offers a voter guide in retention elections, it is always coupled with a formal judicial performance evaluation. Therefore, in those states that use retention elections, it is impossible to distinguish between the influence of voter guides and performance evaluation programs in promoting informed public participation in the electoral process.

In those states that use partisan or nonpartisan elections, voter guides alone (i.e., divorced from judicial performance evaluation) have been successful in informing citizens about judicial candidates. North Carolina's Judicial Campaign Reform Act of 2002 mandated that the State Board of Elections compile, publish, and distribute a voter guide for appellate court candidates, paid for by the Public Campaign Fund.<sup>95</sup> A report by the North Carolina Center for Voter Education examined the public's response to the 2004 voter guide, finding that, among those voters who received the guide at the polling place, 38% used it as their primary source of information about

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reporting that they found the information helpful in determining their vote, and 26.6% indicating that they did not use the information at all. *Id.* at 39.

93. *Id.* at 41. For an extensive discussion of effective usage of judicial performance evaluations, see Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635 (2009).

94. See AM. JUDICATURE SOC'Y, *supra* note 82.

95. N.C. GEN. STAT. ANN. § 163-278.69.

judicial candidates; another 17% used it as a secondary source.<sup>96</sup> Similarly, those voters who received the voter guide were more likely to vote in judicial elections and less likely to rely on partisan cues when doing so.<sup>97</sup> This success could be replicated in those states that use retention elections, even absent a formal performance evaluation process.

State-funded judicial performance evaluations resolve many of the problems associated with bar polls: they rely on a wide variety of individuals who have experience in a judge's courtroom; they are implemented in a systematic way; and they can be widely distributed to voters, particularly in combination with state-sponsored voter guides. In addition, the standardized questions are directly relevant to the work that judges do and include evaluation of professional demeanor, efficiency, and clear communication in the courtroom.

#### *D. The Role of Interest Groups*

In the absence of more widespread adoption of statewide voter guides or judicial performance evaluation programs, good government and special interest groups have emerged as sources for information about judicial candidates and sitting judges. In some cases, the group serves as a clearinghouse where its members can access information about judicial elections. For example, in 2008 Lambda Legal developed its "judicial elections guide" online, where voters can access state court websites and candidates' campaign websites.<sup>98</sup> The website does not evaluate any judges' rulings or indicate which candidates are considered favorable to the group's positions.<sup>99</sup>

In other cases, a group may ask specific questions of the candidates regarding their qualifications and biographical background and make this information available to voters. In Maryland, for example, the local League of Women Voters asks questions of candidates and posts results online.<sup>100</sup> In 2008, the League collected answers to three questions: (1) "what education and life experience qualify you to hold this office?"; (2) "what is the area of greatest need in the Maryland judicial system?"; and (3) "what can be done to provide individuals with wider and better access to legal help and the legal

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96. SCOTT CROSSEN, IMPACT OF THE 2004 NORTH CAROLINA JUDICIAL VOTER GUIDE: EXIT POLL STUDY REPORT 6, available at [http://www.ncvoter.com/downloads/impact\\_voterguide\\_04.pdf](http://www.ncvoter.com/downloads/impact_voterguide_04.pdf).

97. *Id.*

98. See Lambda Legal, Judicial Elections Guide 2008, [http://www.lambdalegal.org/our-work/issues/fair-and-impartial-courts/2008\\_judicial-elections.html](http://www.lambdalegal.org/our-work/issues/fair-and-impartial-courts/2008_judicial-elections.html) (last visited Aug. 3, 2009).

99. *Id.*

100. See League of Women Voters, <http://www.lwvmd.org/vote/guides/> (last visited Aug. 3, 2009).

system?”<sup>101</sup> Similarly, the New Mexico League of Women Voters asked statewide judicial candidates four questions: (1) “How have your training, professional experience, and interests prepared you to serve on this court?”; (2) “What programs and changes to improve the New Mexico Supreme Court do you plan to implement?”; (3) “What ethical practices are critical to keep the judiciary independent from political influence?”; and (4) “What role do personal beliefs play in your judicial decision-making?”<sup>102</sup>

In the post-*White* environment, some issue-oriented groups have taken advantage of new judicial conduct rules that permit sitting judges and judicial candidates to announce their views on legal, social, and political issues and have sought to collect information about their positions on these issues. Responses have been compiled into “scorecards” and made available on a group’s website or distributed to group members through the mail or in independent campaign literature, often through the use of a “voter guide.” This tactic was pioneered by Focus on the Family and its state-based affiliates. Although questionnaires, like other campaign activities, are more frequently associated with those states that use partisan or nonpartisan contested elections, they have also been used in retention election states. In Iowa, a group called Iowans Concerned About Judges<sup>103</sup> conducted a questionnaire of sitting judges who were up for retention in 2006.<sup>104</sup> In contrast to the more general League of Women Voters questions, issue-based questionnaires like the one used in Iowa exhibit a few distinct features.

First, issue-based questionnaires from interest groups usually claim a general intent to find out about a judge’s “legal” opinions, yet the questions are explicitly geared toward understanding a judge’s personal opinions on salient issues. For example, the 2006 Iowans Concerned About Judges survey purported to seek information about a judge’s “judicial philosophy,” particularly about “judicial activism” and “judicial restraint.”<sup>105</sup> While the first

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101. League of Women Voters, 2008 General Election Voters’ Guide for Anne Arundel County, <http://www.lwvmd.org/vote/guides/VG%20Anne%20Arundel%20County.htm> (last visited Aug. 3, 2009).

102. League of Women Voters of New Mexico, LWVNM 2008 Voters Guide, <http://www.lwvnm.org/VGuide2008/state.html#supreme> (last visited Aug. 3, 2009).

103. The group is a coalition of the American Family Association, Concerned Women for America of Iowa, Focus on the Family, Iowa Christian Alliance, Iowa Family Policy Center, and Professional Educators of Iowa. Iowans Concerned About Judges, 2006 Judicial Voters’ Guide Questionnaire for Judicial Candidates, <http://www.iowajudges.org/doc/Survey.pdf> (last visited Aug. 3, 2009).

104. Their website is [www.iowajudges.org](http://www.iowajudges.org), and the survey is available at [www.iowajudges.org/doc/Survey.pdf](http://www.iowajudges.org/doc/Survey.pdf).

105. The survey introduction includes the following statement:

We believe that most Iowa judges practice judicial restraint and do not improperly legislate from the bench. However, judicial activism has crept into the American judiciary, and we hope to bring appropriate and reasonable voter accountability to the Iowa judiciary, as part of our system of

few questions broadly addressed some combination of “activism” and proper judicial conduct,<sup>106</sup> other questions were directed at whether a judge agreed or disagreed with the outcome of specific U.S. Supreme Court decisions that the group deemed politically important.<sup>107</sup> The survey concluded by asking judges about their political philosophy and demanding that they identify all organizations with which they have been affiliated over the last twenty years.<sup>108</sup> Iowans Concerned About Judges posted all responses on their website, though nearly every response was a letter explaining the judge’s reasons for not answering the questions as they are posed in the survey. The irony, of course, is that state court judges will be required to follow the precedent set by the U.S. Supreme Court (or any higher court) should the question come before them. Failing to do so based on personal opinion would be, undoubtedly, “legislating from the bench.” Thus, one could argue that these issue-based questionnaires are actually encouraging a type of judicial activism.<sup>109</sup>

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merit selection and retention, to see that judicial activism does not become a problem in the future.

Iowans Concerned About Judges, 2006 Judicial Voters’ Guide Questionnaire for Judicial Candidates, <http://www.iowajudges.org/doc/Survey.pdf> (last visited Aug. 3, 2009).

106. *Id.* Here, I use “activism” in the sense that it is used by this particular organization, that is, some notion that judges “legislate from the bench.” Many legal scholars debate the term, and popular political rhetoric has oversimplified the debate about the role of the judiciary relative to the legislative and executive powers into a dichotomous choice between “activism” and “restraint.” A further discussion of this rhetorical confusion is beyond the scope of the present Article, however.

107. Including, for example, *Roe v. Wade*, *Vacco v. Quill*, *Kelo v. City of New London*, and *Stone v. Graham*. *Id.*

108. *Id.* In the first instance, the survey asks the judge, “Which of the following former U.S. Presidents best presents your political philosophy?” followed by a list of John F. Kennedy, Jimmy Carter, Ronald Reagan, George H.W. Bush, and Bill Clinton. *Id.* Why these presidents are listed and others are not is unclear. The survey includes a list of organizations and asks judges to

put a check . . . by each and every organization (national, state, or local chapter) listed below which, in the last 20 years, ha[s] been applicable to you: been a member, contributed money, volunteered time, been employed by, been endorsed by for a campaign, received money from for a campaign or had any other affiliation.

*Id.* Although there is no explicit statement of why this information would be relevant or helpful, two possible explanations emerge. First, it is possible that this group sees this as a way to identify the judge’s ideology. Second, the long time range and broad range of “affiliations” may make this a good way to target judges for “lying” about their group memberships in the past should they overlook any single group.

109. This same argument holds for Tom Parker, the candidate for Alabama Chief Justice who attacked his colleagues for being “activist” when they followed U.S. Supreme Court precedent. Parker’s campaign explicitly endorsed “legislating from the bench” by telling voters that the state court should have deviated from Supreme

The second common feature of these surveys is the pressure they put on judges to implicate the state canons of judicial conduct, which can subsequently be used to challenge those canons. In 2006, the Florida Family Policy Council sent out a similar survey;<sup>110</sup> 90% of responses indicated that judges were unwilling to respond based on their knowledge and acceptance of the canons and, specifically, recusal standards in the state.<sup>111</sup> This led the Florida Family Policy Council to file a lawsuit challenging the recusal canon.<sup>112</sup> Similar cases have been initiated in Kansas and North Dakota. As Terry Carter writes in the *National Law Journal*,

The evolving cat-and-mouse game with judicial election questionnaires has gotten faster and finer as it moves into the corners –

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Court precedent to arrive at a politically preferred outcome. *See supra* text accompanying notes 42-45.

110. *See* Florida Family Policy Council's Revised 2006 Statewide Judicial Candidate Questionnaire, [www.floridafamilypolicycouncil.net/uploadfile/Judicial%20Voter%20Guide/Beer,%20Jerald.pdf](http://www.floridafamilypolicycouncil.net/uploadfile/Judicial%20Voter%20Guide/Beer,%20Jerald.pdf). The Florida Family Policy Council survey was superior to that distributed by Iowans Concerned About Judges because the rulings included in the survey were all Florida court rulings. *Id.* Nonetheless, the survey is organized around the same flawed logic – i.e., that asking candidates' personal opinions on controversial cases and supporting those who personally adopt positions similar to that of the group, with no reference to the application of legal precedent, is endorsing "judicial activism" as the group itself defines the term.

111. Like most surveys of this type, judges are offered several possible answers: agree, disagree, undecided, decline to respond\*, and refuse to respond. *Id.* The asterisk following "decline to respond" corresponds to the following statement printed at the bottom of the page:

This response indicates that I would answer this question, but believe that if I did so, then I would be required to recuse myself as a judge in any proceeding concerning this answer because of Florida Canons 3E(1) and 3E(1)(f), which require a judge to disqualify himself or herself when "the judge's impartiality might reasonably be questioned" or when he or she "has made a public statement that commits, or appears to commit, the judge with respect to (i) parties or classes of parties in the proceeding; (ii) an issue in the proceeding; or (iii) the controversy in the proceeding." In this regard, my opinion is informed by Florida Supreme Court Judicial Ethics Advisory Committee Opinion No. 06-18 (Aug. 7, 2006), which states that "it must be remembered that when considering motions for disqualification, the 'eye of the beholder' is the primary focus . . . [T]he dispositive question is . . . whether the individual 'beholder's' fear of partiality is reasonable, reasonableness being determined by a neutral and objective standard . . . [T]he judicial candidate must not furnish answers that appear to bind the candidate if such issues arise once the candidate has assumed judicial office."

*Id.*

112. A U.S. district court ruled that the recusal canon was constitutional. *See Fla. Fam. Pol'y Council v. Freeman*, 561 F.3d 1246, 1248-49 (11th Cir. 2009).

most significantly since the 2000 elections. Many questionnaires now ask candidates who decline to answer to check blocks indicating why, and one choice concerns the possibility of violating ethical canons.<sup>113</sup>

Because the questionnaires include language about the requirements of the canons, the group can frame judges' hesitance to answer questions in a way that will prove effective in the next lawsuit.<sup>114</sup> As a result, the National Ad Hoc Advisory Committee on Judicial Campaign Oversight specifically advises judicial candidates to "never use a judicial Canon to justify a decision not to respond."<sup>115</sup>

Third, groups use the exercise of administering questionnaires as a way to contribute to their strategic communications about the courts, relative to political issues. For example, in discussing the Iowa questionnaire, President of the Iowa Family Policy Center, Chuck Hurley, wrote the following on the group's website:

Leading up to the 2006 election, IFPC joined with several pro-family groups to form Iowans Concerned About Judges. This joint effort, collectively representing tens of thousands of Iowans, was not enough to convince Iowa Judges to tell us their judicial philosophy by answering the questionnaire. Our group agreed with the 2002 US Supreme Court *White* decision, which said: "voter ignorance" concerning judges is wrong and should end; questionnaires like ours allow judges to remain impartial; and judges who state their judicial philosophy, show that they are more qualified to serve. Sadly, the Iowa judicial branch, with very few exceptions, disagrees . . . That is why I personally cannot in good conscience vote to "hire" judges who refuse to tell me what they believe on issues like life, marriage, and parental rights, and whether they believe in judicial restraint or activism. Sadly, I, as a private citizen,

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113. Terry Carter, *Loaded Questionnaires?: Judicial Candidates Advised to be Wary of Answers Inviting Suits Challenging Canons*, ABA J., Feb. 8, 2006, <http://www.judicialaccountability.org/articles/judgescampaigning.htm>.

114. These lawsuits have been coordinated by James Bopp, who argued the *White* case before the Supreme Court. *Id.* Bopp has carefully constructed a strategy to challenge the "pledges and promises" clause, the "commit" clause, and recusal canons in several states and has been successful in many cases. *Id.* The National Ad Hoc Advisory Committee on Campaign Conduct advises judges and judicial candidates to respond to surveys in a letter, with specific advice that they not refer to the canons in doing so. Memorandum from the Nat'l Ad Hoc Advisory Committee on Jud. Campaign Oversight (Aug. 29, 2008), available at [http://www.judicialcampaignconduct.org/2008%20Updated%20Advice\\_on\\_Questionnaires.pdf](http://www.judicialcampaignconduct.org/2008%20Updated%20Advice_on_Questionnaires.pdf) [hereinafter Memo on Jud. Campaign Oversight].

115. Memo on Jud. Campaign Oversight, *supra* note 114.

am compelled to cast a “NO” vote on each and every judicial retention vote until their refusal to answer pertinent questions ends. Even though I’m guessing there are some judges who believe in judicial restraint, and who recognize life, marriage, and parental rights as sacred and in need of protection, they won’t get my “Yes” vote until they say so . . . For conscientious voters, ignorance is NOT bliss.<sup>116</sup>

This statement mischaracterizes the *White* decision and demands judicial participation in the survey under the guise of informed voting in retention elections. In doing so, Hurley’s reference to specific policy goals is telling, particularly under the banner of “judicial philosophy.” Although voters who share these policy goals may be anxious to get and use information about a judge’s personal opinions, to say that this represents a respectful and appropriate effort to educate the public in a way that is consistent with the impartiality of the judiciary is disingenuous at best.

## V. WHAT WORKS AND WHAT DOES NOT

There is no question that voters need more and better information if we expect that retention elections will serve their intended purpose. If we want a true measure of public accountability that will reward effective administration, dignified courtroom interactions, and adherence to the law even in the face of unpopular decisions, then we need to promote informational resources that will allow voters to make meaningful assessments based upon these goals. Not all information is created equal, and the philosophical disconnect between majoritarian democratic ideals and judicial independence can inform how we think about the most effective means to educate the public. Some, like the Iowa Family Policy Center (and any number of like-minded groups) and a handful of political scientists who strongly adhere to the attitudinal model, have generally accepted the proposition that “accountability” means that judges can and should be held to account if their decisions do not accord with the preferences of the citizenry, in much the same way that a legislator or executive would be.<sup>117</sup> Instead, I propose that we attempt to foster a more complex understanding of judicial accountability within a democratic society by fostering means of assessment that allow the public to hold judges to the law rather than majoritarian preferences.

To be useful, I argue that information should be (1) consistent with the rule of law and respectful of the role of courts in a democratic society; (2) widely available and useful to the voting public; (3) fair, consistent, and representative of a judge’s performance in office; and (4) based on procedural

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116. Iowans Concerned About Judges, [www.iowajudges.org](http://www.iowajudges.org) (last visited Feb. 3, 2009).

117. See, e.g., BONNEAU & HALL, *supra* note 47.

and administrative criteria that encompass the vast majority of a judge's work rather than a small number of controversial or politically charged individual case outcomes.

How, then, does each of the mechanisms for informing voters fare under these criteria? Certainly, interest-group questionnaires conducted by issue-based advocacy organizations, as they have been implemented so far, violate conditions (3) and (4). Even if the results are widely distributed, questions that pertain to a judge's personal opinions about controversial state and federal case outcomes do nothing to foster informed citizen understanding of the work that a judge has done in the courtroom, the degree to which the judge remains faithful to the law, or whether a judge is respectful and fair in judicial proceedings. In other words, the information provided by these advocacy questionnaires is simply irrelevant to the job of a judge.<sup>118</sup> As such, questionnaires by issue-oriented organizations that seek to ascertain a candidate's personal opinions on policy questions also violate condition (1).

Similarly, the growing phenomenon of interest-group advertising in judicial elections, often focusing on negative messages pertaining to one or two case outcomes or politically salient issue areas, is inconsistent with a sound understanding of what judges do (violating condition (4)). Most third-party ads, though they certainly satisfy criterion (2) in that they are widely viewed by voters, misrepresent the work of a judge and the outcome of a few specific cases and offer no meaningful way for a judge to respond; they therefore fail to satisfy criterion (3). By emphasizing the ideological, sensational, and politically-charged aspects of the judge's work, they fail to promote public respect for and understanding of the unique role that courts play within a tripartite system of democratic government.

Interest groups of all stripes, however, seek to gather and disseminate information. Some, like the League of Women Voters, restrict their inquiry to assessments of procedural, administrative, and systemic issues that do have a direct impact on the work that a prospective judge is likely to perform on the bench. By focusing on questions that specifically allow a candidate to demonstrate knowledge of and interest in the institution, these questions more accurately reflect the kind of substantive expertise that is pertinent to the job (condition (4)). More importantly, perhaps, these questions allow judges or judicial candidates to express their own understanding of the judicial function rather than adhere to a group's definition of the social and political role of

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118. The National Ad Hoc Committee on Judicial Campaign Oversight advises judicial candidates to respond to questionnaires with a letter because, as they put it, a letter is an opportunity to educate voters on the role of judges and judicial independence and impartiality – and about yourself! . . . Candidates' letters might express their concern that completing the questionnaire will mislead voters about the relevance of any judges' personal views and the relevance of the issues raised in the questionnaire to being a judge since so few cases concern such issues.

Memo on Jud. Campaign Oversight, *supra* note 114.

courts.<sup>119</sup> Although these public interest organizations generally do not solicit information about the judge's performance from those with whom the judge works (including lawyers, jurors, social service personnel, or the parties who appear before the judge), these efforts come closer to satisfying conditions (1) and (3) than do questionnaires distributed by advocacy groups. Whether the responses to the questions are well distributed and voters are aware of the resource are other potential problems, and the methods and success of distribution vary widely depending on funding. When public interest groups like the League of Women Voters are able to compile the information into a widely distributed voter guide, these responses can be helpful in educating the public about the courts, the candidates, and the job of a judge.

The organized bar's efforts to evaluate judges and provide information for voters have been generally unsuccessful, insofar as voters seem unwilling to follow the recommendations of the bar. Nonetheless, surveys of lawyers who appear before the judge will be more likely to focus attention on the daily responsibilities and courtroom performance of sitting judges. Because the range of respondents is typically small and constrained to active members of the bar, the usefulness of results is questionable, as they give voters no contextual knowledge of who the judge is or what the job is.<sup>120</sup> Judges, for

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119. For example, the New Mexico League allows the judge to put forward a vision of the office, the institution, and the justice system that will, ultimately, tell more about the judges' own qualifications and approach to the position than will a list of questions about their own personal opinions by requesting that judges answer the following questions: (1) "How have your training, professional experience, and interests prepared you to serve on this court?"; (2) "What programs and changes to improve the New Mexico Supreme Court do you plan to implement?"; (3) "What ethical practices are critical to keep the judiciary independent from political influence?"; and (4) "What role do personal beliefs play in your judicial decision-making?" See League of Women Voters of New Mexico, *supra* note 102.

120. Steven Flanders, in his analysis of bar polls, goes so far as to suggest that short media profiles of sitting judges based upon a series of confidential interviews is more likely to give voters an accurate picture of whether a judge deserves to remain in office. See Flanders, *supra* note 76, at 309. *Philadelphia* magazine published profiles like these:

Judge A. Temperament: Excellent. Ability: Excellent. Most say he's the best on the current bench; all agree he's a fine judge. Vigorous, intelligent, amply equipped to handle any kind of case. "Maybe not quite up to [judge] \_\_\_\_\_, but a fine, well-balanced judge." Humane, compassionate, liberal. Excellent administrator. A favorite of former Senator \_\_\_\_\_, who got him his appointment.; Judge B. Temperament: Good. Ability: Poor to mediocre. The nicest thing anyone said about him is that he keeps out of the lawyers' way in a trial and tries to be fair, and only one lawyer said that. A former lieutenant governor of Pennsylvania, he at least looks like a judge and has a resonant voice to go with it; was once a radio announcer. He gets into the press in ways most judges disapprove, was recently roasted for handing out trusteeships to friends and former business associates like Councilman \_\_\_\_\_. Lacks compassion.

their part, often find bar polls problematic because the survey methodology is questionable. Bar polls typically rely on a small sample, which can yield unreliable results.<sup>121</sup> Thus, this particular practice may satisfy condition (4), but criteria (2) and (3) are not met.

State-funded voter guides, particularly when paired with formal judicial performance evaluation programs, offer a systematic way to inform voters about the performance of sitting judges. Because they are funded by the state, wide distribution is guaranteed (condition (2)). Government-sponsored voter guides often provide a brief biographical sketch of the judge (or candidate) and may allow each candidate to contribute a personal statement. In California, for example, circuit court candidates may opt to include a personal statement but, should they choose to do so, will then be asked to pay their share of printing and mailing.<sup>122</sup> In Michigan, each candidate can submit a statement of up to three hundred words.<sup>123</sup> Some states include information about what judges do, the role of the courts, and the qualities that are preferable in a judge.<sup>124</sup> In those cases, voter guides can be a useful tool in promoting responsible public involvement in judicial campaigns while educating voters about a judge's background, qualifications, and performance (satisfying conditions (2) and (3)). Because of the variation, however, it is difficult to say that government-sponsored voter guides will universally offer the information voters need to make a responsible decision in retention elections. They do, however, come closer to the ideal than do voter guides sponsored by advocacy groups with issue agendas.

In those states that use retention elections, voter guides are always paired with judicial performance evaluations (and a judicial performance evaluation is always paired with a voter guide).<sup>125</sup> Judicial performance evaluations that rely on input from a broad range of people who have interacted

*Id.*

121. *Id.* at 305.

122. AM. JUDICATURE SOC'Y, JUDICIAL CAMPAIGNS AND ELECTIONS: VOTER GUIDES, [http://www.judicialselection.us/judicial\\_selection/campaigns\\_and\\_elections/voter\\_guides.cfm](http://www.judicialselection.us/judicial_selection/campaigns_and_elections/voter_guides.cfm).

123. *Id.*

124. For example, in Kentucky, virtually every judge was up for reelection in 2006. The state's Judicial Campaign Conduct Commission issued a press release before the 2007 elections which read (in part) as follows:

The public deserves judges who are open-minded and decide cases **impartially**, based on the facts and law of a particular case. Candidates may state their views on legal and political issues, but according to court rules, they may not indicate how they might rule on a matter. Voters should choose candidates on the basis of their complete records, and remember that the best judges are those who aren't afraid to make decisions that might be unpopular.

Press Release, Some Elections are About More Than Democrats and Republicans (Sept. 8, 2007), available at <http://www.loubar.org/JCCC/KJCCChome.htm>.

125. See AM. JUDICATURE SOC'Y, *supra* note 82.

with the judge allow for a fairly comprehensive assessment of the judge's strengths and weaknesses. Most performance evaluation programs include a bipartisan commission that oversees the evaluation process and compiles the information, which helps to promote fair and accurate information divorced from narrow political agendas.<sup>126</sup> Alaska established a state-funded judicial performance evaluation program in 1975 as a means to improve retention elections.<sup>127</sup> The state distributes surveys to "attorneys, peace and probation officers, court employees, jurors, and social workers, guardians ad litem, and volunteer children's case officers."<sup>128</sup> Alaska's broad-based survey is, like many state programs, designed to ensure a meaningful evaluation process that reaches across the universe of court users to solicit feedback.<sup>129</sup> Unlike bar polls or interest-group surveys, judicial performance evaluations are based on actual courtroom behavior (condition (4)), and the process is open to all who participate in the judicial process. Furthermore, performance evaluation programs, and the voter guides that publish the results, have been effective at educating the public and encouraging voter participation in retention elections (condition (2)).<sup>130</sup> Although some judges worry that judicial performance evaluation will intrude upon judicial independence, other judges report that they feel as though the process is fair, is consistent, and accurately represents their performance (condition (3)).<sup>131</sup> And, more than most educational efforts, judicial performance evaluations and voter guides are superior in their non-partisan, non-issue-based orientation (condition (1)).<sup>132</sup>

## VI. CONCLUSION: MAKING RETENTION ELECTIONS WORK

When we ask judges to stand for election, we implicitly demand that each will navigate the conflict between the judicial ideal and the democratic impulse. We ask that they remain faithful to the law but accountable to voters. This is a daunting task, not because judges are incapable of following the law and making difficult decisions based upon their understanding of what

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126. *See id.*

127. *See id.*

128. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA'S JUDGES: 1984-2007, at 33 (2008), available at <http://www.ajc.state.ak.us/Reports/JudgeProfile08.pdf>.

129. Alaska Judicial Council, Judicial Selections, <http://www.ajc.state.ak.us/> (last visited Sept. 1, 2009).

130. *Id.* at 9. The Alaska Judicial Council notes that approximately 84-87% of all voters participate in judicial retention elections. *Id.* at 36.

131. Justice at Stake Campaign, Justice at Stake – State Judges Frequency Questionnaire, available at <http://www.gavelgrab.org/wpcontent/resources/polls/JASJudgesSurveyResults.pdf>.

132. Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure – Its Historical Development*, in JUDICIAL SELECTION AND TENURE: SELECTED READINGS 43 (Glenn R. Winters ed., 1973).

the law demands in each case, but because they know their performance of that task will be assessed by voters who do not possess the same knowledge of the law or the case facts. Retention elections were thought to provide a mechanism by which voters could evaluate judges individually, based upon how effectively they served on the bench, and determine whether their work merited additional terms of office.

But, if retention elections are to work, they cannot be exercises in uninformed, misinformed, or capricious public pronouncements on judicial performance. To that end, careful consideration of how citizens can get the information that they need (and want) to make a responsible choice and how states can facilitate citizens' understanding of their courts, their judges, and the judicial process is a significant undertaking. Although retention elections are frequently criticized for being "nonpartisan and issue-less, typically generat[ing] little publicity and less voter interest,"<sup>133</sup> this characterization is as much a reflection of a failure to promote responsible participation as a statement of the innate qualities of the process.

In our search for effective ways to gather and disseminate information that can advance active and informed participation in judicial retention elections, however, we need to be constantly mindful of the value of fair and impartial courts and resist the temptation to sacrifice the integrity of our judicial system on the altar of public accountability. It is extraordinarily difficult to find an appropriate balance between two equally compelling democratic ideals. If retention elections (or any judicial elections) are to work, however, it is essential that we work toward that goal by developing effective sources of information while remaining committed to the rule of law and respecting the unique role of judicial institutions.

We will never fully reconcile our contradictory ideals and are, therefore, fated to continue debate about the appropriate balance between independence and accountability. The absence of an accepted equilibrium, however, does not absolve us of the responsibility to embrace the most appropriate means of addressing the conundrum. Given the available mechanisms of public education at this juncture, formalized judicial performance evaluation programs with results widely distributed in a voter guide are demonstrably superior in achieving this objective.

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133. ESTERLING & SAMPSON, *supra* note 83, at 3.