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## Voter Ignorance and Judicial Elections

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INTRODUCTION

IMAGINE you are in the midst of your first term as a state court trial judge. On your current docket are two cases. The first is a criminal trial involving a defendant charged with committing a violent crime. The second is a civil case regarding the constitutionality of the state legislature's recent tort reform bill. Like most judges in the United States, you are an elected official. In two years you will be up for re-election.

In the criminal case, you are about to rule on an evidentiary motion that is likely to decide the outcome of the case. The defendant has argued that the police improperly entered and searched his home in violation of the Fourth Amendment and its state analogue, and that all the fruits of the search must be excluded from evidence. Without this evidence, the prosecution's case will likely collapse. As you sit in your chambers trying to decide how to rule, you are probably thinking about many things: the scope of the Fourth Amendment and the constitutionality of warrantless searches; the applicability of the exclusionary rule; and the precedent set by the state and federal appellate courts. All these factors cut in one direction: the search was improper, and the evidence must be excluded.

But there is something else that you cannot ignore. A few years ago, one of your judicial colleagues had ruled in favor of a criminal defendant on a similar evidentiary motion. After the prosecution dropped the case, the defendant went on to commit another crime. In the next election, that decision on a simple pre-trial motion—a decision that was undoubtedly correct, perhaps even required, as a matter of state and federal constitutional law—cost your

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colleague his job. The advertisements against him were relentless. The most effective one proclaimed that your colleague “worked to put criminals on the street, finding loopholes to set them free. Those defendants then went on to commit more crimes.” “Can you feel safe,” the narrator ominously intoned, “with judges like [your colleague] on the court?”<sup>2</sup> Now, despite your obligations to support the state and federal constitutions, and despite your ethical duty to remain independent and impartial, you cannot help but worry that ruling in favor of the defendant may cost you your job as well.<sup>3</sup>

The civil case offers a similar, but distinct, challenge. Your chambers have been flooded with amicus briefs from all the major corporations—and likely future corporate defendants—in the state. Based on your research and understanding of the law, the statute, which limits the amount of damages a plaintiff can recover in a civil suit, violates the state constitutional right to a trial by jury. And you are fairly certain that the public is on your side. Surveys show that most people in the state oppose the law.

But here, too, you worry about striking down the statute, although the nature of your concern is slightly different. Some of the biggest contributors to judicial election campaigns in your state are insurance companies, including the defendant in the case under consideration. These corporate heavyweights have just spent millions lobbying the state legislature to get the law passed. If you strike it down, you anticipate that they will spare no expense to get you out of office. They are likely to succeed. And although tort reform is neither salient nor popular with the voting public, the insurance companies will direct their money into ads on issues that are salient, issues like crime and punishment.<sup>4</sup> In fact, you believe that they were behind some of the ads that cost your colleague his judicial office. Again, you know that your obligation is to uphold the state constitution, but you also understand that a ruling against the insurance industry in this case may cost you your job.

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2 This hypothetical advertisement is based on an actual video run in the 2008 Wisconsin election against then-justice Louis Butler. The advertisement can be seen at <http://youtube/ihaqLYBicwo>. Partly as a result of this advertisement, Louis Butler lost the 2008 election to current justice Michael Gableman. See Norman L. Greene, *Perspectives from the Rule of Law and International Development: Are There Lessons for Reform of Judicial Selection in the United States?*, 86 DENV. U. L. REV. 53, 99 n.187 (2008) (discussing the 2008 campaign between Louis Butler and Michael Gableman). This advertisement is representative of judicial election ads across the country.

3 Your concerns are reasonable. Many judges have lost their elections after being labeled soft on crime based on decisions in individual cases. See Amanda Frost, *Defending the Majoritarian Court*, 2010 MICH. ST. L. REV. 757, 760.

4 Special interests often focus their spending on hot-button issues that are salient with the electorate, even if the judge's rulings on those issues are not central to the group's agenda. See Melissa S. May, *Judicial Retention Elections After 2010*, 46 IND. L. REV. 59, 71-72 (2013).

Proponents of judicial elections had two objectives: more judicial independence and more judicial accountability.<sup>5</sup> Today's judicial elections, characterized by record-high spending and aggressive media campaigns, threaten judges' ability to remain independent and impartial on the bench. At the same time, the voters, ignorant of judicial decisions and misled by deceptive television advertising, are unable to hold judges accountable for erroneous decisions, clear bias, or even unethical conduct. No wonder then, that a judge famously likened the prospect of facing voters in judicial elections to having a crocodile in the bathtub.<sup>6</sup>

Although many have written about judicial elections,<sup>7</sup> this Article proposes a new approach to solving the judicial elections riddle. It focuses directly on what I perceive to be the root of the problem: voter ignorance that has led to judicial fear. The fear is not always of an outraged public holding the judge accountable for a decision the voters dislike.<sup>8</sup> Instead, it is the fear of uninformed voters removing a judge from office because they are misled by deceitful advertisements and have inadequate information to even understand the judge's decision(s). Few voters can evaluate judicial performance based on their limited knowledge about judges or judging. My solution to this problem is to provide voters with the information they need to evaluate judicial candidates directly on the ballot. Not only will these notations help voters cast more intelligent and competent votes, but judges will be less fearful of the electorate when deciding cases.

This Article proceeds as follows. Part I begins by offering a brief history and background of judicial elections in the United States. It then describes the two major justifications for judicial elections. The first, made by the original proponents of judicial elections, is that elections would make judges more independent, freeing them to make decisions according to the requirements of the law. I call this the "independence theory of judicial elections." The second justification, made frequently by defenders of judicial elections, is that judicial elections allow the electorate to hold judges accountable for mistakes, whether intentional or unintentional, as well as improper or unacceptable conduct in office. This I call "the accountability theory of judicial elections." Although

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<sup>5</sup> See *infra* Part I.B.1–2.

<sup>6</sup> Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

<sup>7</sup> It has been suggested that more has been written about judicial selection than any other topic in law. See, e.g., Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. (SPECIAL ISSUE) 31, 31 (1986) ("[I]t is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past fifty years as the subject of judicial selection.")

<sup>8</sup> This certainly can, and does, happen. The recent experience in Iowa provides a great example. After the Iowa Supreme Court struck down a state statute defining marriage as between a man and a woman, three of the justices that joined the court's unanimous decision lost their retention election after a heated campaign focused almost solely on the court's same-sex-marriage ruling. May, *supra* note 4, at 61–64.

judicial independence and judicial accountability are often thought to be at odds, I conclude that in the context of the original visions of judicial elections they are two sides of the same coin: judicial elections were intended to make it easier for judges to follow the law (the judicial independence side of the coin), while at the same time making it easier for the public to ensure that judges are indeed following the law (the judicial accountability side of the coin).

Part II argues that these visions have both failed, and they have failed for one very important reason: voter ignorance. In Part II, I begin by presenting evidence that the public is particularly uninformed when it comes to judicial candidates and judicial elections. While voters can often make up for their political ignorance in other elections by relying on cues and heuristics such as party labels and the candidate's previous performance or particular votes, few such cues are available to voters in judicial elections. And the ones that are available are generally of such poor quality that they hinder rather than promote voter competence. Part II then argues that public ignorance undermines both judicial accountability and judicial independence. Worse still, it breeds judicial fear. This fear leads to unsatisfactory results, including decisions and decision-making procedures entirely at odds with the judicial role.<sup>9</sup> Any solution to the problem of judicial elections, therefore, must address the twin issues of public ignorance and judicial fear.

In Part III, I make a novel proposal designed to address the twin problems of public ignorance and judicial fear. The proposal calls for states that elect judges to make greater use of ballot notations—relevant information provided directly to the voters on the ballot. Surprisingly, judicial election scholars have not studied how changes to the ballot itself might help cure voter ignorance and restore the original vision of judicial elections.<sup>10</sup> Part III begins by describing ballot notations and states' efforts to implement ballot notations beyond mere party labels and incumbency status in other kinds of elections. Part III then argues that ballot notations are particularly promising in the context of judicial elections. Most importantly, Part III proposes a specific notation that the states should implement. I recommend that states use a non-partisan judicial performance evaluation commission to assess the performance of any candidate with prior judicial experience, and notify the voters (again, directly on the ballot) how the candidate performed while in office with respect to certain objective and subjective measures. Part IV answers some potential objections to my proposal.

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<sup>9</sup> Here, I rely on studies showing that judges nearing elections frequently tailor their decisions to perceived public preferences, as well as to the wishes of campaign contributors. *See, e.g.,* Frost, *supra* note 3, at 760–61.

<sup>10</sup> A seminal article on ballot notations generally is Elizabeth Garrett's *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533, 1539–40 (1999). Garrett's terrific article discusses special interest groups' practice of placing notations on ballots but does not address the use of ballot notations in judicial elections.

The Article's conclusion is not that ballot notations will remove all of the challenges associated with judicial elections. They are not perfect solutions. But even partial solutions hold value in this context, for judicial elections are an entrenched reality of our political system, and few other reform proposals hold much promise. Ballot notations, by contrast, could make a large improvement in judicial elections, and that improvement is well worth pursuing.

## I. THE ORIGINAL VISION(S) OF JUDICIAL ELECTIONS

### A. *The History of Judicial Elections*

To understand the judicial election debate today, it is important to appreciate both the history of judicial selection in the United States and the different judicial election methods used throughout the states. At the time of the founding, none of the thirteen original states elected their judges.<sup>11</sup> Generally, state judges were appointed either by the state legislature or by the legislature acting together with the governor.<sup>12</sup> Most appointed judges served for life under the “good behavior” standard that was ultimately adopted for federal judges by the U.S. Constitution.<sup>13</sup> In other words, state judicial selection and retention mechanisms generally mirrored the model that the framers in Philadelphia ultimately adopted for the federal judiciary.

Both practices—appointment by elected officials and life tenure—began to disappear in the 1830s and 1840s.<sup>14</sup> Life tenure was the first to go as states adopted shorter terms for their state judges.<sup>15</sup> Nearly every new state that joined the Union in the nineteenth century either established limited terms for its judges or switched to limited terms (after initially adopting the good behavior

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<sup>11</sup> Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction—Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 856 tbl.1 (2012). Some scholars have erroneously claimed that state judges were elected at the time of the founding. See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 814 n.233 (1984).

<sup>12</sup> Fitzpatrick, *supra* note 11, at 855–56 tbl.1.

<sup>13</sup> *Id.* at 857–58 tbl.2. Commentators have questioned whether the good-behavior standard truly protected judicial independence. For example, legislators not only called judges to testify and explain their decisions, G. Alan Tarr, *Contesting the Judicial Power in the States*, 35 HARV. J.L. & PUB. POL'Y 643, 647 & n.34 (2012) (discussing the Rhode Island legislature's decision to summon the state supreme court justices after the court exercised judicial review in *Trevett v. Weeden*), but also often sought to impeach or “address” judges under a very broad definition of misbehavior, see, e.g., PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635–1805*, at 68–76 (1984).

<sup>14</sup> See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1073, 1075 (2010).

<sup>15</sup> See *id.* at 1074–75.

standard) before the Civil War.<sup>16</sup> The same is true of most of the original states, which largely abandoned life tenure in favor of shorter terms.<sup>17</sup>

It took longer for judicial elections to take hold, but once they did, elections quickly spread throughout the country. Although a few states dabbled with judicial elections for some lower court judges early in the nation's history,<sup>18</sup> Mississippi was the first to implement judicial elections for all its judges in 1832.<sup>19</sup> But the landscape was not transformed until 1846, when New York adopted judicial elections for its state courts.<sup>20</sup> The New York constitutional convention's adoption of judicial elections was the "trigger" that led to the widespread adoption of judicial elections by most of the American states.<sup>21</sup> With remarkable speed, seventeen states adopted judicial elections over the next five years.<sup>22</sup> In fact, every single state that joined the Union between 1846 and 1912 chose to elect its judges in partisan elections.<sup>23</sup> By 1912, nearly three-quarters of the states had implemented partisan elections for state judges.<sup>24</sup>

While the trend towards judicial elections continued well into the twentieth century, the elections themselves underwent some significant changes. The first change took place in the early 1900s as a number of states introduced non-partisan elections.<sup>25</sup> In a non-partisan election, the public does not learn the candidates' partisan affiliation; only the candidate's name is listed on the ballot.<sup>26</sup> The Progressive reformers' goal was to decrease the influence of parties and politics in judicial selection.<sup>27</sup> Progressives hoped that non-partisan elections would ensure that "more highly qualified jurists would be elected to the bench and that voters would make judgments based on the objective qualifications of

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16 G. ALAN TARR, *WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES* 40 (2012).

17 *Id.*

18 "Judicial elections began in 1789 in Georgia localities, then in 1793 in Vermont localities, and in 1812 Georgia adopted it for state judges." Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1399-1400 (2003). Some trial judges in Vermont were also elected before Vermont was admitted into the Union. *Id.*

19 EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 99-100 (1944).

20 Shugerman, *supra* note 14, at 1066.

21 JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURT: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 86 (2012).

22 Shugerman, *supra* note 14, at 1097 ("From 1846 to 1851, twelve states adopted judicial elections for their entire court systems, and five states adopted partially elective systems."). Shugerman calls the speed at which states adopted judicial elections in this five-year span a "historical marvel." SHUGERMAN, *THE PEOPLE'S COURT*, *supra* note 21, at 121.

23 See Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190 (1993).

24 LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 323 (1973).

25 Tarr, *supra* note 13, at 644.

26 CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* 8 (2009).

27 *Id.*

the candidates instead of their partisan ties.”<sup>28</sup> But non-partisan elections failed to address the reformers’ concern.<sup>29</sup> Nonetheless, non-partisan elections have survived, and in many states that use competitive elections to elect their judges, the candidates’ party affiliations do not appear on the ballots.

Discontent with non-partisan elections led to yet another election technique: the retention election. In a retention election, voters must decide whether a sitting judge should retain her seat on the bench. The incumbent judge, generally appointed to her seat by the governor using a process of merit selection,<sup>30</sup> runs unopposed and must receive a certain percentage of the vote—generally 50%, but sometimes higher—to remain on the bench. If the judge fails to receive at least 50% of the vote, the selection process begins anew. Since it was introduced, the merit-selection-plus-retention-election model (also known as the “Missouri Plan”) has become the most prevalent method of judicial selection.<sup>31</sup>

Ever since the wave of states adopted the retention election model, there have been no major changes to the mechanisms of judicial elections. This leaves us with three different models of judicial elections: partisan, non-partisan, and retention. The elections themselves, however, have undergone a major transformation in the last two decades. Unlike the sleepy and low-key contests of the past, judicial elections are now highly competitive and characterized by record-breaking contributions and spending.<sup>32</sup> Part II describes the implications and consequences of this change.

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28 *Id.*

29 As discussed in greater detail below, party labels serve as an important cue for voters in judicial elections. Without partisan cues on the ballot, the electorate was left virtually blind in casting their ballots, and the absence of partisan labels forced them to rely even more on irrelevant cues like the familiarity of the candidate’s name, the candidate’s gender, or place on the ballot. See Luke Bierman, *Beyond Merit Selection*, 29 *FORDHAM URB. L.J.* 851, 854 (2002).

30 Although details differ from state to state, merit selection generally involves a committee made up of lawyers and lay people that screens potential nominees and evaluates them on the basis of qualifications and merit. The committee then sends a list of names to the governor, who then selects a judge from this list. See Sandra Day O’Connor, *The Essentials and Expendables of the Missouri Plan*, Earl F. Nelson Lecture at the University of Missouri School of Law (Feb. 27, 2009), in 74 *MO. L. REV.* 479, 486 (2009).

31 For a description and discussion of the Missouri Plan, see Symposium, *Mulling Over the Missouri Plan: A Review of State Judicial Selection and Retention Systems*, 74 *MO. L. REV.* 473 (2009). For a critique, see James Bopp, Jr., *The Perils of Merit Selection*, 46 *IND. L. REV.* 87, 87–88, 97–99 (2013).

32 See BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 185 (2006).

*B. Defending Judicial Elections*

What are the justifications for judicial elections? After all, judicial elections are virtually unheard of in most of the world.<sup>33</sup> There are two major theories explaining why states began to implement judicial elections in the middle of the nineteenth century: what I call the accountability theory and the independence theory.<sup>34</sup>

1. *The Accountability Theory.*—Today, the predominant defense of judicial elections revolves around the idea of judicial accountability. Proponents of this theory argue that judicial elections are part of the Jacksonian movement to make all elected officials, including judges, more accountable to the public.<sup>35</sup> This theory has been accepted by most lawyers and judges. For example, in *Republican Party of Minnesota v. White*, Justice Scalia proclaimed that “[s]tates began to provide for judicial election” spurred by the ideas of populism and “Jacksonian democracy.”<sup>36</sup> Likewise, Chris Bonneau and Melinda Gann Hall, the two leading academic supporters of judicial elections, attribute the rise of judicial elections to the Jacksonian ideas of popular democracy.<sup>37</sup> Most scholars—whether they support or oppose judicial elections—seem persuaded by the argument that judicial elections were intended to hobble the courts and rein in state judges.<sup>38</sup>

To this day, defenders of judicial elections highlight the ability of judicial elections to hold judges accountable for their decisions.<sup>39</sup> Judicial elections, argues James Bopp, can help limit judicial activism and curb judicial overreaching.<sup>40</sup> The argument, rooted in the idea of popular democracy, is that the people themselves should choose their public officials. Professor David Pozen frames the argument like this: “as government officials who wield significant discretionary authority to ‘make’ and apply law, judges should be selected

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33 A small percentage of judges in Switzerland and Japan are also elected. 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, 1232–33 (2008).

34 Some scholars have suggested a third theory—that it was the legal profession trying to help itself—but support for this theory is limited, and it has generally not been accepted as a stand-alone explanation for the rise of judicial elections. See Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 45 HISTORIAN 337, 353–54 (1983).

35 Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966) (arguing that judicial elections were a “manifestation of the populism movement”).

36 *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002).

37 BONNEAU & HALL, *supra* note 26, at 5.

38 See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 722 (1995); Nelson, *supra* note 23, at 207.

39 See DEBORAH O’MALLEY, HERITAGE FOUND., A DEFENSE OF THE ELECTED JUDICIARY 1 (2010), available at [http://thf\\_media.s3.amazonaws.com/2010/pdf/lm0057.pdf](http://thf_media.s3.amazonaws.com/2010/pdf/lm0057.pdf).

40 James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 FIRST AMEND. L. REV. 180, 191 (2007).

by those over whom they hold power.”<sup>41</sup> And given this nation’s democratic heritage, judicial elections can stake a strong claim to democratic legitimacy. They allow the people to “ensur[e] that the adjudicated Constitution remains aligned with public opinion” and to “shape the trajectory of legal doctrine.”<sup>42</sup>

Judicial elections thus offer the public a direct voice in all three branches of state government. They let the public reaffirm judicial decisions with which they agree, and to punish judges who err. Viewed this way, judicial elections are democracy-enhancing institutions<sup>43</sup> and can serve as “tools for translating [people’s] sovereignty into desired outcomes” and “for ensuring that judicial doctrine remains tethered to community views.”<sup>44</sup> This is particularly true in the current environment of judicial elections, with elections becoming more competitive, spending increasing exponentially, the challengers to incumbents becoming stronger, and the public seemingly more and more engaged. In fact, as judicial elections begin to look more and more like all other elections, many of the arguments that justify non-judicial elections can be used in support of judicial elections.<sup>45</sup>

But there is one important caveat to note about the accountability defense. I have not seen anyone argue that judicial elections should be used to allow the public to vote out of office judges who make correct but unpopular decisions. In other words, even the most fervent supporters of judicial accountability seem to believe that judges should not be punished for following the rule of law, even if the judge’s ultimate decision is unpopular.<sup>46</sup> This is a critical point: the accountability theory is about holding judges accountable for mistakes (intentional and unintentional), for ignoring the law, for imposing their own views of the law, and for ethical misconduct, but not for correct decisions that the public does not like, or that the public does not understand.<sup>47</sup>

2. *The Independence Theory.*—The accountability theory is the predominant justification for judicial elections today. But while the accountability theory

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41 David Pozen, *Are Judicial Elections Democracy-Enhancing?*, in *WHAT’S LAW GOT TO DO WITH IT: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT’S AT STAKE* 248, 249 (Charles Gardner Geyh ed., 2012).

42 David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2070 (2010).

43 See BONNEAU & HALL, *supra* note 26, at 5–7.

44 Pozen, *supra* note 41, at 250.

45 See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 273–77 (2008).

46 Of course, there is likely to be tremendous disagreement over what constitutes a correct judicial decision, and to what extent a judicial decision must merely reflect the will of the people. However, discussion of proper methods of constitutional and statutory interpretation is outside the scope of this Article.

47 Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 924 (2006) (“[J]udicial elections can serve to hold judges accountable in ways that keep faith with all three objectives of judicial accountability by turning out those who administer their courts ineffectively, behave unethically, or disregard the law intentionally.”).

can explain some of the early changes to state judicial selection methods,<sup>48</sup> the theory does not entirely explain the move towards judicial elections. First, most states did not adopt judicial elections until after the end of the populist movement. Although some states had begun electing some judges as early as 1810, the movement did not gain traction until long after the Jacksonian wave of democracy swept the nation.<sup>49</sup> Some radicals sought to eliminate judicial appointments as vestiges of monarchies and aristocracies, but these arguments apparently had little influence at the constitutional conventions that adopted judicial elections.<sup>50</sup>

This leads to a second point: the accountability theory is inconsistent with the rhetoric at the state constitutional conventions. Reformers expressed a great deal of concern that “appointive systems had allowed governors and legislators to award judgeships based on party loyalty rather than on legal ability, judicial temperament, or fair mindedness.”<sup>51</sup> Judicial elections, argued its supporters, would free judges from partisan control.

In fact, the evidence shows that the reformers’ goal “was a desire to promote judicial independence from the political branches, rather than to increase democratic accountability for judicial decisions.”<sup>52</sup> The general sentiment was expressed well by Abner Keyes at the Massachusetts Convention: “Elect your judges, and you will energize them, and make them independent, and put them on a par with the other branches of government.”<sup>53</sup> The shift to judicial elections, then, was just a part of constitutional reforms throughout the states designed to restrain state *legislatures*, not state judges.<sup>54</sup> Elected judges, supporters of elections argued, would become less partisan and more independent and would be better able to perform their constitutional role.<sup>55</sup>

Not only were elected judges expected to be more independent, these judges were also to be better judges than those appointed by state legislatures.

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48 For example, in the early 19th century, many states shortened judicial terms in an effort to curtail judicial independence and bring the judiciary more into popular control. See WILLIAM S. CARPENTER, *JUDICIAL TENURE IN THE UNITED STATES 173–76* (1918).

49 In fact, after Mississippi began electing all of its judges in 1832, other states holding constitutional conventions between 1832 and 1846 rejected judicial elections. TARR, *supra* note 16, at 42.

50 *Id.* at 47.

51 O’Connor, *supra* note 30, at 483.

52 Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 *GEO. J. LEGAL ETHICS* 1259, 1261 (2008). Historians from Caleb Nelson to Kermit Hall have convincingly argued that judicial elections were intended to make state judges more, not less, independent. See Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1921*, 1984 *AM. B. FOUND. RES. J.* 345, 351; Nelson, *supra* note 23 at 206, 217–19.

53 Hall, *supra* note 34, at 350.

54 See Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 *IND. L. REV.* 659, 659–60 (2002) (stating that judicial elections intended “to elevate the judiciary and make it more independent of other branches so that it could better render justice”).

55 See SHUGERMAN, *THE PEOPLE’S COURT*, *supra* note 21, at 105–15.

Because the selection process before elections was so heavily driven by political party machinery, the public perceived appointed judges as mere cronies of the state legislators that appointed them.<sup>56</sup> These patronage appointees were chosen not because of their legal acumen or judicial character but because of their partisanship and connections. Courts, one author claimed, had become “asylums for broken down or defeated politicians.”<sup>57</sup> Thus, at the same time as the number of trained professional judges and skilled lawyers was increasing in the states,<sup>58</sup> state legislatures often bypassed those well-qualified individuals in favor of their friends and political allies.<sup>59</sup> The legal profession itself supported judicial elections, expecting that the public was more likely to choose well-qualified judges than party bosses.<sup>60</sup>

Perhaps proponents of judicial elections were being naïve, or disingenuous. Perhaps their goal was to create a judiciary subservient to the public wishes, and they simply couched their arguments in favor of judicial election in terms that would appeal to supporters of an independent judiciary. It is difficult to know for certain, but recent scholarship suggests otherwise, for their initial vision met with some success. Judicial review became more prevalent; elected judges “established a more widespread practice of judicial review in America.”<sup>61</sup> Surprisingly, the judges engaging in judicial review frequently offered “countermajoritarian justifications for judicial review,”<sup>62</sup> protecting individual rights against abusive state factions. Whether the spread of judicial review was due to judges feeling more legitimate, or more confident, or more empowered, judges were apparently freed by judicial elections to act more independently, even against the wishes of state majorities.<sup>63</sup>

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It may seem odd to defend judicial elections on the basis of judicial independence, especially since most critics of judicial elections argue that such elections are irreconcilable with either judicial independence or impartiality.<sup>64</sup>

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<sup>56</sup> See Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 5–6 (1994).

<sup>57</sup> Hall, *supra* note 34, at 347 (quoting KY. YEOMAN, July 5, 1849).

<sup>58</sup> ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN THE AMERICAS FROM THE 1850S TO THE 1980S 20–21* (1983).

<sup>59</sup> Thomas R. Phillips, *The Merits of Merit Selection*, 32 HARV. J.L. & PUB. POL’Y 67, 73 (2009).

<sup>60</sup> Hall, *supra* note 34, at 343.

<sup>61</sup> SHUGERMAN, *THE PEOPLE’S COURT*, *supra* note 21, at 123.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 131 (“[A]ppointed judges were cowed by the democratic legitimacy of legislators, but elections gave judges more courage to assert their power on behalf of ‘the people.’”).

<sup>64</sup> See Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1592 (2009) (discussing “the deeply rooted conviction that judicial elections are inconsistent with judicial independence”).

The people must choose, these critics argue, between a strong judiciary that protects individual liberties and one that is elected; we cannot have both. But the history of judicial elections offers a strong challenge to this argument, and supports the notion that judicial elections were implemented to enhance judicial independence. And there is even some evidence that elections may have succeeded in making judges more independent.

Not only are the independence theory and the accountability theory both compatible with judicial elections, but the two theories were designed to work together, so that judicial elections could foster both judicial independence and judicial accountability. When it comes to judicial elections, judicial independence and judicial accountability are two sides of one coin.<sup>65</sup> The independence side of the coin stands for a judiciary free to make decisions based on the law rather than feeling bound to the state legislature, the governor, or public will. The accountability side is for a judiciary that must decide cases according to the law, must act ethically, and must at least consider the will of the people because any other decision could lead to a judge losing her job. The best way to defend judicial elections, therefore, is to argue that they can promote both goals, while also promoting trust in the judiciary.<sup>66</sup>

## II. VOTER IGNORANCE AND JUDICIAL ELECTIONS

More independence *and* more accountability—how could anyone oppose that? Unfortunately, most scholars have concluded that judicial elections have generally failed on the independence prong, arguing that judicial elections are incompatible with rule of law values or the judicial role. In his classic work on judicial elections, Professor Steven Croley coined the term “majoritarian difficulty” to describe the tension between judicial elections and the rule of law.<sup>67</sup> Judges who must seek approval from the people to keep their jobs, argues Croley, are likely to decide cases according to majority preferences rather than according to the requirements of the law.<sup>68</sup> This is inconsistent with notion that judges must stand up against the majority to defend both minorities and individual rights.<sup>69</sup>

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<sup>65</sup> Stephen B. Burbank, *What Do We Mean by “Judicial Independence”?*, 64 OHIO ST. L.J. 323, 325 (2003).

<sup>66</sup> See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 26 (1990) (“Efforts to explore public opinion about the police, the courts, and the law reflect the belief among judges and legal scholars that public confidence in the legal system and public support for it—the legitimacy accorded legal officials by members of the public—is an important precursor to public acceptance of legal rules and decisions.”).

<sup>67</sup> Croley, *supra* note 38, at 694.

<sup>68</sup> *Id.*

<sup>69</sup> See, e.g., THE FEDERALIST NO. 10 (James Madison) (discussing the “tyranny of the majority”); Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 65–68 (1996) (discussing judges’ responsibility to protect minorities from majorities).

Others, too, have raised concern about judicial elections and the independence of elected judges. In fact, “more sweat and ink have been spent on getting rid of judicial elections than on any other single subject in the history of American law.”<sup>70</sup> Most commentators remain pessimistic that judicial elections can be saved. Since the method of judicial selection (and retention) is the most important factor in measuring judicial independence,<sup>71</sup> judicial elections necessarily decrease judicial independence in favor of greater accountability.<sup>72</sup> Judicial elections, argues a recent article, are “the single greatest threat to judicial independence.”<sup>73</sup>

I agree with the bulk of the academic literature concluding that judicial elections have failed to accomplish the goals of greater independence and accountability. But this Article challenges the prevailing notion that judicial elections are *ipso facto* incompatible with those values.<sup>74</sup> Rather, I conclude that judicial elections have failed because of widespread voter ignorance. An ignorant electorate cannot hold judges accountable if it cannot understand judicial decisions or rule-of-law values. For the public to hold judges accountable when they decide cases incorrectly, the voter in a judicial election must have some inkling of what the correct decision is in any given case, or at the very least an understanding of the decision itself. And for judges to have the independence necessary to reach correct but unpopular decisions, the public must be able to distinguish a correct but unpopular decision from a wrong decision, and refuse to remove the judge for simply reaching the former.

Voter ignorance is a problem in almost all elections, especially low-level, low-salience elections. But the voter ignorance problem is particularly acute in judicial elections because of the nature of the judicial office, the opaqueness of

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70 Roy A. Schotland, Comment, *LAW & CONTEMP. PROBS.*, Summer 1998, at 149, 150, *available at* <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1096&context=lcp>.

71 Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 313 (1997) (identifying the method of judicial selection as the most important factor in measuring judicial independence).

72 See, e.g., Jonathan Remy Nash, *Prejudging Judges*, 106 *COLUM. L. REV.* 2168, 2204 (2006) (“[L]egal academics . . . reject judicial elections as a threat to judicial independence . . .”); Shepherd, *supra* note 64, at 1603 (“Many academics, elite lawyers, and judges fear that the increasing contentiousness of judicial elections threatens judicial independence.”); Kelly J. Varsho, *In the Global Market for Justice: Who is Paying the Highest Price for Judicial Independence?*, 27 *N. ILL. U. L. REV.* 445, 489 (“Under current judicial elections, judicial independence is being sacrificed for judicial accountability.”).

73 Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 *VA. L. REV.* 719, 722 n.4 (2010) (citing Chief Justice Margaret H. Marshall, President of the Conference of Chief Justices, Remarks to the American Bar Association House of Delegates 5–6 (Feb. 16, 2009) (transcript available at <http://archives.lib.state.ma.us/bitstream/handle/2452/37538/ocn294909900-2009.pdf>)).

74 For an article describing this prevailing notion, see Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 *CORNELL J.L. & PUB. POL’Y* 273, 278 (2002) (concluding that judicial elections are incompatible with judicial independence and impartiality).

judicial performance, and the lack of useful cues and heuristics that allow voters to compensate for their lack of relevant knowledge. And instead of increased accountability or independence, judicial elections have led to judicial fear, and the consequences of that fear are truly troubling.<sup>75</sup>

### A. Voter Ignorance

Much has been written about public ignorance of most basic political facts, and the extent of that ignorance is truly shocking. Year after year, a new study reveals that public ignorance in the United States has reached new highs (or lows). For example, in their recent book,<sup>76</sup> Michael Delli Carpini and Scott Keeter demonstrate that few Americans can name the three branches of government<sup>77</sup> or both state Senators.<sup>78</sup> Whether it is comparing voter knowledge of Will Smith versus William Rehnquist,<sup>79</sup> or the ability to name the three stooges as compared to the three branches of government,<sup>80</sup> the empirical studies generally show a pervasive ignorance of politics and government. Political scientists have recognized the problem for decades,<sup>81</sup> and although legal scholars have been slow to catch up, recent scholarship has explored and exposed the voter ignorance problem through various lenses,<sup>82</sup> including its implications for election law.<sup>83</sup>

Most scholars agree that voter ignorance is entirely rational.<sup>84</sup> It is rational in part because “the chance of any one vote influencing the outcome of an election is infinitesimally small.”<sup>85</sup> Because the value of each vote is low, and the cost of obtaining accurate information is high, it makes sense for most voters

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75 See *infra* Part II.D (summarizing evidence that judicial decisions tend to favor lawyers and litigants who had previously contributed to the judge’s campaign).

76 MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996).

77 19%. *Id.* at 71 tbl.2.2.

78 35%. *Id.* at 75 tbl.2.3.

79 Slightly over 2% of American teenagers could identify Rehnquist as the Chief Justice of the Supreme Court, while nearly 95% identified Will Smith as the Fresh Prince of Bel-Air. Don Herzog, *Dragonslaying*, 72 U. CHI. L. REV. 757, 767–68 (2005) (reviewing GERRY MACKIE, *DEMOCRACY DEFENDED* (2003)).

80 A big win for the stooges. *More Teens Can Name Three Stooges than Can Name Three Branches of Government: New Survey Shows Wide Gap Between Teens’ Knowledge of Constitution and Knowledge of Pop Culture*, NAT’L CONST. CTR (Sept. 2, 1998), <http://constitutioncenter.org/media/files/survey-1999-stooges.pdf> (Three Stooges 59% to three branches of government 41%).

81 For one of the groundbreaking studies, see ANGUS CAMPBELL, PHILIP E. CONVERSE, WARREN E. MILLER & DONALD STOKES, *THE AMERICAN VOTER* (1960).

82 See generally ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE* (2013) (describing the nature, extent, and effects of voter ignorance in the United States).

83 See Christopher S. Elmendorf & Davis Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 ILL. L. REV. 363, 365–66.

84 See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238–59 (1957).

85 Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625, 643 (2012).

to spend more time with their family, watching television, or going outdoors rather than learning about government or politics.<sup>86</sup> Although much of the voter-ignorance scholarship has focused at the national level, things look even worse when we drill down to the state and local levels. Political scientists have paid comparatively little attention to public knowledge for state and local elections. The same is true of the media: media spends significantly more time covering national races than state legislative and judicial races.<sup>87</sup> As a result, the studies cited above actually overrate public knowledge when it comes to state and local level elections.

As bad as things look when it comes to voter knowledge of the government's other branches, when it comes to the judiciary, public knowledge lags even farther behind.<sup>88</sup> One study famously showed that while over two-thirds of Americans could not name a single Supreme Court Justice, 54% were able to name and identify Judge Wapner as the judge on the television show "The People's Court."<sup>89</sup> Not only are voters unfamiliar with the identity of their judges, but they know little about what it is, exactly, that judges are supposed to be doing, and how their role differs from other elected officials. The public generally "lacks sufficient information to have clear, considered, and internally consistent judgments about exactly what the judicial role under the Constitution either is or ought to be."<sup>90</sup> This state of affairs is not surprising. While some Supreme Court decisions gain national prominence, the general salience of court output is low.<sup>91</sup> The public is generally unaware of Supreme Court decisions, or its decision-making process.<sup>92</sup> Much of the work done by the federal judiciary is done behind closed doors: There are no cameras in the

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86 DOWNS, *supra* note 84, at 265 ("[T]ime is the principal cost of voting: time to register, to discover what parties are running, to deliberate, to go to the polls, and to mark the ballot.")

87 Martin Kaplan, Ken Goldstein & Matthew Hale, *Local News Coverage of the 2004 Campaign: An Analysis of Nightly Broadcasts in 11 Markets*, LOCAL NEWS ARCHIVE (Feb. 15, 2005), at 9–12, 28–29, <http://www.localnewsarchive.org/pdf/LCLNAFinal2004.pdf>.

88 See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 316 (1999) (arguing that the public's knowledge about the judiciary is "abysmal"); Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1308 tbl.1 (2004).

89 Richard Morin, *Wapner v. Rehnquist: No Contest; TV Judge Vastly Outpolls Justices in Test of Public Recognition*, WASH. POST, June 23, 1989, at A21. There is some debate as to whether these measures of voter competence are accurate. See James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POL. 429, 430 (2009) (suggesting that the way standard survey questions are asked skews the results in surveys of voter knowledge).

90 Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1825 (2005).

91 See, e.g., Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2620 (2003) ("Scholars are uniform in their assessment that the salience of the output of courts is low.")

92 Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW & SOC'Y REV. 357, 360–64 (1968) (explaining that public awareness of Supreme Court decisions and processes is low).

Supreme Court, the Court's deliberations are private, and judges generally lead very cloistered lives, at least as compared to members of Congress.

The pattern of political ignorance continues when we look at public knowledge of the state judiciaries. Because state courts often get little attention from top political scientists and empiricists, we know little about public ignorance of their state judiciaries,<sup>93</sup> and what little is known is generally discouraging. Voter ignorance in judicial elections is staggering.<sup>94</sup> Many people, including those that had previously voted in a judicial election, do not even know that judges in their state are elected.<sup>95</sup> While at least some people can name a Supreme Court Justice or two, most voters are unable to name a single state court judge, at any level of the state judiciary.<sup>96</sup> In fact, over half the respondents to a 1988 poll did not even know that their state had a constitution.<sup>97</sup>

### *B. Cues and Heuristics in Judicial Elections*

Of course, if voter ignorance is ubiquitous, then perhaps any criticism of judicial elections based on such ignorance proves too much and condemns all elections, not just judicial elections. After all, the evidence in the previous section indicates that voters rarely have the information or the knowledge about the legislative or executive branches of state or federal government.<sup>98</sup> But election law scholars have argued that this is less of a problem than it appears at first glance because voters are able to use shortcuts to compensate for their limited knowledge.<sup>99</sup> These shortcuts, often called cues or heuristics, enable voters to make reasonably informed choices in the voting booth.<sup>100</sup> The question, then, is whether voters in judicial elections have adequate cues that allow them to vote competently.<sup>101</sup>

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<sup>93</sup> See DAVID B. ROTTMAN ET AL., PERCEPTIONS OF THE COURT IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY 2 (2003).

<sup>94</sup> Arthur T. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U. L. REV. 1, 43-44 & n.63 (1956).

<sup>95</sup> See, e.g., Deborah R. Hensler, *Do We Need an Empirical Research Agenda on Judicial Independence?*, 72 S. CAL. L. REV. 707, 712 (1999) (noting that 60% of voters in a study of North Carolina could not name their state supreme court justices).

<sup>96</sup> See *id.*

<sup>97</sup> SANFORD LEVINSON, FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 29 (2012). Levinson suggests that this level of ignorance is even more disturbing than the fact that Americans are unable to name a single member of the Supreme Court. *Id.*

<sup>98</sup> See *supra* Part II.A.

<sup>99</sup> See ARTHUR LUPA & MATTHEW D. McCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 1-2 (1998).

<sup>100</sup> See *id.* at 13.

<sup>101</sup> In other words, the relevant question is whether voters in fact cast the same vote that they would have cast had they possessed all available knowledge about the judicial candidates. See, e.g., *id.* at 31-32 (discussing the "cognitive stock market" and way in which people process information to make reasoned decisions).

1. *Importance of Shortcuts.*—Voters are often ignorant of crucial information when choosing between candidates in any election, despite the fact that plenty of information about the candidates is available to voters who look for it. In fact, in most elections, the problem is that there is too much information, requiring voters to separate the wheat from the chaff, and to figure out how to apply the relevant information in particular contexts.<sup>102</sup> Because trying to become an educated voter imposes significant costs on the average person, most voters do not take the time to inform themselves of the issues or the candidates on the ballots.<sup>103</sup>

But voters compensate for their ignorance and lack of political sophistication by relying on certain cues.<sup>104</sup> The most common of these cues are the candidates' party affiliation, group endorsements, and person stereotypes (i.e. race, sex, and gender).<sup>105</sup> “[L]imited information decision strategies not only may perform as well as, but in many instances may perform better than, traditional rational . . . decision strategies.”<sup>106</sup> Voters also rely on a candidate's statements or previous performance to infer the candidate's ideology.<sup>107</sup> For example, when a candidate in a general election announces his opposition to affirmative action, or her support for same-sex marriage, voters can develop a fairly strong intuitive understanding of that candidate's ideology.<sup>108</sup> Likewise, past performance, by the candidate or the candidate's party, also provides crucial information.<sup>109</sup> A candidate's behavior while in office (for example, the candidate may have supported legislation prohibiting same-sex marriage) is a good indicator of how he or she will act in the future.<sup>110</sup>

If these limited bits of information can substitute for more in-depth political knowledge, then voter ignorance is not much of a problem.<sup>111</sup> The uninformed

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102 Elizabeth Garrett, Commentary, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1025 (2003) (“Not only is it not the case, given voters' capabilities, that more information is always a good thing, but too much information can overwhelm the ability of average Americans to process and understand information and may result in their tuning out data that could provide helpful cues.”).

103 See Croley, *supra* note 38, at 731 n.131.

104 See Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 952 (2001).

105 Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447, 1498–99 (2012).

106 *Id.* at 1499 (alteration in original) (quoting RICHARD R. LAU & DAVID P. REDLAWSK, *HOW VOTERS DECIDE: INFORMATION PROCESSING DURING ELECTION CAMPAIGNS* 226 (2006)).

107 See SIDNEY KRAUS, *TELEVISED PRESIDENTIAL DEBATES AND PUBLIC POLICY* 140, 142–43 (1st ed. 1988).

108 See *id.* at 142–43 (explaining that candidates' statements in debates about issues can serve as important cues for voters).

109 See DOWNS, *supra* note 84, at 238–44.

110 See PAUL M. SNIDERMAN, RICHARD A. BRODY & PHILIP E. TETLOCK, *REASONING AND CHOICE: EXPLORATIONS IN POLITICAL PSYCHOLOGY* 173–77 (1991).

111 See DONALD A. WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE: WHY POLITICAL IN-*

voter might cast a competent ballot by simply relying on shortcuts.<sup>112</sup> But for these shortcuts to work, they must be available, as well as provide the kind of useful information necessary to make a somewhat reasonable electoral choice between two candidates. Bad cues may actually harm a voter's ability to make an informed voting decision, instead leading the voter astray.<sup>113</sup>

2. *Availability of Shortcuts in Judicial Elections.*—Judicial elections take place in a low-salient-information environment, leaving voters with few cues that allow them to vote competently.<sup>114</sup> This lack of meaningful cues is what separates judicial elections from other elections. Some of the common cues that voters rely on in other elections are often entirely missing when it comes to judicial elections.<sup>115</sup> But even when those cues are available, they are generally of such low quality and have such low informational value that they do not compensate for voter ignorance.<sup>116</sup>

For reasons unique to the judiciary, voters in judicial elections search in vain for cues that would help them vote competently. First, judicial candidates often do not express their positions on any substantive issues over the course of their campaign.<sup>117</sup> In fact, historically candidates were prohibited from even announcing their positions on political issues.<sup>118</sup> The Supreme Court struck this prohibition down in *Republican Party of Minnesota v. White*, holding that such restrictions violate the First Amendment.<sup>119</sup> In practice, however, many judicial

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STITUTIONS ARE INEFFICIENT 12–14 (1995) (explaining that voters can make competent decisions in spite of limited political knowledge).

112 See Lau & Redlawsk, *supra* note 104, at 952, 954.

113 See generally *id.* at 964–67 (discussing the disadvantages of heuristic use).

114 See Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 19–20 (2003) (discussing low-information elections).

115 See *id.* at 19–26.

116 Pamela S. Karlan, *Judicial Independences*, 95 GEO. L.J. 1041, 1046 (2007). One prominent scholar has argued that, contrary to popular belief, voters in judicial elections are indeed competent. Melinda Gann Hall, *On the Cataclysm of Judicial Elections and Other Popular Antidemocratic Myths*, in *WHAT'S LAW GOT TO DO WITH IT*, *supra* note 41, at 223–224, 227. In response to the critique that voters in judicial elections do not know what they are doing, Melinda Gann Hall argues that voters are “sophisticated” when it comes to choosing judges. *Id.* at 227. In support of that assertion, Hall claims that voters respond well to one particular cue on the ballot: whether the candidate has previous judicial experience. *Id.* This finding does not seem to support Hall's conclusion that voters in judicial elections are either sophisticated or competent. Being able to tell apart judicial candidates with previous judicial experience from those without it tells us little about whether a voter is capable of holding a judge accountable for decisions made while in office, and history is rife with elections where even unethical and incompetent judges are reelected. If the purpose of judicial elections is to increase judicial accountability and judicial independence, then responding to the incumbency cue does little to further those values.

117 See Alan B. Morrison, *The Judge Has No Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 IND. L. REV. 719, 728, 731–38 (2003).

118 See *id.* at 719.

119 *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

candidates continue to refuse to take positions on controversial issues while campaigning for office.<sup>120</sup> There is a longstanding norm that judicial candidates should not express any policy or political views, and most states still prohibit judicial candidates from making pledges.<sup>121</sup> The ABA's *Model Code of Judicial Conduct* still prohibits much extrajudicial speech by judges.<sup>122</sup> In addition, judges risk facing recusal and disqualification motions if they hear cases on issues where they have announced their views.<sup>123</sup> Thus, a judge trying to avoid a recusal controversy is often better off not discussing any issue that he or she might face once in office.

Second, one of the most important ways a voter can determine a candidate's ideology and views is based on that candidate's prior decision as a lawmaker. But when it comes to judges, the record is often sparse because judges do not pick the issues that they will decide.<sup>124</sup> This is especially true when it comes to trial judges, many of whom decide cases that are not particularly salient with the public. The judge's work product is an abstruse written opinion, and many important decisions are made without a written opinion at all.<sup>125</sup> The bulk of their work may come in settlement conferences, in response to discovery and evidentiary motions, and in response to objections at trial. Furthermore, judges operate largely behind the scenes. Cameras in the courtroom, while more common at the state level than at the federal level, are generally rare.<sup>126</sup> Judicial deliberations are not open to the public.<sup>127</sup> In this age of transparency, the work of courts remains mostly hidden and the judiciary remains the "least understood branch."<sup>128</sup>

<sup>120</sup> See Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 301–04 (2003).

<sup>121</sup> See Stephen Gillers, "If Elected, I Promise [\_\_\_\_\_]"—*What Should Judicial Candidates Be Allowed to Say?*, 35 IND. L. REV. 725, 725–26 (2002); Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701, 716 (2002).

<sup>122</sup> Tobin A. Sparling, *Keeping up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441, 441 (2006).

<sup>123</sup> *White*, 536 U.S. at 794 (Kennedy, J., concurring) (discussing possible options available when a state wishes to ensure judicial integrity).

<sup>124</sup> Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 738 (2002) ("[T]rial judges do not choose the cases they decide.").

<sup>125</sup> See Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1436–39, 1442–44 (2004) (discussing private judging and the use of unpublished decisions).

<sup>126</sup> See Alex Kozinski & Robert Johnson, *Of Cameras and Courtrooms*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1107, 1108–09, 1114–17, 1129 (2010).

<sup>127</sup> Although appellate judges more frequently issue written opinions, it is very difficult for the public to evaluate whether the decision is right or wrong without legal training. In fact, most people, unlike most law students, do not read judicial opinions.

<sup>128</sup> William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1190 n.122 (1978).

Furthermore, a judge's ruling in any particular case, even if it is known and understood, may not be a good indicator of the judge's views, and may provide no relevant information to a potential voter. In the criminal case discussed in the Introduction, the judge may decide to exclude the illegally obtained evidence because that result is required by Supreme Court precedent, not because that judge is "soft on crime." Thus, voters can make fairly confident inferences about a legislative candidate based on her previous votes on hot-button issues like abortion, but not necessarily based on a judge's decisions in abortion cases where the judge's discretion is often limited.

Perhaps the most important heuristic that voters rely on in other elections is the partisan label.<sup>129</sup> The candidate's party affiliation allows voters who are otherwise unengaged in politics to have a sense of what a candidate stands for.<sup>130</sup> And when the party label is absent (as it is in primaries), voters are often left entirely in the dark.<sup>131</sup> The same is true of judicial elections. A majority of judicial elections, including all retention elections, are non-partisan.<sup>132</sup> States exclude partisan affiliations from the ballot and many even prohibit party endorsements.<sup>133</sup> This means that the most important cues that voters use in other elections are often intentionally removed from judicial elections.<sup>134</sup> These regulations were implemented to remove partisanship from judicial elections, with the hope that the best candidate, regardless of party, would prevail.<sup>135</sup> Instead, the restrictions work to sharply diminish the quality of information that voters have at their disposal.

And even when the party cue is present, it does not serve the same function in a judicial election as it does in most other elections. In judicial elections, the average voter rarely has any understanding of what separates a "Democratic" judicial candidate from a "Republican" one, and therefore cannot convert the party label into information about a candidate's positions.<sup>136</sup> Nonetheless, when party labels are available, voters rely heavily on party affiliation "without any

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129 See, e.g., Lau & Redlawsk, *supra* note 104, at 953.

130 *Id.*

131 See David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 466 (2007).

132 Croley, *supra* note 38, at 725-26.

133 See Marci Haarburger, Comment, *Intrastate Judicial Endorsement Clauses: How States Can Protect Impartiality Without Violating the First Amendment*, 2011 U. CHI. LEGAL F. 327, 328. Lower courts have been mixed in their interpretation of the Supreme Court's decision in *White*. Some have read it broadly, striking down any law that would be unconstitutional for non-judicial elections, while others have read it narrowly, applying it only to the announcement of political views. See generally Siefert v. Alexander, 608 F.3d 974, 983-88 (7th Cir. 2010) (discussing the constitutionality of endorsement bans).

134 See David Klein & Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POL. RES. Q. 709, 719-26 (2001) (discussing the importance of providing a candidate's party affiliation on judicial ballots).

135 See SHUGERMAN, *THE PEOPLE'S COURT*, *supra* note 21, at 167-69.

136 See Karlan, *supra* note 116, at 1046.

knowledge of the relationship between party and judicial philosophy (if there is one).<sup>137</sup> As Professors Elmendorf and Schleicher explained, “[T]he party cue tends to be least reliable in lower profile elections, where voters are most likely to be lost at sea without it.”<sup>138</sup> Such partisan cues may be useful for United States Supreme Court Justices because the public has a good sense of how Republican judges decide cases differently than Democratic judges, even if they might not understand the interpretive methods those judges will use to get there. But party cues are of low value when it comes to selecting a state court trial judge. Much of what trial judges do is management of cases.<sup>139</sup> This means that the work of a trial judge consists in large part of shepherding discovery and resolving discovery disputes, hearing and resolving pre-trial motions, and trying to guide the parties towards settlement. Much of the judge’s work is done behind the scenes, in his chambers, with only the lawyers and the litigants present. A partisan affiliation does not offer voters the kind of information needed to decide whether a judge is particularly good at these skills. There is no evidence that partisan affiliation has any correlation to being able to manage a case well, conduct settlement conference expeditiously, or deal with lawyers and parties fairly. Thus, there turns out to be a “mismatch’ between constitutional or institutional goals and electoral reality” because “political party competition does not produce a relevant heuristic” compared to the work of the judge.<sup>140</sup> Judging is unique in a representative democracy; it is too complex and multifaceted, and the kinds of heuristics that are so effective in other elections either do not exist or do not work in judicial elections.<sup>141</sup> As a result, voters end up focusing on irrelevant, meaningless characteristics like candidates’ names,<sup>142</sup> race, gender, and ethnicity.<sup>143</sup>

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<sup>137</sup> *Id.*

<sup>138</sup> Elmendorf & Schleicher, *supra* note 83, at 393.

<sup>139</sup> Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77, 378 (1982) (discussing the role of trial judges and how that role has changed over time).

<sup>140</sup> David Schleicher, *What If Europe Held an Election and No One Cared?*, 52 HARV. INT’L L.J. 109, 157 (2011); *see also* Schleicher, *supra* note 131, at 421–27 (describing how low levels of competition in local elections leave few choices for diverse political candidates).

<sup>141</sup> *See* Mariah Zeisberg, *Should We Elect the U.S. Supreme Court?*, 7 PERSP. ON POL. 785, 791–94 (2009).

<sup>142</sup> Examples abound of judicial candidates winning judicial elections solely because their names resembled those of local television personalities or other well-known, popular figures. Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1093 (2007) (noting several instances where highly qualified judges lost to unqualified newcomers with mistaken identities).

<sup>143</sup> Marsha Matson & Terri Susan Fine, *Gender, Ethnicity, and Ballot Information: Ballot Cues in Low-Information Elections*, 6 ST. POL. & POL’Y Q. 49, 52–53 (2006). Whether elections lead to worse judges is subject to debate, and the few scholars that have attempted to measure differences in judicial quality based on judicial selection methodology have reached inconclusive results. For example, Professors Choi, Gulati, and Posner found that while appointed judges arguably write judicial opinions of higher quality (measured by the number of times their opinions are cited), elected judges are more productive than appointed judges. Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed*

Unable to discover adequate cues on the ballots or deduce them from a judge's performance in office, voters are left to rely on television advertisements. This raises a new set of concerns in judicial elections. Television advertising has an important effect on all elections.<sup>144</sup> In fact, television ads can serve as an important heuristic for voters, especially in low-salience, low-information elections.<sup>145</sup> But television advertising plays a particularly important role in judicial elections because the public is even less knowledgeable about judges than other elected officials.

Unfortunately, television advertising often does little to increase voter competence in judicial elections. Rarely do judicial campaign ads raise important substantive issues, and rarer still are discussions about important judicial qualities like impartiality, fairness, promptness, and diligence. Instead, judicial campaigns generally consist of misleading, irrelevant information designed to deceive voters who do not have the resources to assess the candidates' qualifications or the content of the advertisements.<sup>146</sup> Rather than offering voters the kinds of cues that would allow them to vote competently, these ads generally distort judges' rulings, taking judicial decisions out of context and misrepresenting the judicial role.<sup>147</sup> The little information that the ads provide is often misleading or wrong, manipulating voters and distorting their ability to cast informed votes.<sup>148</sup> The ads often play on voters' fear or dislike of certain individuals or groups, especially criminal defendants.<sup>149</sup>

Nevertheless, the public is highly reliant on what the media says.<sup>150</sup> Because voters know so little about judicial candidates, every piece of information, no matter how skewed or misleading, can potentially play an important role. When it comes to judicial elections, negative ads work well,<sup>151</sup> and such ads

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*Judiciary*, 26 J.L. ECON. & ORG. 290, 292 (2010).

<sup>144</sup> See ED ROLLINS WITH TOM DEFRAK, *BARE KNUCKLES AND BACK ROOMS: MY LIFE IN AMERICAN POLITICS* 350–51 (1996); Shaun Bowler & Todd Donovan, *Do Voters Have a Cue? Television Advertisements as a Source of Information in Citizen-Initiated Referendum Campaigns*, 41 EUR. J. POL. RES. 777, 777 (2002).

<sup>145</sup> See Bowler & Donovan, *supra* note 144, at 778.

<sup>146</sup> Bert Brandenburg, *Inevitable, Flexible, Expandable Caperton?*, 33 SEATTLE U. L. REV. 617, 619 (2010) (discussing “nasty” and “misleading” ads that are common in judicial campaign advertising).

<sup>147</sup> See Adam R. Long, Note, *Keeping Mud Off the Bench: The First Amendment and Regulation of Candidates' False or Misleading Statements in Judicial Elections*, 51 DUKE L.J. 787, 788–89 (2001).

<sup>148</sup> See *id.*

<sup>149</sup> See Traci V. Reid, *The Politicization of Judicial Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 70 (1999); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793–94 (1995).

<sup>150</sup> See Hans A. Linde, Comment, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2003 (1988) (discussing the importance of media advertising and coverage for judicial elections).

<sup>151</sup> See Jim Kuhnhehn, *Millions Spent on Negative Political Ads*, WASH. POST (Oct. 31, 2006, 1:43 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/31/AR2006103100516.html>.

can sink a judicial candidacy.<sup>152</sup> This is why any proposal to restore judicial independence and accountability to judicial elections has to provide voters with salient, substantive information that can counter the negative, misleading advertisements about judicial candidates that bombard the electorate.<sup>153</sup>

### C. Voter Ignorance and Judicial Accountability

As I argued in Part I, one of the main justifications for judicial elections is that they allow the people to hold judges accountable for mistakes and misconduct. Although some traditionalists continue to claim that judges should be accountable only to the law,<sup>154</sup> such a view of judging has generally been replaced by one that acknowledges that judges have tremendous discretion and should be held accountable to the public.<sup>155</sup> After the rise of the legal realism movement, political scientists studying the work of the courts have developed the attitudinal model to describe judicial decision-making.<sup>156</sup> Their findings suggest that judicial decisions are heavily influenced by the judges' own attitudes and ideologies.<sup>157</sup> If that is indeed the case, then it is certainly legitimate for the electorate to seek to hold judges directly accountable.<sup>158</sup>

The shift to judicial elections seems, at least in theory, to be well-suited to serve that role, and the more recent shift to highly competitive judicial elections even more so. It is now almost passé to claim that judicial elections are becoming "noisier, nastier and costlier."<sup>159</sup> In fact, these elections are in many ways difficult to distinguish from elections for other offices. When it comes to money, candidates and independent groups now spend record sums on judicial

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152 STEPHEN ANSOLABEHRE ET AL., *THE MEDIA GAME: AMERICAN POLITICS IN THE TELEVISION AGE 100* (1993) ("More often than not, the victor is the candidate who is best able to condense his or her message into something that the average voter . . . will remember and care about. Out of necessity, such circumstances force candidates to highlight easily absorbed negative messages about the opponent."); see Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 *IND. L. REV.* 669, 684–85 (2002).

153 See Schotland, *supra* note 142, at 1081–84, 1100 (discussing instances where highly qualified candidates lost elections because of their opponents' media presence and highly funded campaigns).

154 Ed Ratushny, *Speaking As Judges: How Far Can They Go?*, *NAT'L J. CONST. L.*, 1999–2000, at 293, 296 ("Judicial independence requires that judges be accountable only to the law and their conscience.").

155 BONNEAU & HALL, *supra* note 26, at 2 ("[J]udges have considerable discretion and should be held accountable for their choices, at least at the state level where we would expect a close connection between public preferences and public policy . . .").

156 JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 87–88 (2002).

157 *Id.* at 110.

158 In addition, the public's confidence in the judiciary grows if the public feels that it has some say in who serves on the bench. See *id.* at 93–94.

159 Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 *J.L. & POL.* 57, 76 (1985).

elections, with no end in sight.<sup>160</sup> Spending in state supreme court elections has risen substantially in the past two decades.<sup>161</sup> Judicial elections are starting to resemble legislative elections and federal congressional elections in other ways as well, becoming highly contested and competitive.<sup>162</sup> For example, Melinda Hall, a leading defender of judicial elections, found that competition and contestation in judicial elections nearly matched the elections for the U.S. House of Representatives.<sup>163</sup> Incumbent judges and justices are frequently challenged, and, when challenged, face stiff competition, often losing their seats.<sup>164</sup> And since elections are, after all, designed to hold public officials accountable, and competition promotes accountability, the enhanced competition in judicial elections might be thought to lead to greater accountability for elected judges.<sup>165</sup>

But there is one problem with this theory: voter ignorance. Voter ignorance is a major hurdle to the public's ability to hold judges accountable. Accountability, almost by definition, requires voters to know candidates' views and positions and to have at least some political knowledge. But as Judge Posner explained, "[m]ost of what courts do is opaque to people who are not lawyers. It is completely unrealistic to think that the average voter will ever know enough about judicial performance to be able to evaluate judicial candidates intelligently."<sup>166</sup> Widespread voter ignorance reduces voters' ability to hold judges accountable, review their performance in office, and remove judges from office if they are doing a poor job. In fact, nearly 80% of voters cannot identify any judicial candidates for office.<sup>167</sup>

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160 DEBORAH GOLDBERG ET AL., BRENNAN CTR. FOR JUSTICE & INST. ON MONEY IN STATE POLITICS, *THE NEW POLITICS OF JUDICIAL ELECTIONS* 2004, at 1, 18–19 (Jesse Rutledge, Justice at Stake Campaign ed., 2005), available at [http://www.justiceatstake.org/media/cms/NewPoliticsReport2004\\_83BBFBD7C43A3.pdf](http://www.justiceatstake.org/media/cms/NewPoliticsReport2004_83BBFBD7C43A3.pdf).

161 See Chris W. Bonneau, *The Dynamics of Campaign Spending in State Supreme Court Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 59, 63, 70 (Matthew J. Streb ed., 2007).

162 See *id.* at 59.

163 Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 165, 183 (Matthew J. Streb ed., 2007).

164 In fact, justices appear to lose their seats much more frequently than House representatives. *Id.* at 167. Streb speculates that incumbent judges do not have the same incumbency advantage because of their inability to earmark, perform casework, or establish name recognition. Matthew J. Streb, *How Judicial Elections Are Like Other Elections*, in *WHAT'S LAW GOT TO DO WITH IT*, *supra* note 41, at 197, 200.

165 See John D. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, 68 J. POL. 911, 919–20 (2006).

166 Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 5 (2006).

167 Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 52 (2003). Professor Geyh's influential article describes "The Axiom of 80": 80% of the public prefers to elect its judges, 80% does not vote in judicial elections, 80% cannot identify the judicial candidates, and 80% believes that when partisan elections are held, the elected judges are influenced by campaign contributions. *Id.* at 52–56.

Judge Posner is right that the public is generally ignorant about the state judiciary and judges' decisions. Voters often show up to vote without having any knowledge about judicial candidates or the issues at stake.<sup>168</sup> As a result, voters are unable to hold judges accountable for violating the public's trust or the state's rule of law values.<sup>169</sup> Instead of voting for or against a judge based on his or her record, voters often choose their judges randomly based on mostly irrelevant factors like name, gender, race, and ballot position.<sup>170</sup> Individual decisions that were highlighted in the course of the campaign also play a big role. Each decision is carefully scrutinized and is subject to misrepresentation in election campaigns.

Even when it comes to misconduct, voters seem to be unable to hold unethical judges accountable.<sup>171</sup> Although there are few studies conclusively demonstrating that elected judges engage in more misconduct than appointed judges, there is some evidence that this is indeed the case. For example, "elected judges in California, Florida, and New York are more likely to be disciplined for misconduct than judges appointed to fill vacancies."<sup>172</sup> In the 2012 election, Illinois voters re-elected a judge who was offering an insanity defense to a misdemeanor battery charge and was barred from entering the county courthouses.<sup>173</sup> It is hard to expect voters to hold judges accountable for legal errors when voters cannot hold judges accountable for unethical conduct or corruption.

Think back to the hypothetical judge in the Introduction. The judge was not afraid that the public would disagree with her interpretation of the Fourth Amendment on the exclusionary motion. Rather, our judge was fearful that the public, without any understanding of whether the decision was correct or even what the case was about, might vote against her based on incomplete and misleading information in the campaign. In fact, the possibility of a campaign itself may give judges second thoughts on how to rule in any particular

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168 Kenyon N. Griffin & Michael J. Horan, *Patterns of Voting Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming*, 67 JUDICATURE 68, 72 (1983); see Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Voter Knowledge, Behavior and Attitudes in Primary and General Judicial Elections*, 82 JUDICATURE 216, 219 (1999).

169 Cf. Sambhav N. Sankar, *Disciplining the Professional Judge*, 88 CALIF. L. REV. 1233, 1250–51 (2000) ("Voters do not have enough information to make reasoned decisions about a judge's fitness for office, and thus elections cannot meaningfully ensure adherence to legal norms and proper judicial behavior.").

170 See Matson & Fine, *supra* note 143, at 52–53; Schotland, *supra* note 142, at 1093.

171 Election pressures themselves often lead to misconduct. In August 2012, Pennsylvania Supreme Court Justice Joan Orié Melvin was suspended, without pay, for misconduct related to her judicial campaigns. See Associated Press, *Three Political Sisters in Pa. Convicted of Corruption*, USA TODAY (Feb. 22, 2013), <http://www.usatoday.com/story/news/nation/2013/02/22/3-sisters-corruption/1940495/>.

172 Roy A. Schotland, *A Plea for Reality*, 74 MO. L. REV. 507, 516 (2009).

173 Debra Cassens Weiss, *Judge Barred from Courthouse Wins Re-Election, Presses Insanity Defense in Battery Case*, ABA JOURNAL (Nov. 8, 2012, 9:53 AM), [http://www.abajournal.com/news/article/judge\\_barred\\_from\\_courthouse\\_wins\\_re-election\\_presses\\_insanity\\_defense\\_in\\_b/](http://www.abajournal.com/news/article/judge_barred_from_courthouse_wins_re-election_presses_insanity_defense_in_b/).

case, regardless of how the public would react to the ruling if it had a full understanding of the decision. The hypothetical is neither far-fetched nor alarmist. Judges are indeed fearful of losing their jobs based on decisions in individual cases, and in recent years a number of judges have lost their jobs based, in whole or in part, on decisions in a single case.<sup>174</sup>

*D. Voter Ignorance, Judicial Independence, and Judicial Fear*

Almost everyone agrees that judges must be independent to fulfill the judicial role.<sup>175</sup> Judicial independence is one of the central values of the American judiciary. It is essential to a constitutional democracy because it “insulates judges from external interference with their impartial judgment that could corrupt the rule of law.”<sup>176</sup> Judicial independence has been an important value since the founding. The Declaration of Independence charged the king with making “judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.”<sup>177</sup> Many state constitutions also emphasized the importance of judicial independence.<sup>178</sup> In the immortal words of Alexander Hamilton in the Federalist Papers, judicial independence is “an essential safeguard against the effects of occasional ill humors in the society.”<sup>179</sup> Judges, whether elected or appointed, take an oath to remain independent and impartial.

But elected judges live in constant fear of losing their jobs. Judges themselves talk about their fear, with Justice Otto Kaus’s “crocodile in the bathtub” adage being the most famous example.<sup>180</sup> When interviewed, other judges have expressed the same concern: deciding cases in ways with which

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<sup>174</sup> For example, three Iowa Supreme Court Justices likely lost their retention election because of their decision in a same-sex marriage case. Tyler J. Buller, Note, *Framing the Debate: Understanding Iowa’s 2010 Judicial-Retention Election Through a Content Analysis of Letters to the Editor*, 97 IOWA L. REV. 1745, 1747 (2012).

<sup>175</sup> See Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROBS., Summer 1998, at 59, 67.

<sup>176</sup> Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 217 (2012).

<sup>177</sup> THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776). One could argue that the colonists’ complaint was less about judicial independence, and more about “freeing judges from subservience to an unaccountable executive.” TARR, *supra* note 16, at 9. Regardless, as discussed in greater detail below, judicial independence seems to have played an important role during the revolutionary era and at the time of the founding of the federal and many state constitutions.

<sup>178</sup> For example, according to the Massachusetts Constitution, state citizens deserve “judges as free, impartial, and independent as the lot of humanity will admit.” MASS. CONST. of 1780, art. XXIX; see John Adams, *The Report of a Constitution, or Form of Government, for the Commonwealth of Massachusetts*, in 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 219, 229 (Charles Francis Adams ed., 1851).

<sup>179</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>180</sup> Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994).

the majority of the voters disagree is dangerous.<sup>181</sup> Judges also fear that voters will hold them accountable based on inaccurate information or failure to understand their decision in context. Their fear is well-founded. In partisan elections, judicial incumbents lose more often than other elected officials.<sup>182</sup> And even in retention elections, which have generally been considered safe for sitting judges, incumbents have recently faced organized blitzes that have cost a number of judges their jobs. For example, in the same year that the three Iowa Supreme Court justices lost their retention election following their decision in a same-sex marriage case, a number of judges, including two district judges in Colorado, a judge in Alaska, and a judge in New Mexico, also lost their retention bids.<sup>183</sup> And many of those who were retained had to overcome heated and expensive campaigns against them.<sup>184</sup>

As a result of this fear, judges quite often cannot decide cases neutrally or impartially.<sup>185</sup> Judges who want to keep their jobs must keep the public and campaign supporters happy. This desire to ensure a successful reelection often leads to dramatic changes to judges' decisions. The empirical evidence of the effect of judicial fear is overwhelming. It is also very troubling.

First, the evidence shows that elected judges are less independent, deciding cases in ways they expect would satisfy the electorate. These judges impose significantly longer sentences as an election nears.<sup>186</sup> They are much more likely to impose or uphold the death sentence as an election gets closer.<sup>187</sup> They award

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181 See Andrew P. Morriss, *Opting for Change or Continuity? Thinking About 'Reforming' the Judicial Article of Montana's Constitution*, 72 MONT. L. REV. 27, 46 (2011) ("Interviews with judges suggest that concern over retention elections affects decision making.").

182 See Streb, *supra* note 164, at 200.

183 See Trevor Hughes, *Colorado Election Results: Judges Gilmore, Blair Ousted, Reflecting Anger over Tim Masters Case*, COLORADOAN (Nov. 3, 2010), <http://www.coloradoan.com/article/20101103/NEWS03/11030364/Judges-Gilmore-Blair-ousted-reflecting-anger-over-Tim-Masters-case> (Colorado district court judges Jolene C. Blair and Terence A. Gilmore); STATE OF ALASKA, DIV. OF ELECTIONS, OFFICIAL RETURNS: NOVEMBER 2, 2010 GENERAL ELECTION 8 (2010), available at [http://www.elections.alaska.gov/results/10GENR/data/2010\\_General\\_Election\\_Results\\_Book.pdf](http://www.elections.alaska.gov/results/10GENR/data/2010_General_Election_Results_Book.pdf) (Alaska district court judge Richard W. Postma, Jr.).

184 Press Release, Justice at Stake, 2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say (Nov. 3, 2010), [http://www.justiceatstake.org/file.cfm/media/cms/November\\_3rd\\_Press\\_Release\\_B7DA55C632A10.pdf](http://www.justiceatstake.org/file.cfm/media/cms/November_3rd_Press_Release_B7DA55C632A10.pdf).

185 Cf. Burbank, *supra* note 88, at 321 ("[I]t is inconsistent with the arrangements for judicial security contained in that document, and hence with the core of federal judicial independence, to remove a federal judge from office for the content of her judicial behavior.").

186 Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 AM. J. POL. SCI. 247, 253–62 (2004).

187 Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 438–43 (1992).

higher damages against out-of-state businesses.<sup>188</sup> On the whole, elected judges are much more responsive to political pressure than appointed judges.<sup>189</sup>

Second, elected judges are also less impartial. Studies prove that elected judges rule disproportionately in favor of their contributors.<sup>190</sup> For example, when studying the Alabama Supreme Court, Professor Stephen Ware found a “remarkably close correlation between a justice’s votes on arbitration cases and his or her source of campaign funds.”<sup>191</sup> A *New York Times* study of the Ohio Supreme Court also showed that Ohio justices “voted in favor of contributors 70 percent of the time.”<sup>192</sup> Elected judges also tend to favor the lawyers who have contributed to their campaigns.<sup>193</sup> And a recent Pennsylvania study found that in nearly 25% of the cases heard by the Pennsylvania Supreme Court, one of the litigants or one of the lawyers had contributed to one of the Justices’ campaigns.<sup>194</sup>

A recent Supreme Court decision, *Caperton v. A.T. Massey Coal Co.*,<sup>195</sup> is a perfect example of the potential influence that candidate contributions, or even independent expenditures, can have on judicial impartiality. After a West Virginia jury awarded Caperton \$50 million in damages, Massey appealed the decision to the West Virginia Supreme Court.<sup>196</sup> At the same time, West Virginia was holding its 2004 election for a seat on the state supreme court, and Massey’s CEO Don Blankenship became the leading supporter of Brent Benjamin, an attorney running for the seat on the high court.<sup>197</sup> Blankenship contributed \$1000 to Benjamin’s campaign, and spent \$3 million of his own

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188 Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186 (1999).

189 Cf. DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY 130 (1995).

190 See Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 669 (2009).

191 Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 584 (2002).

192 Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1; see also Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. TIMES, Jan. 29, 2008, at A14 (revisiting the study).

193 Aman McLeod, *Bidding for Justice: A Case Study About the Effect of Campaign Contributions on Judicial Decision-Making*, 85 U. DET. MERCY L. REV. 385, 398–400 (2008) (explaining that an elected justice is more likely to rule in favor of the attorney who contributed more funds to the judge’s campaign); cf. Chris W. Bonneau & Damon M. Cann, *The Effect of Campaign Contributions on Judicial Decisionmaking* 17–18 (Feb. 4, 2009) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1337668](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337668).

194 See Laura Stafford & Samantha Sanchez, *Campaign Contributions and the Pennsylvania Supreme Court*, NAT’L INST. ON MONEY IN STATE POLITICS 2 (Apr. 30, 2003), <http://www.followthemoney.org/press/PA/20030430.pdf>.

195 *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009).

196 *Id.* at 872–73.

197 *Id.*

money on a PAC and mailings supporting Benjamin.<sup>198</sup> His spending dwarfed all of Benjamin's other supporters, and led to Benjamin's victory.<sup>199</sup> Benjamin then cast the deciding vote to overturn the jury's verdict in favor of Caperton.<sup>200</sup> On appeal, the United States Supreme Court held that Benjamin's refusal to recuse himself violated the Due Process Clause.<sup>201</sup>

Just as important as actual independence and impartiality is the effect of judicial elections on the *appearance* of independence and impartiality. Ninety percent of voters and 80% of judges expressed concern that special interest groups could influence judicial decisions because of their role in judicial elections.<sup>202</sup> Nearly 80% of business leaders also believe that their contributions have at least "some influence" on judges' decisions.<sup>203</sup> As Justice O'Connor explained, "[e]ven if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."<sup>204</sup>

Is it possible that, just as with judicial accountability, voter ignorance is to blame? Neither political scientists nor legal scholars have linked the public's political ignorance with judicial independence.<sup>205</sup> But the link is there, and public knowledge is indeed very important to judicial independence. More knowledgeable voters—those who have some information about judicial candidates and judicial decisions—are more likely to understand the judicial role and will be less influenced by misleading advertising and other campaign information.<sup>206</sup> And public support for judicial independence rises as people learn more about the role of the judiciary in a democracy.<sup>207</sup> In order to preserve judicial independence, the electorate must recognize that mere disagreement

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 874–75.

<sup>201</sup> *Id.* at 886.

<sup>202</sup> *Justice at Stake – State Judges Frequency Questionnaire*, JUSTICE AT STAKE CAMPAIGN 5 (2002), [http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults\\_EA8838C0504A5.pdf](http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf).

<sup>203</sup> CHRISTIAN W. PECK, ZOGBY INT'L, ATTITUDES AND VIEWS OF AMERICAN BUSINESS LEADERS ON STATE JUDICIAL ELECTIONS AND POLITICAL CONTRIBUTIONS TO JUDGES 4–5 (May 2007), available at [http://www.justiceatstake.org/media/cms/CED\\_FINAL\\_reports\\_14MAY07\\_BED4DF4955B01.pdf](http://www.justiceatstake.org/media/cms/CED_FINAL_reports_14MAY07_BED4DF4955B01.pdf).

<sup>204</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring).

<sup>205</sup> In part, this is because of the general focus in academic scholarship on the federal judiciary. Voter competence is not a necessary condition for judicial independence at the federal level because federal judges are appointed for life. Regardless of how ignorant the public is about the federal judiciary or the judicial role, the judges' jobs are safe.

<sup>206</sup> Anca Cornis-Pop, *Republican Party of Minnesota v. White and the Announce Clause in Light of Theories of Judge and Voter Decisionmaking: With Strategic Judges and Rational Voters, the Supreme Court Was Right to Strike Down the Clause*, 40 WILLAMETTE L. REV. 123, 177 (2004).

<sup>207</sup> See James L. Gibson & Gregory A. Caldeira, *Knowing About Courts* 23–24 (June 20, 2007) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=956562](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956562).

with a judge's decision, or an opponent's representation of that decision, is not a sufficient reason for removing a judge from office. Thus, judicial independence increases as the actor deciding on the judge's retention becomes more knowledgeable.

Perhaps a useful analogy is to states that use gubernatorial reappointments to retain their judges. Because governors are more knowledgeable about the judiciary, they generally reappoint judges, even judges previously appointed by governors from a different party; unless the judge is corrupt, incompetent, and completely out of touch, he can live without fear of losing his job.<sup>208</sup> Thus, while the link between voter ignorance and judicial independence is more attenuated than the one between voter ignorance and judicial accountability, it is a link nonetheless.

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When taken together, the evidence in Part II paints a damning picture of judicial elections: neither of the justifications for elections offered in Part I have come to fruition. On the independence side, judges are fearful of losing their jobs and tailor decisions to the will of not only of the electorate, but the will of the special interests that heavily influence the electorate. On the accountability side, mass voter ignorance suggests that the voting public is unable to determine who should and should not be a judge. This has led scholars to conclude that judicial elections are a "hopeless disaster,"<sup>209</sup> and students of judicial elections have called for a drastic reduction in the public's role in selecting judges.

### III. BALLOT NOTATIONS

If judicial elections frustrate both judicial accountability and judicial independence because of voter ignorance, then a promising type of solution must seek to counteract that ignorance. Instead, many scholars have focused on trying to eliminate judicial elections altogether,<sup>210</sup> imposing stricter disqualification and recusal standards,<sup>211</sup> and implementing a more effective system of campaign finance reform, including public financing of judicial elections.<sup>212</sup> None of these proposals are likely to succeed. Judicial elections

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<sup>208</sup> See Dhammika Dharmapala et al., *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037, 1065 (2010) (discussing gubernatorial reappointment of judges previously appointed by governors from a different party); Richard H. Steen, *Preserving Judicial Independence*, N.J. LAW., THE MAG., Aug. 2010, at 5, 5 (discussing the first time a New Jersey Supreme Court Justice was denied reappointment by a governor since 1949).

<sup>209</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 5 (2011).

<sup>210</sup> Justice Sandra Day O'Connor has been at the forefront of the movement. John Schwartz, *Effort Begun to Abolish the Election of Judges*, N.Y. TIMES, Dec. 24, 2009, at A12.

<sup>211</sup> See Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 348-50 (2010).

<sup>212</sup> See James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign*

are extremely popular among the public,<sup>213</sup> and are unlikely to disappear.<sup>214</sup> Recusal reform does not address the problem of voter ignorance, and relies too much on ineffective recusal procedures, including self-recusal.<sup>215</sup> And campaign finance reform is doomed to fail because of the Supreme Court's decisions in *Citizens United v. FEC*<sup>216</sup> and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,<sup>217</sup> which have made campaign finance reform a nearly impossible solution by providing extensive protection to campaign expenditures.<sup>218</sup>

State courts have long acknowledged the problem of voter ignorance, and have sought to address it. Recognizing the limitations in voters' capacities to choose judges, Wisconsin Supreme Court Justice Shirley Abrahamson has argued that it is the role of the state courts to provide people with the information they need.<sup>219</sup> To that end, states have sought to implement ideas that would increase public knowledge, from making the selection process more transparent,<sup>220</sup> to providing voters with election guides or judicial performance evaluations<sup>221</sup> in advance of the elections. State courts have also more readily allowed cameras in the courtrooms,<sup>222</sup> made greater use of technology to expose the public to more information about the judges,<sup>223</sup> and have even considered

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*Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727, 752 (2011).

<sup>213</sup> Around 80% of the public supports judicial elections. Geyh, *supra* note 167, at 52–53.

<sup>214</sup> Because judicial elections are written into state constitutions, voters would be required to go to the polls and vote to limit their ability to select judges. This is highly unlikely to happen.

<sup>215</sup> See Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 985–86.

<sup>216</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>217</sup> *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2812 (2011) (striking down Arizona's public financing scheme).

<sup>218</sup> Nonetheless, some scholars argue that the Court's decision in *Caperton* suggests that the Court may be more tolerant of campaign finance in the context of judicial elections. Sample, *supra* note 212, at 752.

<sup>219</sup> Shirley S. Abrahamson, Chief Justice, Wis. Supreme Court, *The Ballot and the Bench*, Address at the Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice (Mar. 15, 2000), in 76 N.Y.U. L. REV. 973, 994–95 (2001).

<sup>220</sup> Arizona does this by making the work of the merit selection committee public. See Ruth V. McGregor, *Arizona's Merit Selection System: Improving Public Participation and Increasing Transparency*, 59 SYRACUSE L. REV. 383, 390 (2009).

<sup>221</sup> Eight states provide voters with judicial performance evaluations before the judicial election. Judicial performance evaluations are discussed in greater detail below. David C. Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115, 118 (2008).

<sup>222</sup> Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1491–92 (2012).

<sup>223</sup> Indiana has utilized technology to bring more of its proceedings to the public. For example, court proceedings are available in their entirety on webcasts. Randall T. Shepard, *The Necessity of Civic Education*, ATLANTIC (June 27, 2012), <http://www.theatlantic.com/national/print/2012/06/the-necessity-of-civic-education/258983/>. The Maine court system also has a twitter feed that provides information about the judiciary. Ann S. Kim, *Maine's Court System Taking to Twitter*, PORTLAND PRESS HERALD (Sept. 24, 2012), <http://www.pressherald.com/news/Maine-courts-are->

making deliberations public.<sup>224</sup> In some states, judges travel to local high schools to hold hearings, and the Illinois Supreme Court recently began a project for state judges to teach civics classes at high schools throughout the state.<sup>225</sup> Other states have established programs intended to help citizens understand the workings of the court system.<sup>226</sup>

But these state efforts have had little success because voters have neither the time nor the inclination to learn about their state judicial officers or the judicial role. In other words, these educational programs continue to impose high costs on voters who want to learn more about the judiciary.<sup>227</sup> They require voters to seek out the information and to spend time learning and processing it. More importantly, these efforts are unable to compete with the much more salient television advertisements, and the special interests bankrolling them because the television ads are dramatic and repeated *ad nauseum*. As a result, the information that states provide is overshadowed by more prominent and more salient information about judges.

That leaves us with a seemingly impossible paradox. Voter ignorance is high, but giving voters more information is ineffective. Often, voters cannot understand the information or do not have the time to process it. Further, this information may be cancelled out in the voters' minds because of publicly available misleading information. But there is a partial way out, and it involves the ballot itself. Although the contents of judicial election ballots have been ignored by judicial election scholars,<sup>228</sup> the best way to improve the quality of information that voters have in judicial elections is by placing that information directly on the ballot.

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tweeting.html.

<sup>224</sup> Jason Stein & Patrick Marley, *Abrahamson Suggests Open Deliberation for State Supreme Court*, MILWAUKEE WIS. J. SENTINEL (Sept. 6, 2011), <http://www.jsonline.com/news/statepolitics/129347808.html>. This proposal was made by Justice Abrahamson in Wisconsin, but it was quickly rejected. Patrick Marley, *Wisconsin Justices Reject Public Deliberation Proposal*, MILWAUKEE WIS. J. SENTINEL (Sept. 6, 2011), available at [http://www.twincities.com/ci\\_18907275](http://www.twincities.com/ci_18907275). Very few nations in the world make judicial deliberations public. See, e.g., SHABTAI ROSENNE, *PROCEDURE IN THE INTERNATIONAL COURT* 52 (1983).

<sup>225</sup> *Illinois Supreme Court Starts Civics Talks About Constitution*, STATE J. REG. (Sept. 8, 2012), <http://www.sj-r.com/breaking/xi298140376/Illinois-Supreme-Court-starts-civics-talks-about-Constitution>.

<sup>226</sup> See *Who We Are*, OUR COURTS COLORADO, <http://www.ourcourtscolorado.org/index.cfm/ID/22330> (last visited Jan. 15, 2014). Founded in 2007, Our Courts was organized to further public knowledge of Colorado state courts by providing information to audiences around the state. *Id.*

<sup>227</sup> See, e.g., DELLI CARPINI & KEETER, *supra* note 76, at 269–72; DOWNS, *supra* note 84, at 236–37.

<sup>228</sup> This trend extends beyond judicial elections. See Garrett, *supra* note 10, at 1534 (“Surprisingly, very little of the recent scholarly attention has focused on the ballot itself, even though the information it contains—name and party affiliation—provides the strongest cues for voters seeking shortcuts.”).

### A. Background on Ballot Notations

A ballot notation is a statement, or any piece of information, that appears directly on the ballot, generally immediately next to, or across from, the candidate's name.<sup>229</sup> The dominant ballot notation in American elections is the candidate's party affiliation, which appears on ballots for most races,<sup>230</sup> and incumbency status, which appears on the ballot with less frequency.<sup>231</sup> These notations serve as important voting cues that allow voters to cast an intelligent ballot, making up for their political ignorance. In fact, the party label is generally believed to be the most crucial cue for voters in any election,<sup>232</sup> and the importance of incumbency status is not far behind.<sup>233</sup>

Ballot notations beyond the candidate's party affiliation and incumbency status have a spotty record in American history. The United States Supreme Court has struck down two state attempts at different ballot notations. The Court first addressed ballot notations in *Anderson v. Martin*.<sup>234</sup> There, the Court struck down a Louisiana law requiring that a candidate's race appear on the ballot next to the candidate's name.<sup>235</sup> Such a requirement, the Court held, violated the Equal Protection Clause.<sup>236</sup> The Court was concerned that "by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice."<sup>237</sup>

229 When it comes to ballot measures such as initiatives and referenda, the language used to describe the ballot measure is a significant ballot notation. Craig M. Burnett, Elizabeth Garrett & Mathew D. McCubbins, *The Dilemma of Direct Democracy*, 9 ELECTION L.J. 305, 316 (2010); Craig M. Burnett & Vladimir Kogan, *When Does Ballot Language Influence Voter Choices? Evidence from a Survey Experiment*, POL. COMM. (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1643448](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643448). In fact, some of the most important issues that arise when it comes to initiatives and referenda involve the language that the state will use to describe the ballot measure.

230 See Garrett, *supra* note 10, at 1534. In contrast party affiliation is not listed on ballots in most judicial elections.

231 See *id.* at 1534 n.3. There are a few other common ballot notations that some states have used for various elections. Brian P. Anderson, Student Work, *Judicial Elections in West Virginia: "By the People, For the People" or "By the Powerful, For the Powerful?" A Choice Must Be Made*, 107 W. VA. L. REV. 235, 247 (2004). For example, some states disclose the candidate's place of residence. Other states list the candidate's current job. These cues offer voters little information that would allow them to hold a judge accountable for performance in office.

232 See Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 661 (2000) ("The party label is an important cue for voters, providing general information about candidate orientations over a range of policy issues.").

233 See Lee Sigelman, *Voting in Gubernatorial Succession Referenda: The Incumbency Cue*, 51 J. POL. 869, 871 (1989); see also MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 24–25 (2d ed. 1989) (discussing voter cues in the 1950s and 1960s).

234 *Anderson v. Martin*, 375 U.S. 399 (1964).

235 *Id.* at 404.

236 *Id.* at 401–02.

237 *Id.* at 402.

The most famous recent attempt to add an informative ballot notation happened in 1996 when U.S. Term Limits, Inc. sought to place a ballot notation next to the names of Congressional candidates. That notation was intended to reflect that candidate's views on a term limits amendment proposed by the group.<sup>238</sup> But in *Cook v. Gralike*,<sup>239</sup> the Supreme Court struck down the so-called "Informed Voter" notations, holding that they violate the U.S. Constitution.<sup>240</sup> The Court explained that these "Scarlet Letter" designations "would handicap candidates for the United States Congress" and "dictate electoral outcomes" in violation of the First Amendment and the Elections Clause.<sup>241</sup>

The Court's decisions in *Anderson* and *Cook* highlight the fact that ballot notations can play an important role in shaping voter preferences. Even if they provide information that is otherwise available, the timing and the placement of the information directly on the ballot can make all the difference. Can we design a ballot notation that is likely to make a difference in judicial elections; one with the potential to overcome voter ignorance, and restore the original vision of judicial elections? That is the question to which I now turn.

*B. Ballot Notations Are Likely To Be  
Particularly Effective in Judicial Elections*

There are two reasons why ballot notations can be particularly effective in the context of judicial elections: placement and timing.

When it comes to placement, ballot notations can make a big difference because voters cannot avoid seeing them. Unlike the state efforts to educate the public about the state's judiciary, ballot notations do not rely on voters taking any initiative other than showing up at the polling place on election day. Thus, ballot notations reduce voters' decision costs significantly. Voters can access notations without researching judicial candidates, studying judicial decisions, or reviewing ethics complaints against judges. Furthermore, ballot notations need not use television advertising to compete for voters' attention. With candidates and special interest groups spending millions of dollars on television advertisements, misleading television advertisements often overshadow relevant information about judges.<sup>242</sup> Ballot notations offer a way to get around this problem by highlighting a particularly relevant item for voters' attention.

Ballot notations can be incredibly effective, even when the information conveyed by the notation is already available to the public. Studies of human

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<sup>238</sup> Specifically, candidates who declined to support term limits would receive a notation that they "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" or "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS." Mo. CONST. art. VIII, §§ 17-18, *invalidated* by *Cook v. Gralike*, 531 U.S. 510 (2001).

<sup>239</sup> *Cook v. Gralike*, 531 U.S. 510 (2001).

<sup>240</sup> *Id.* at 526.

<sup>241</sup> *Id.* at 525-26.

<sup>242</sup> *See supra* Part II.B.

psychology have shown that how the information is presented is just as important as the information itself.<sup>243</sup> For example, even in states that compile judicial performance evaluations and keep track of judges' ethical violations and reversal rates, voters are unlikely to discover this information without substantial work—something that most voters are unwilling to do. Thus, for voters relying on cues and heuristics, information appearing directly on the ballot is likely to serve as a key shortcut that helps the voter to cast an intelligent vote, whether or not that information might be available from other sources.<sup>244</sup> And in nonpartisan and retention elections, any well-conceived ballot notation is likely to make a large difference because ballots in those elections offer voters virtually no other cues.

As for timing, not only is the information on the ballot readily available, but it comes at a key moment in the election. That is, it is offered to the voter precisely when he is casting his vote. Scholars recognize that last-minute information is particularly salient to voters in elections.<sup>245</sup> Because the information is accessible at a crucial time, voters might perceive it to be more credible, especially if it is coming from a trusted (or trust-able) source. And most obviously, the information is fresh in the voter's mind. These are important points in light of the central role that misleading campaign ads play in judicial elections—such timing advantages allow ballot notations to possibly overcome the effect of misleading advertisements, and negate the ads as a major source of judicial fear.

In fact, we already know that the information on the ballot is highly influential in judicial elections. Many voters do not even realize that they will be voting for judges until they are required to mark a name on the ballot.<sup>246</sup> In low-information, low-salience contests like judicial elections, the ballot is the primary source of information about judicial candidates.<sup>247</sup> For example, when voters in judicial elections do not have access to a party label, they rely on whatever information is available. Researchers have found that ballot notations of the candidates' current job influence voters more than endorsements, pamphlets, and candidates' own advertisements by providing a distinct advantage to incumbents and candidates holding judicial positions.<sup>248</sup>

243 See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 288 (1979).

244 See, e.g., Susan A. Banducci et al., *Ballot Photographs as Cues in Low-Information Elections*, 29 *POL. PSYCHOL.* 903, 904 (2008) (explaining the impact of ballot photographs in low-information elections on voter behavior); Monika L. McDermott, *Candidate Occupations and Voter Information*, 67 *J. POL.* 201 (2005) (discussing the effect on voter behavior of candidate occupational information on election ballots).

245 See Raleigh Hannah Levine, *The (Un)informed Electorate: Insights into the Supreme Court's Electoral Speech Cases*, 54 *CASE W. RES. L. REV.* 225, 284 (2003).

246 See Hensler, *supra* note 95, at 711 (“[M]any citizens do not understand how their judges are selected.”).

247 Baum, *supra* note 114, at 21.

248 DuBois, *supra* note 7, at 45.

Recognizing the importance of “last-minute” speech, states have imposed a number of regulations on such speech. Nearly every state has implemented campaign-free zones around the polling place, prohibiting any kind of political activity in the immediate vicinity of the voting booth. The Supreme Court has upheld these restrictions because of concerns that last-minute information might be too influential, and might confuse voters.<sup>249</sup> Many states also have sought to limit newspaper editorial endorsements of candidates on the day of election, although the Court has struck down those regulations.<sup>250</sup>

These efforts highlight the dangers of ballot notations.<sup>251</sup> Because of the powerful advantages associated with placement and timing, ballot notations must be used with care. The content must be especially refined and considered, and must in fact increase voter competence lest it confuse or mislead voters into voting against their interests. Luckily, when it comes to judicial elections, this is a manageable task. Ballot notations allow the state to identify what information about judicial candidates is particularly relevant to improving voter competence and ensure that such information is available at the time of the election. By selecting that information in advance and placing it directly on the ballot, notations can minimize the importance of misleading television advertisements and diminish the effect of other, less relevant “information” available on the ballot, including ballot placement<sup>252</sup> and the candidate’s name<sup>253</sup> and gender.<sup>254</sup> And if a neutral, third-party group provides the information, voters are likely to perceive the information to be more reliable than the candidate’s own speech or literature, or the information provided by the candidate’s supporters.

### C. Implementation

This brings me to the heart of my proposal. If this Article has convinced the reader that voter ignorance is an important problem and that intelligently designed ballot notations can compensate for voter ignorance and allow the voter to cast a competent ballot, the question that remains is what an intelligently

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<sup>249</sup> See *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

<sup>250</sup> See *Mills v. Alabama*, 384 U.S. 214, 220 (1966).

<sup>251</sup> See *infra* Part IV (discussing these dangers in greater detail).

<sup>252</sup> Albert J. Klumpp, *Judicial Primary Elections in Cook County, Illinois: Fear the Irish Women!*, 60 DEPAUL L. REV. 821, 844 (2011) (discussing the important role ballot design and configuration can play in judicial elections).

<sup>253</sup> Many candidates, recognizing the importance of the “name” heuristic, have tried changing their name in order to attract voters. See, e.g., Tracy Boutelle, *Familiar Name, Different Face Among Alderman Candidates*, ASSOCIATED PRESS, Jan. 14, 1999, available at NewsBank, Record No. D6QEORtGt.

<sup>254</sup> See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., LEVELING THE PLAYING FIELD: GENDER, ETHNICITY, AND JUDICIAL PERFORMANCE EVALUATION 5 (2012), available at [http://iaals.du.edu/images/wygwam/documents/publications/IAALS\\_Level\\_the\\_Playing\\_Field\\_FINAL.pdf](http://iaals.du.edu/images/wygwam/documents/publications/IAALS_Level_the_Playing_Field_FINAL.pdf).

designed notation may look like. I propose that judicial–election ballots include a neutral, non–partisan assessment of any candidate’s judicial performance.

In order to provide these assessments, states should create judicial performance evaluation commissions.<sup>255</sup> These commissions should be independent entities, although they could be overseen by either the state bar association or a state board of bar overseers. The commissions should be made up of lawyers, judges, academics, and public members. This membership combination is important. Lawyers know judges better than almost anyone, and their feedback should be influential. However, public members would add legitimacy to the commission and bring a non–lawyer perspective.

In fact, some states already use such commissions. Alaska was the first state to evaluate judges standing for retention elections, and eight states—Alaska, Arizona, Colorado, Kansas, Missouri, New Mexico, Tennessee, and Utah—now make judicial performance evaluations available to voters.<sup>256</sup> These commissions are generally made up of lawyers, judges, and lay people.<sup>257</sup> Unfortunately, as implemented, these commissions either do not provide their findings to the voters,<sup>258</sup> or provide them in advance of the election and rely on voters to find, understand, and apply the findings to cast an intelligent ballot. But expecting voters to review and understand thick booklets concerning elected judges is unreasonable, especially in light of the voter ignorance literature discussed in Part II.<sup>259</sup> In essence, then, I propose that all states that elect judges put in place the types of commissions that have already been tested in some jurisdictions. Moreover, I propose that the work of the commissions be highlighted more prominently. Rather than relying on voters to seek out and review the commission’s findings in advance of the elections, and to bring their knowledge into the voting booth, the commissions will be much more effective if their work and ultimate conclusions are featured more prominently on the election ballot itself.<sup>260</sup>

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255 While this name is not as eloquent as most, it accurately reflects the commission’s mission and goals. Furthermore, the term is at least somewhat familiar in a few states that perform judicial performance evaluations for judges facing retention elections.

256 Brody, *supra* note 221, at 118 & n.34.

257 For example, Arizona’s commission consists of thirty members: eighteen public members, six lawyers, and six judges. *The Arizona Judicial Merit Selection and Retention Symposium*, 6 PHX. L. REV. 1, 6 (2012) (describing the role of the commission in the merit selection process).

258 This is true of the eleven other states that have implemented judicial performance evaluation (JPE) systems but do not make their findings public. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT app. A (2006), available at [http://iaals.du.edu/images/wygwam/documents/publications/Shared\\_Expectations\\_Judicial%20Accountability\\_Context2006.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Shared_Expectations_Judicial%20Accountability_Context2006.pdf).

259 *See supra* Part II. Evaluations of the JPE programs’ success are inconclusive, and there is little evidence that these programs, as currently operated, increase judicial independence and accountability.

260 *See supra* Part II.B. In fact, I would argue that anyone who supports the work of the judicial performance evaluation commission should favor my proposal because it will only serve to make the commission’s work more important and their conclusions more influential.

As for how the commission would evaluate judicial performance for placement on the ballot, we can look to legal scholarship that has attempted to measure judicial merit, as well as the efforts of judicial performance evaluation commissions already in existence throughout the United States. Largely, the commission should gather and assess the kind of information that the public needs to cast a competent ballot in a judicial election. Professor Jordan Singer, citing procedural fairness literature, suggests that in evaluating judges, voters care more about judicial neutrality and impartiality than the substantive results those judges reach in particular decisions.<sup>261</sup> However, the general public is unable to assess the judiciary on any of these dimensions because neither judicial campaigns nor television advertisements focus on these factors, and most voters are not engaged as participants in the legal system. This is precisely where the commission could bring its expertise. In other words, the commission must seek to evaluate factors that relate to procedural fairness, such as the judge's temperament, patience, treatment of litigants, promptness in deciding cases, and impartiality.<sup>262</sup>

Any evaluation would likely consist of objective and subjective components. As for objective components, the performance evaluation would look to some of the commonly used measures of judicial quality in the academic literature.<sup>263</sup> These include the number of positive citations to a judge's opinions by other courts,<sup>264</sup> the judge's reversal rate,<sup>265</sup> and the judge's level of productivity.<sup>266</sup> The number of a judge's ethical violations can also be measured, as well as the number of ethics complaints against the judge. None of these measures is perfect, and some have been criticized,<sup>267</sup> but together they can offer a useful picture of the judge's competence and legal skills.

Subjective evaluations are also critical to the process. Subjective information could be gathered from litigants, lawyers, witnesses, court personnel, jurors, and

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<sup>261</sup> Jordan M. Singer, *The Mind of the Judicial Voter*, 2011 MICH. ST. L. REV. 1443, 1447.

<sup>262</sup> *Id.*

<sup>263</sup> See, e.g., Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 31-34 (2004) (describing performance evaluation method based on objective criteria).

<sup>264</sup> This criterion is designed to measure opinion quality. Generally, scholars focus on the number of positive citations by other courts, although some measures also look to positive citations by law reviews and other academic journals. See *id.* at 49, 51.

<sup>265</sup> See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 254, at 5. This, too, might measure the quality of the judicial opinion. Of course, it might also simply reflect the judge's ability to predict the preferences of higher courts.

<sup>266</sup> This could be measured by looking at the number of opinions published. See Choi & Gulati, *supra* note 263, at 42. Some have argued that even these "objective" measures are truly subjective in nature. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., LEVELING THE PLAYING FIELD: GENDER, ETHNICITY, AND JUDICIAL PERFORMANCE EVALUATION 5 (2012), available at [http://iaals.du.edu/images/wygwam/documents/publications/IAALS\\_Level\\_the\\_Playing\\_Field\\_FINAL.pdf](http://iaals.du.edu/images/wygwam/documents/publications/IAALS_Level_the_Playing_Field_FINAL.pdf).

<sup>267</sup> See Laura Denvir Stith, Response, *Just Because You Can Measure Something, Does It Really Count?*, 58 DUKE L.J. 1743, 1743-44 (2009).

other judges. For example, information about judges' fairness and impartiality can be measured by interviewing litigants and lawyers that frequently appear in front of the judges in question. The commission would also receive information about the way the judge treats those that participate in his or her courtroom. In addition, the commission could hold public hearings and receive comments from members of the public that have relevant knowledge. If necessary, the commission could interview judges to gain a better understanding of their temperament and judicial capacity. The commission is well-suited to receive and process this information because it will consist of members who have interacted with the judge(s) in question.

Ballot notations are particularly important in retention elections. Without an opposing candidate, there is generally even less information available to the voters, and voter participation is generally lower than in competitive elections.<sup>268</sup> As a result, incumbents prevail at extremely high rates, which leads critics to proclaim that these elections are “sham” and do not promote judicial accountability.<sup>269</sup> A rating by a merit evaluation commission could provide voters the information they need to hold judges accountable.

The final product—the actual ballot notation—must be pithy and succinct. For example, a judge that scores highly on the objective and subjective prongs might receive a notation of “extremely qualified,” or simply an “A.” Lower-scoring judges would receive notations like “somewhat qualified” or “not qualified.” A lengthy evaluation risks overwhelming the voter and creating its own problems of voter roll-off and voter confusion.<sup>270</sup> Rather than paying attention to the ballot notations, the voters might ignore them, reverting once again to relying on the misleading advertisement campaigns, or the voting cues that have proven so ineffective in judicial elections.

#### IV. OBJECTIONS

I believe a succinct evaluation of judicial performance placed directly on the ballot can help the public hold judges accountable. It might also foster judicial independence by ensuring judges that their performance will play an important role in their reelection bid. But the proposal also raises some concerns, and I conclude by discussing some potential objections.

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<sup>268</sup> William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 342 (1987).

<sup>269</sup> Michael R. Dimino, Perspective, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803, 807 (2004).

<sup>270</sup> Peter Selb, *Supersized Votes: Ballot Length, Uncertainty and Choice in Direct Legislation Elections*, 134 PUB. CHOICE 319, 325 (2008). And, indeed, states and scholars have expressed concern about the effect of lengthy ballots on the people's ability to cast an informed vote. See Judith L. Elder, *Access to the Ballot by Political Candidates*, 83 DICK. L. REV. 387, 389 (1979) (stating that the ballot reform movement began out of a concern that voters do not give careful attention to all of the candidates when presented with a long list of names and offices to be filled).

*A. Ballot Notations Are Unconstitutional*

Even if ballot notations can increase voter competence, some notations are unconstitutional under the Supreme Court's decisions in *Anderson v. Martin*<sup>271</sup> and *Cook v. Gralike*.<sup>272</sup> In *Anderson*, the Court struck down a Louisiana statute requiring that candidates' race be listed on the ballot next to the candidate's name.<sup>273</sup> Although the Court viewed the ballot notation with extreme suspicion, the content of the ballot notation doomed the Louisiana law.<sup>274</sup> The Court saw the statute as part of Louisiana's "system of racial discrimination against African Americans."<sup>275</sup> Because the statute was discriminatory, and promoted racial discrimination by voters, it was invalid.<sup>276</sup> None of these concerns arise with the proposed ballot notation, and my proposal, on its face and as applied (assuming, of course, that it is applied fairly), is entirely neutral on any potentially suspect classifications. Thus, *Anderson* is likely inapposite.

*Cook v. Gralike* presents a bit more of a challenge, but it too can be distinguished.<sup>277</sup> The majority's decision was based on its interpretation of the Elections Clause.<sup>278</sup> The Court held that rather than being a regulation of an election under the Elections Clause, the ballot notation was more akin to an indirect attempt to impose term limits on congressional incumbents, in violation of the Qualifications Clause.<sup>279</sup> The Court saw *Cook* as an attempt by the state to get around the Court's decision in *U.S. Term Limits v. Thornton*.<sup>280</sup> The majority's rationale was clearly limited to federal elections, where the Qualification Clause imposes the sole qualifications for office. As Justice Kennedy explained, federalism was the dispositive principle that drove the Court to reach the conclusion it did.<sup>281</sup> Because my proposal applies only to state elections, *Cook* does not control.

Justices Rehnquist and O'Connor, however, offer a different, perhaps more problematic, argument for the unconstitutionality of the ballot notation in *Cook*. They argue that the ballot notation "violates the First Amendment right of a political candidate, once lawfully on the ballot, to have his name appear

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<sup>271</sup> *Anderson v. Martin*, 375 U.S. 399 (1964).

<sup>272</sup> *Cook v. Gralike*, 531 U.S. 510 (2001).

<sup>273</sup> *Anderson*, 375 U.S. at 403.

<sup>274</sup> *Id.* at 403.

<sup>275</sup> David E. Strauss, Response, "Recognizing Race" and the Elusive Ideal of Racial Neutrality, 113 COLUM. L. REV. SIDEBAR 1, 1 (2013), [http://columbialawreview.org/wp-content/uploads/2013/01/1\\_Strauss.pdf](http://columbialawreview.org/wp-content/uploads/2013/01/1_Strauss.pdf).

<sup>276</sup> *Anderson*, 375 U.S. at 403.

<sup>277</sup> *Cook*, 531 U.S. 510.

<sup>278</sup> *Id.* at 513 (citing U.S. CONST. art. I, § 4, cl. 1) (delegating to the states the power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives").

<sup>279</sup> *Id.* at 517 (citing U.S. CONST. art. I, § 2).

<sup>280</sup> *Id.* at 526-27.

<sup>281</sup> *Id.* at 528 (Kennedy, J., concurring).

unaccompanied by pejorative language required by the State.<sup>282</sup> Since the First Amendment applies with equal force in state and federal elections, including judicial elections,<sup>283</sup> we must consider whether the ballot notation that this Article proposes would also be barred by the Rehnquist–O’Connor approach.

First, Chief Justice Rehnquist explained that the ballot notation in *Cook* was viewpoint discriminatory, since only those candidates who “fail to conform to the State’s position receive derogatory labels.”<sup>284</sup> Discrimination on the basis of viewpoint receives the most stringent review.<sup>285</sup> To the contrary, my proposal would place a ballot notation next to the name of any candidate for judicial office with judicial experience, regardless of what that candidate’s views were on any particular issue.

Second, while the ballot notations in *Cook* can fairly be characterized as “derogatory,”<sup>286</sup> my proposed ballot notation would offer an objective evaluation of the candidate. Of course, if the candidate’s performance in office was deficient, the ballot notation might indeed read “Highly Unqualified” or use other similar language. But even such a negative evaluation would not raise the same concerns about loaded wording. Unlike the ballot notation at issue in *Cook*, this notation is not designed to stigmatize any candidate or evoke an emotional reaction from the voters.<sup>287</sup>

Third, in *Cook*, Missouri required candidates to take a position on a certain issue, even if they did not want to do so. Rehnquist saw this as compelled speech,<sup>288</sup> something that the Court had previously held was in violation of

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282 *Id.* at 530–31 (Rehnquist, C.J., concurring).

283 *See* *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (holding that a “canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment”).

284 *Cook*, 531 U.S. at 532 (Rehnquist, C.J., concurring).

285 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994) (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”); *see* *Cox v. Louisiana*, 379 U.S. 559, 581 (1965) (Black, J., concurring in part and dissenting in part) (“[Viewpoint-based regulation is] censorship in a most odious form . . .”); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application*, 74 S. CAL. L. REV. 49, 56 (2000) (“[V]iewpoint restrictions have never been upheld.”). *See generally* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 90–91 (1948) (arguing for an “unabridged freedom of public discussion” as the foundation of our government).

286 *Cook*, 531 U.S. at 510, 514–15. The Missouri provision in question required that the statement “DISREGARDED VOTERS’ INSTRUCTION ON TERM LIMITS” be printed ballots adjacent to the name of a Senator or Representative who fails to support term limits, and that the statement “DECLINED TO PLEDGE TO SUPPORT TERM LIMITS” be printed on ballots next to the name of every nonincumbent congressional candidate who refuses to take a particular pledge in support of term limits. *Id.* at 514–15.

287 *But see* *Garrett*, *supra* note 10, at 1576–77 (discussing the potential of ballot notations to “take advantage of references to hot button issues to convince voters that a politician who acts irresponsibly in one instance is invariably a bad actor”).

288 *Cook*, 531 U.S. at 531 (Rehnquist, C.J., concurring).

the First Amendment.<sup>289</sup> Unlike the notation in *Cook*, which “effectively require[d] candidates to take pledges if they believe voters will impute meaning to silence,”<sup>290</sup> under my proposal, the candidate need not take a position on any issue. All the work is done by an independent, non-partisan commission. To the extent that the judge is involved at all in the process (for example, the commission might choose to interview the judge in connection with her candidacy), the participation is purely voluntary.

Finally, Chief Justice Rehnquist was concerned about the state selecting a single issue and making that issue central to an election. “During the campaign, [candidates] may debate tax reform, Social Security, national security, and a host of other issues; but when it comes to the ballot on which one or the other of them is chosen, the State is saying that the issue of term limits is paramount.”<sup>291</sup> The concern appears to be less about compelled speech than about government speech.<sup>292</sup> The Supreme Court’s “recently minted”<sup>293</sup> government speech doctrine has yet to be developed, but the Court has hinted that there are limitations on the government’s ability to engage in partisan advocacy.<sup>294</sup> Courts often characterize such governmental advocacy as unfair to the opposing side.<sup>295</sup> For example, Professors Kamenshine and Ziegler have conveyed strong objections to the government’s participation and expression in contested political issues.<sup>296</sup>

This is the strongest constitutional objection to my proposal. But I believe my proposal could withstand such a challenge. First, while there is something troubling about the government expressing its views as to which issues are important, the ballot notation requirement could be imposed by the people of the state in a constitutional amendment. Furthermore, the speech here would be purely private speech, not government speech, and the notation could make clear that the evaluation was not performed by the government or any of its

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289 See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that the “right to refrain from speaking” is protected by the First Amendment); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (“It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.”).

290 *Garrett*, *supra* note 10, at 1578.

291 *Cook*, 531 U.S. at 532 (Rehnquist, C.J., concurring).

292 See *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (“[Government] may not select which issues are worth discussing or debating . . .”).

293 *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 481 (2009) (Stevens, J., concurring).

294 *Id.* at 468–69 (majority opinion).

295 *Palm Beach Cnty. v. Hudspeth*, 540 So. 2d 147, 154 (Fla. Dist. Ct. App. 1989) (government’s speech in favor of a ballot proposition “undercuts the very fabric which the constitution weaves to prevent government from stifling the voice of the people”); *Citizens to Protect Pub. Funds v. Board of Educ. of Parsippany–Troy Hills Twp.*, 98 A.2d 673, 679 (N.J. 1953).

296 Robert D. Kamenshine, *The First Amendment’s Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1104 (1979); Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578, 617–19 (1980). For an excellent summary of the concerns raised by “governmental campaign speech,” see Helen Norton, *Campaign Speech Law with a Twist: When the Government Is the Speaker, Not the Regulator*, 61 EMORY L.J. 209, 262–63 (2011).

agencies. More importantly, my proposal does not select a single issue (for example, a judicial candidate's view on abortion or crime and punishment). Rather, it is the voters who end up focusing on a single issue, or even a single judicial decision, because they have no other information on which to base their vote. It is true that my proposal focuses largely on the judge's merit and qualifications for office. But that is the whole point of the proposal—it gives voters the information they need to cast a competent ballot, information that they do not otherwise have at their disposal.

*B. Judicial Performance Cannot Be Objectively and Impartially Measured*

Even if the proposal is constitutional, one might question the validity of the evaluation, or the capacity of any group to evaluate a judicial candidate. A candidate receiving a negative evaluation, for example, might object that the criteria selected by the commission are irrelevant to appraising judicial performance or merit, or may argue that the commission was not in fact neutral or impartial. The argument thus might take one of the two forms. First, one might object to my proposal by arguing that it is impossible to provide an “objective” measure of judicial quality. After all, judicial performance is not something that can be easily quantified, and any efforts to measure it are doomed to failure. Second, one might argue that even if an evaluation is theoretically possible, any group of evaluators brings in its own biases that would subject an evaluation to criticism. In other words, the second objection is not to the substance of the evaluation but rather to its administration.

As to the first concern, undoubtedly “[t]he effectiveness of any judicial performance evaluation project will depend . . . upon the reliability of the information it generates.”<sup>297</sup> Judicial performance is notoriously difficult to measure objectively, and previous efforts to do so have been unsatisfying. Unlike party affiliation and incumbency status, evaluations of judicial performance require a somewhat subjective assessment of judicial quality. But some states already have decades of experience with judicial evaluations, and states implementing my proposal from scratch could learn from the experience of those states.<sup>298</sup> The American Bar Association also has a long history of evaluating judges and judicial performance, and some of the ABA's criteria could be incorporated into the process as well.<sup>299</sup> And academics have proposed

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<sup>297</sup> A.B.A. SPECIAL COMM. ON EVALUATION OF JUDICIAL PERFORMANCE, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE 26 (1985).

<sup>298</sup> See Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375, 1388–89 (2001) (describing the work of judicial performance evaluation commissions in the states and providing recommendations on how to implement them elsewhere). See generally Choi & Gulati, *supra* note 263, at 81–82 (developing a method to objectively measure judicial merit and productivity); Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CALIF. L. REV. 299, 303, 321–22 (2004) (using a “host of relatively objective measures . . . to rank judges”).

<sup>299</sup> See James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989–2000*, 17 J.L. & POL. 1, 4–5 (2001).

numerous measures that, while imperfect, provide good potential measures of judicial quality.<sup>300</sup>

The second objection is also troubling. If these evaluations are conducted in a one-sided manner, or by a commission biased in favor or against certain judges or certain results, then the proposal is doomed to failure. And the concern is not entirely unfounded. For example, in states that evaluate judicial performance and provide voter guides in advance of elections, the evaluation system usually ends up recommending the retention of the judge.<sup>301</sup> That is why it is so important that the commission include a significant number of public members in addition to “elites” (i.e. lawyers and judges). Those participants are less likely to have personal relationships with sitting judges, and will have less to gain from a one-sided result. In addition, if law professors, political scientists, and other academics are involved in designing the criteria for evaluation, opportunities for manipulation are minimized.<sup>302</sup> At the end of the day, so long as the inputs are valid, and the commission members are selected in a non-partisan manner, the evaluation would likely be conducted in an objective and neutral way.<sup>303</sup>

### C. Ballot Notations Are Ineffective

One objection may be that ballot notations will do nothing to increase voter competence. Perhaps voters will simply ignore them. Perhaps the voters have already made up their minds when showing up to vote. Or perhaps, if much of the information is already available to voters, there is simply no need to provide it via ballot notation. I believe these objections are unfounded.

First, there is ample research that information on the ballot plays a key role in an election.<sup>304</sup> Furthermore, although it is true that some (but not all) of the information considered by the performance evaluation commission would be publicly available, it is clear that the public is not aware of it. How the information is presented is just as important as the information itself.<sup>305</sup> Voters are unlikely to conduct their own research of judges, seek out information from the state bar association about the judge’s ethical violations, or review appellate decisions to determine how often a trial judge is reversed on appeal.

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300 For some examples of efforts to evaluate judicial quality, see Robert Anderson IV, *Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Courts of Appeals*, 76 Mo. L. REV. 315, 315 (2010).

301 Brody, *supra* note 221, at 134.

302 Another option may be to allow a second committee to review the work of the first, and provide its own ballot notation—a minority report—if it comes to a different conclusion.

303 While my goal is not to downplay or minimize this objection, it does not undermine the proposal in Part III. Instead, it merely shows the importance of identifying the correct criteria for determining how the evaluation will be performed and how members are selected.

304 See generally Garrett, *supra* note 10, at 1534–40 (focusing on the potential benefits of ballot notations).

305 See Kahneman & Tversky, *supra* note 243, at 288.

Even if the notation does not convince all voters to change their minds, some will almost certainly be influenced. After all, many voters are not even aware that they are going to be voting for judges until they reach that part of the ballot. Furthermore, many of those who have made up their minds have done so based on misleading advertisements, so for those people, seeing an expert's conclusion that a judge is indeed incompetent (or competent) is likely to lead them to reconsider their vote.<sup>306</sup>

#### *D. Ballot Notations Are Too Powerful*

Courts have long been concerned that last-minute speech—speech presented to the voter immediately before the voter casts his ballot—is too influential. The concern here is that rather than getting drowned out by all the money in judicial elections, ballot notations would drown out key information that voters should consider in making an informed electoral decision. This, in turn, would harm both the competent voter (by overshadowing other, “better” information at that voter’s disposal) and the incompetent one (by overshadowing other, “better” cues at that voter’s disposal). The Court and the states have been wary of last-minute information hoisted upon the voter, upholding campaign restriction near the polling places.<sup>307</sup>

Of course, this is a risk. Last-minute speech is certainly likely to be particularly effective, and that is why a state adopting ballot notations must make sure that the information is accurate and informative. But if the quality of information is good and improves voter competence, then it may not be a problem that this information overshadows the other information in judicial elections. This is particularly true because the other information is of such low quality.

A variation on this objection is that the information would provide an incumbent too much of an advantage. Incumbents already have an advantage in most elections, especially retention elections where a judge is essentially running unopposed. And even though the incumbent advantage is smaller in judicial elections as compared to legislative elections,<sup>308</sup> it is true that most incumbent judges do get reelected. And if the ballot notations for incumbents are universally positive, as has been the case with judicial performance

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<sup>306</sup> If the objection is that voters will not in fact become educated about the judicial role, or about how a judge treats litigants or witnesses, that is correct. But that is also not the point of the proposal. My goal is not to create a fully informed electorate, but rather to overcome voter ignorance and provide a cue that lets people cast a competent vote.

<sup>307</sup> See *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

<sup>308</sup> Matthew J. Streb et al., *Contestation, Competition, and the Potential for Accountability in Intermediate Appellate Court Elections*, 91 JUDICATURE 70, 75–76 (2007). Professor Streb speculates this is due to the fact that, unlike judicial incumbents, congressional incumbents benefit from earmarks, casework, and name recognition. *Id.*

evaluations, then perhaps the ballot notation, rather than allowing the public to hold judges accountable, will simply add to the incumbency advantage.

There are a number of ways to respond. First, even though incumbents do have an advantage in judicial elections, what matters when it comes to judicial fear is how judges perceive their odds. And we know that even judges who have fairly good odds of winning their next election are fearful of losing their jobs because of an uninformed public. Informing the public about the high quality of the judge's performance will help increase judicial independence, even if it does not increase the likelihood of the judge winning the election. In other words, even if the odds of an incumbent winning a retention election remain the same because they are already fairly high, ballot notations may allow the judge to feel greater freedom to reach correct legal decisions, rather than having to worry about the public's reaction.

Second, this problem largely disappears if the evaluation is legitimate and accurate, and is not merely a rubber stamp on the performance of sitting judges. Assuming my proposal is implemented correctly, ballot notations will only "entrench" incumbents that receive high scores. And that is a feature of the system, not a bug. The incumbents that have received sparkling evaluations and who have high objective rankings (based on the number of decisions, citations to and reversals of the judge's decisions, and the judge's ethical record) deserve to be retained.

Another variant on this objection is that it is unfair to allow an incumbent to appear on the ballot with a ballot notation next to her name while the challenger is forced to run on name alone. While this is a particularly powerful objection, the power of ballot notations to increase judicial independence and accountability is worth the trade-off. Once again, this objection only arises when the evaluation is positive, since a challenger would be particularly happy to run against an incumbent with a negative evaluation.<sup>309</sup> But there is another option. States can evaluate the judicial candidate without judicial experience and provide that candidate with a distinct evaluation. For example, the American Bar Association evaluates federal judicial nominees based on factors like quality of legal education, years of experience in the legal profession, and ethical record as a practicing lawyer.<sup>310</sup> The state could create a similar commission, or empower the judicial performance evaluation commission to *also* evaluate judicial candidates. If this is done, it is important that the ballot makes clear that the two candidates are being assessed based on different criteria.

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<sup>309</sup> In that situation, it would be the incumbent challenging the notation on the grounds that it is inaccurate or unconstitutional. Both objections have already been discussed above.

<sup>310</sup> Cf. William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 35-68 (1990) (explaining the role of the ABA in evaluating and recommending potential candidates to the federal judiciary).

## CONCLUSION

Imagine once again that you are the hypothetical judge from the Introduction. The same two cases are on your docket, and your election is fast approaching. This time, however, a judicial performance evaluation commission will assess your record over the past few years, and place a notation across from your name informing voters of its evaluation of your performance in office. Undoubtedly, you are still concerned about the ads that your opponent might run against you based on your decision in the criminal case. And you are still worried that ruling against the insurance industry in the civil case may lead them to spend money to defeat your candidacy.

But now there is another important factor in play that might assuage your concerns. Because of the ballot notation, you have much greater incentive to put aside your fears and reach the correct result. If, in the criminal case, the Fourth Amendment requires that the evidence be excluded, and your decision is likely to be overturned on appeal, the performance evaluation will free you to reach the correct result.<sup>311</sup> Because receiving a high score on the ballot notation is now a primary objective, deciding the case correctly may be more important than trying to keep the insurance industry, or the public, happy. Knowing that ballot notations play a major role in all elections, you can now confidently follow the law with the knowledge that voters will be told of your performance directly on the ballot.

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<sup>311</sup> In fact, when interviewed, many judges in Colorado suggested that judicial performance evaluations increase judicial independence. Brody, *supra* note 221, at 140–44.