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by

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I. INTRODUCTION

ALTHOUGH surely no one has made a formal count, it 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.[1] Few have approached dispassionately the question of how to best select state judges, and few have escaped from the enterprise unconvinced of the correctness of their position.

Because of the strongly held opinions on judicial selection, any discussion of the subject must include diverse viewpoints and recognize the potential contributions to be found in the alternative perspectives brought to this debate by practicing attorneys, judges, academic researchers, public officeholders, journalists, and members of the public. This balance will not necessarily produce any converts nor end the debate, but it will perhaps temper viewpoints and create the conciliatory atmosphere so necessary to the reasoned discussion that is required before reform can be considered.[2]

Although academic research on judicial selection dates back over twenty years,[3] the vast majority of that research has been produced since 1976.[4] The research includes case studies of selection systems at work in particular jurisdictions[5] as well as broad comparative cross-state analyses.[6] Compared to just ten years ago, we now know a great deal about the actual workings of

1. N. CHINN & L. BERKSON, LITERATURE ON JUDICIAL SELECTION (1980).

2. Kaminsky, *Available Compromises for Continued Judicial Selection Reform*, 53 ST. JOHN'S L. REV. 466, 466-75 (1979).

3. *See* B. HENDERSON & T. SINCLAIR, THE SELECTION OF JUDGES IN TEXAS: AN EXPLORATORY STUDY (1965), *reprinted in part in* G. WINTERS, JUDICIAL SELECTION AND TENURE: SELECTED READINGS 150 (1973); Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104 (1964).

4. *See* Volcansek, *The Effects of Judicial-Selection Reform: What We Know and What We Do Not*, in THE ANALYSIS OF JUDICIAL REFORM 79, 80-84 (P. Dubois ed. 1980).

5. R. WATSON & R. DOWNING, THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN (1969).

6. P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980).

partisan, nonpartisan, and merit retention elections, the behavior of judicial nomination and appointment authorities, the backgrounds of judges selected by different methods, and variations in judicial behavior associated with differing systems of judicial recruitment.[7]

This body of scholarly knowledge has a great deal of relevance to the contemporary debate over state judicial selection. This paper neither attempts to present or summarize the detailed findings from this research nor attempts a broad comparative analysis of the relative merits of alternative selection systems. That has been done elsewhere.[8] Instead, this paper will: (1) address the role that elections may play in the selection of state judges; (2) clarify some of the empirical findings that have been made with respect to the operation of judicial elections; and (3) perhaps address more directly than before[9] some of the usual criticisms made of elections in general and partisan elections in particular with respect to their potential as a legitimate method of judicial selection.

This is necessarily a difficult task. As one observer has noted, no method of judicial selection can be evaluated "in the abstract" without regard to the performance of other methods of selection.[10] The choice of a particular method of judicial recruitment inevitably involves a comparison of what reformers perceive to be the relative strengths and weaknesses of the available alternatives. Perhaps more accurately, it needs to be recognized that each method of selection strikes a slightly different balance among several different but not necessarily complementary objectives or goals. Despite some heroic attempts by commentators to design selection systems that will simultaneously achieve these conflicting objectives,[11] a realistic assessment of the inherent tensions suggests that the choice of a selection method will require unavoidable trade-offs.

If there has been a problem in the literature on judicial selection, it is that these trade-offs are rarely recognized. Too often it has been assumed, without argument or discussion, that the only major objectives in judicial selection are to secure judicial independence and to recruit the "highest quality" legal professionals to staff the bench. Other goals, such as judicial accountability or the desirability of having a judiciary that is broadly representative of the population that it serves, are assigned positions of secondary importance or go unnoticed entirely.[12] One of the purposes of this paper is to make

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7. *See* N. CHINN & L. BERKSON, *supra* note 1; Volcansek, *supra* note 4, at 81-84.

8. *See, e.g.*, C. DUCAT & V. FLANGO, IN SEARCH OF QUALIFIED JUDGES: AN INQUIRY INTO THE RELEVANCE OF JUDICIAL SELECTION RESEARCH (1979); P. DUBOIS, *supra* note 6, at 1-35, 242-52; Volcansek, *supra* note 4.

9. *See* P. DUBOIS, *supra* note 6.

10. Gunderson, *"Merit Selection": The Report and Appraisal of a Participant Observer*, 10 PAC. L.J. 683, 683 (1979).

11. *See* Davidow, *Beyond Merit Selection: Judicial Careers Through Merit Promotion*, 12 TEX. TECH. L. REV. 851, 868-86 (1981) [hereinafter cited as Davidow, *Beyond Merit Selection*]; Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. 409, 432-51 (1981) [hereinafter cited as Davidow, *Judicial Selection*].

12. *But see* Davidow, *Judicial Selection*, *supra* note 11, at 423-24; Kessler, *Affirmative Action Can Mean the Best Person for the Job*, 22 JUDGES J. 12 (1983).

explicit and to assert the legitimacy of the value choices that underpin judicial elections.

At the same time, it also needs to be remembered that the question of judicial selection cannot be divorced from other institutional arrangements that bear upon the recruitment, retention, and tenure of judges. For instance, advocates of "merit" judicial selection often argue that partisanship in elections or appointments is inconsistent with the recruitment of high quality lawyers to serve on the bench.[13] This argument is weakened by the conceptual difficulties associated with defining and assessing the characteristics or qualities that make for good judges[14] and by the lack of empirical evidence that "merit" selection methods have removed "politics" from judicial selection and thereby produced judges of demonstrably higher quality.[15] Furthermore, the composition and quality of the bench are undoubtedly affected by a host of factors other than the method of selection. These factors include: constitutional and statutory provisions mandating minimum formal qualifications (*e.g.*, age, length of law practice); the competitiveness of judicial salaries and benefits; the provisions of judicial pension plans; the existence of mandatory retirement laws; the length of judicial terms; the availability of mechanisms of judicial discipline; and the overall attractiveness of the courts' working conditions, including the adequacy of court facilities and support staffs.[16] The recognized high quality of the federal bench demonstrates that there is no necessary incompatibility between a partisan selection system and the recruitment of able lawyers to serve as judges.

Finally, care must be exercised not to attach too much significance to the formal modes of judicial selection at the expense of recognizing the informal realities of selection systems in practice.[17] As suggested above, the experience of most jurisdictions with merit selection plans has not been the elimination of political considerations from judicial selection, but the substitution of some kinds of political forces by others.[18] Similarly, one of the most frequently repeated criticisms about judicial elections is that most judges are not initially recruited through election but are appointed by the governor to fill mid-term vacancies. Apart from the oddity that this criticism has most often originated with observers who would far prefer appointive to elective

13. *See* Davidow, *Judicial Selection*, *supra* note 11, at 424-25; *see also* P. DUBOIS, *supra* note 6, at 6-9.

14. *See* Aldisert, Erickson, Leflar, & Roberts, *What Makes a Good Appellate Judge? Four Views*, 22 JUDGES J. 14 (1983) [hereinafter cited as *Four Views*]; Goldman, *Judicial Selection and the Qualities that Make a "Good" Judge*, 462 ANNALS 112 (1982).

15. *See* P. DUBOIS, *supra* note 6, at 9-20; R. WATSON & R. DOWNING, *supra* note 5, at 19-43, 101-09, 272-308; Glick, *The Promise and Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509 (1978); Gunderson, *supra* note 10, at 695-706.

16. See Davidow, *Beyond Merit Selection*, *supra* note 11, at 877, 884-85; Kaminsky, *supra* note 2, at 511-12; Walsh, *The Attraction and Selection of Good District Court Judges*, 39 WASH. & LEE L. REV. 33, 34-35 (1982).

17. *See* C. DUCAT & V. FLANGO, *supra* note 8, at 27-28.

18. Gunderson, *supra* note 10, at 703-05; Troutman, *Florida Judicial Nominating Commissions*, 54 FLA. B.J. 534, 534, 536 (1980).

judicial selection,[19] the reality is that there is wide variation in the corporation of initially appointed judges in formally elective judicial systems. This variation is a function of the type of ballot used (i.e. partisan or nonpartisan), the length of judicial terms, the underlying degree of political competition in each state, and probably several other factors not yet uncovered.[20] The message here for those considering reform is that a single method of selection may not "work the same" in all states or even in all places within the same state. The importance of this message for an appreciation of the potential role of judicial elections will be explored later.

II. JUDICIAL INDEPENDENCE AND ACCOUNTABILITY: THE INHERENT TENSIONS

Institutional arrangements governing the selection and retention of state judges frequently reflect contradictory strains in American political thought concerning the role of courts. On the one hand, there is the preeminent notion that courts serve a critical role in the maintenance of limited government in a system of separated powers by serving as a check upon the actions of the legislative and executive branches, which may exceed the powers delegated to them by constitutional provisions. To perform such a critical role, it is seen as necessary to provide for judicial independence by insulating judges from legislative, executive, and even popular sentiments. This insulation is provided by lengthy, if not lifetime, terms in office, protection against the diminution of judges' salaries while they serve in office, and provisions governing impeachment that provide for judges only to be removed from office in the event of malfeasance or criminal misbehavior, not merely because elected officials or the public at large disagree with judges' decisions.

At the same time, there is recognition that the judiciary is responsible also for the application and interpretation of those rules of human behavior that legislatures and executives have agreed upon in the form of statutes, and for the resolution of disputes through the application of common law principles when statutory guidance has not been provided. In performing these functions, judges should be sensitive and responsive to the political, economic, social, moral, and ethical views held by a majority of citizens. Thus, to guarantee this accountability and responsiveness, judges are initially selected either directly by the people of their elected representatives and may be provided with a limited term in office that can only be renewed with popular approval.

Historically, there has been great disagreement on how best to accommodate these conflicting values of judicial independence and judicial accountability in the selection and retention of judges. Some have urged adoption of the federal model, striking the balance on the side of judicial independence with judges nominated by a popularly elected executive and confirmed by a legislative body, but then secure in office "during good behavior" or at least

19. Winters, *One-Man in Judicial Selection*, in G. WINTERS, JUDICIAL SELECTION AND TENURE: SELECTED READINGS (1973).

20. P. DUBOIS, *supra* note 6, at 101-43.

for very long terms. Others would place the emphasis upon accountability, with judges initially selected by popular election and subject to popular review after relatively short terms in office.

Throughout the nineteenth and into the first decade of the twentieth century, these tensions could be easily seen in the different methods of judicial selection adopted by the American states. Whereas most of the original American states and all of the states that joined the Union prior to 1845 adopted the federal model of executive selection with legislative confirmation, all of the states created thereafter until 1912 provided for judges to be selected in partisan elections for fixed terms in office.[21]

In part, the widespread adoption of popular judicial selection was attributable to "the broadened base of popular political power associated with the Jacksonian Democratic party.[22] However, as historian Kermit Hall has shown, partisan judicial elections were not solely or even primarily the result of an uncontrolled wave of popular Jacksonian sentiment as is so commonly asserted.[23] "The rise of popular, partisan election of appellate judges is best understood as an essentially thoughtful response by constitutionally moderate lawyers and judges in the Whig, Democratic, and Republican parties. . . . Lawyers and judges—not wild-eyed agrarian and urban radicals—controlled the all-important committees on the judiciary in the state constitutional conventions that adopted popular election."[24] Furthermore, as Hall explains, popular election was not viewed as inconsistent with the ideal of a powerful independent judiciary. Indeed, elections were seen as the mechanism by which the courts could call upon a base of popular support and credibility sufficient to allow them to effectively rival legislative and executive power.[25]

The tension between accountability and independence was heightened by powerful societal changes in the late nineteenth and early twentieth centuries that included the emergence of Progressivism as a political movement and the formation of state and local bar associations to promote the professionalization of lawyers.[26] The result was "a shift in the values of the American legal profession and in attitudes generally toward law and judging."[27] Increasingly, public and professional attitudes toward accountability shifted to reflect the view "that the law is a separate authority with its own internal criteria" and values.[28] Consequently, in selecting judges, members of the legal profession were seen to be best suited to determining which individuals would possess the abilities and qualities thought most critical to the tasks of judging: independence, impartiality, fairness, and the ability to articulate

21. *See* Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RESEARCH J. 345, 346-47 (1984).

22. *Id.* at 347.

23. L. BERKSON, S. BELLER, & M. GRIMALDI, JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 1 (1980) [hereinafter cited as COMPENDIUM].

24. Hall, *supra* note 21, at 347-48.

25. *Id.* at 348.

26. *Id.* at 350.

27. *Id.* at 349.

28. *Id.* at 350.

decisions in terms of established precedents.[29]

Thus, first in the acceptance of various Progressive reforms to diminish the role of political parties in judicial selection (i.e., the nonpartisan ballot), and then in the adoption of the so-called "merit plan" of selection, which provided that lawyers would play a critical role in the certification of individuals eligible for appointment, many American states sought to strike a new balance between independence and accountability in judicial selection. Even though few of these states went so far as to provide lifetime tenure and still provided a measure of accountability in the maintenance of elections either to select or retain their judges, the accountability envisioned was of a different sort. Rather than whether a judges' decisions reflected the political, social, and moral values held by a majority of citizens, judges were to be evaluated in terms of their legal training and experience, their possession of personal attributes thought to be essential to the judicial function (*e.g.*, "judicial temperament"), and their adherence to professional norms of good judicial behavior.[30] In short, the public was urged to be more concerned with "how" judges had done their jobs rather than with "what" judges had decided.

This particular view of the judicial function was not a temporary and transitory phenomenon. It remains a powerful force in the thinking of those who advocate that methods of selection should protect judicial independence. As one prominent California appellate judge[31] recently stated:

> A judge's responsibility is to interpret and apply the Constitution, legislative enactments, and the decisions of higher courts to cases or controversies presented to the court. This function must be performed by relying on legal training and knowledge of the law, and cannot, in any conscious way, be dependent upon personal or public opinion. A judge may not consciously follow subjective social, political, or economic views if the law requires a contrary result.

Independence, then, is claimed to be essential to allow judges to perform their unique role, which is quite different from that of legislators and executives. "While these latter agencies of government have the legitimate as well as the legal right to administer, change, or innovate, the judiciary is appropriately shielded from popular influence because it does none of these. Instead, it serves as the detached and impersonal voice of the community in applying the law."[32] Although it may appear difficult to reconcile the concept of a independent power of judicial review with the idea that, in a democracy, "public policies are made, on a majority basis, by representatives

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29. *See* Wasby, *Accountability of the Courts*, in ACCOUNTABILITY IN URBAN SOCIETY: PUBLIC AGENCIES UNDER FIRE 148-50 (S. Greer, R. Hedlund & J. Gibson eds. 1978).

30. *See* S. CARBON & L. BERKSON, JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES 1-17 (1980); Hall, *supra* note 21, at 350-51; Wasby, *supra* note 29, at 145-57.

31. Alarcon, *Political Appointments and Judicial Independence—An Unreasonable Expectation*, 16 LOY. L.A.L. REV. 9, 13 (1983).

32. Ladinsky & Silver, *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections*, 1967 WIS. L. REV. 128, 138-39 (1967).

subject to effective popular control at periodic elections,"[33] reconcilliation is made considerably easier if judges exercise no discretion or independent power, but serve merely as "the detached conscience of the society" and as the "passive vehicle of constitutional verities."[34]

In this view, elections threaten to force judges to bow to the temporary whims of the public rather than to protect the enduring principles of the law. Elections also fail to result in the selection of those individuals who possess the professional qualifications necessary to the correct interpretation and application of legal principles. If elections must be held, they must not be conducted in such a way that would tend to suggest that judges are governed in their decisions by anything other than determinate principles of law and legal reasoning. According to this line of thinking, the public's faith and confidence in the courts is linked directly to their belief that judges are impartial; a perception that judges lacked this impartiality would undermine the public's willingness to voluntarily comply with judicial decisions with which they disagree.[35] Thus, incumbent judges must adhere to the restrictions of the Code of Judicial Conduct, which prohibit them from making pledges or promises of conduct in office or from expressing their views on disputed legal or political issues.[36] Even lawyers seeking to challenge incumbent judges must be careful not to issue statements critical of the incumbent that would undermine public confidence in the courts.[37]

Students of constitutional theory will recognize these as the basic elements of a jurisprudential debate that dates at least to the time of Hamilton and Jefferson,[38] although it has been carried on with more than ample quantities of both heat and light in the last fifty years. Focused primarily upon the role of the United States Supreme Court in the American political system, scholars have attempted to determine whether and under what circumstances an unelected and unaccountable judicial branch can be reconciled with the principles of democratic government. That debate has consumed several book-length treatises and dozens of articles and is surely too extensive to recount here.[39] Suffice it to state here that the case for judicial accountability rests upon a considerably different view of the judicial function than that which is described by the advocates of independence.

Rather than seeing the process of judicial decision-making as one in which judges serve to apply fixed and enduring principles of law impersonally and

33. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 4 (1980) (quoting H. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 70 (1960)).

34. Ladinsky & Silver, *supra* note 32, at 139-40.

35. Gary, *Ethical Conduct in a Judicial Campaign: Is Campaigning an Ethical Activity?*, 57 WASH. L. REV. 119, 136 (1981).

36. *Id.* 131-35.

37. *Id.* 120-30.

38. *See* Nejelski, *The Jefferson-Hamilton Duality: A Framework for Understanding Reforms in the Administration of Justice*, 64 JUDICATURE 450 (1981).

39. *See, e.g.*, L. CARTER, REASON IN LAW (2d ed. 1984); J. CHOPER, *supra* note 33; J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); L. LEVY, JUDICIAL REVIEW AND THE SUPREME COURT: SELECTED ESSAYS (1967); Ladinsky & Silver, *supra* note 32.

impartially, it is possible to see the tasks of judging as calling for far more discretion and human judgment. Whether engaged in the resolution of constitutional, statutory, or common law cases, judges are required to make choices in their determination of the relevant facts, in the selection of the appropriate legal principles and precedents, and in the application of those principles to the determined facts. These choices are pregnant with underlying questions of equity, justice, and public policy which are inevitably influenced by the judge's personal attitudes and values.[40] In making these choices judges, like other political decision-makers, "allocate values in society such as opportunity, liberty, money, protection, or representation in other types of decision-making. Like other political decision-making, this allocation of values is differential; that is, some individuals and groups are favored and others are disadvantaged."[41] Accordingly, in a democratic political system governed not entirely but in the main by the principle of majority rule,[42] judges should be held popularly accountable for their decisions.

This view of the judicial function, drawn from the tradition of the Legal Realists, urges "a realistic understanding of the creative and innovative aspects of the judicial role"[43] and suggests that popular support for the judiciary need not depend upon preservation of "the myth that judges have no opinions and that they go with an empty head to hear each case.[44] Respect for judicial decisions may be tied to the perceptions of individual litigants that they have been treated fairly and impartially, whereas impartiality means that the judge has not reached his or her decision as a result of "a personal affection or preference for one "party."[45] It is unrealistic and naive, however, to assume that judges will entirely set aside their own attitudes and values in determining the relevant facts, in interpreting the applicable legal rules, and in reaching the result that they consider just, equitable, or most consistent with sensible public policy. Contrary to the view held by those who advocate independence, the fact that judges can be held accountable through elections actually reinforces and legitimates judicial power on those occasions when judicial decisions offend a substantial portion of the citizenry. "[A]n image of the judiciary that sees it as an instrument of popular sovereignty, albeit occupying a special place in our political arrangements, is likely to prove stronger armor than the older image" of judges as mere oracles of self-evident and immutable principles of law.[46]

As in the debate over the United States Supreme Court's power of judicial review, advocates of independence for state courts respond that the American political system is not based upon the principle of pure majoritarianism

40. *See* L. CARTER, *supra* note 39; P. DUBOIS, *supra* note 6, at 23-25.
41. Barber, *Ohio Judicial Elections: Nonpartisan Premises with Partisan Results*, 32 OHIO ST. L.J. 762, 763 (1971).
42. *See* J. CHOPER, *supra* note 33, at 4-59.
43. Ladinsky & Silver, *supra* note 32, at 142.
44. Panel Discussion, *Judicial Independence and Accountability: Walking the Tightrope*, 66 JUDICATURE 207, 210 (1982).
45. L. CARTER, *supra* note 39, at 297.
46. Ladinsky & Silver, *supra* note 32, at 169.

and that judges must be free to offer protection to the essential rights of minorities against infringement by majoritarian political interests in the elected branches and in the population at large. Pointing with pride to the record of the Supreme Court under the leadership of Chief Justice Earl Warren in offering constitutional protection to racial minorities, individuals accused of crime, and other relatively powerless individuals and groups, the advocates of independence argue that judges need freedom from potential retribution by voters for making "unpopular decisions in cases involving minority rights or sensitive constitutional issues."[47]

In part, this view again seems to be based upon the notion that judges should be free to give expression to what "the law" demands and that their own personal views in no way enter the process of defining fundamental constitutional rights of liberty.[48] It skirts the critical issue of how fundamental constitutional rights are defined and appears to justify the undemocratic nature of judicial power by the results it achieves.[49] Unelected judges are certainly free to act as the preeminent guarantors of the rights of minorities, but there is no necessity that they do so. As the Supreme Court has so clearly demonstrated throughout most of its history, judicial protection of minority rights may have nothing to do with the protection of the poor and the disadvantaged, but may instead be defined to protect those advantaged and privileged minorities who have been unsuccessful in achieving their goals in the executive and legislative branches.

Even if one is willing to concede that the Supreme Court's occasional protection of disadvantaged racial, religious, political, and social minorities and its protection of fundamental political rights has been important to the American democratic system, and that its independence has been essential to its ability to assume this "protectionist" role, it is far from clear that state judges require the same degree of insulation. Constitutional decision-making involving alleged deprivations of important fundamental rights and liberties is only a small portion of what state courts are asked to do.[50] State judiciaries are far more occupied "with common law development, statutory application and interpretation, procedural review, and the supervision of lower courts."[51] It is this difference in judicial function which suggests a different balance to be struck between accountability and independence. As Dean Jesse Choper has so perceptively noted, the public attention that focuses debate around the Supreme Court's power of judicial review tends to obscure the "vital features that distinguish the normal work of courts."[52] In most of their work, courts should be supportive of majoritarian values and concerns:

47. Davidow, *Judicial Selection*, *supra* note 11, at 420-21; Ellis, *Judges and Politics: Accountability and Independence in an Election Year*, 12 N.M.L. REV. 873, 881 (1982).

48. Ellis, *supra* note 47, at 881.

49. L. LEVY, *supra* note 39, at 38.

50. *See* P. DUBOIS, *supra* note 6, at 26-27; Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 132 (1977) [hereinafter cited as *State Supreme Courts*].

51. Adamany & Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731, 770 (1976).

52. J. CHOPER, *supra* note 33, at 131.

> Unlike judicial review, which normally operates against . . . value judgments that have already been delicately balanced and finally resolved in the political process, judicial development of common law principles occurs when no such political action has been taken. Rather than being perceived as the censurer of the consensus of the popular will, which is the task of the Court in judicial review, the common law judge's duty—as Cardozo explained—"to declare the law in accordance with reason and justice is seen to be a phase of his duty to declare it in accordance with custom," to act "as the interpreter for the community of its sense of law of order." In even starker contrast to the rejection-of-the-people's choice function of judicial review, the judicial process of statutory interpretation is exclusively designed to fulfill the matured policy decisions of the political branches.[53]

These opposing views of the judicial function and of the merits of independence and accountability have been renewed in dozens of state constitutional conventions, in the halls of state legislatures, and in election campaigns where voters have been asked to lend their approval to changes in state constitutional provisions governing judicial selection. And, intentionally or not, each state has reached a slightly different conclusion about the appropriate balance to be struck between accountability and independence. Thus, "[t]oday there is an almost endless combination of schemes used to select judges. Almost no two states are alike and few employ the same method for choosing judges at all levels of their judiciary."[54]

Despite the variety, there does appear to be a tendency in the states for appellate judges to be afforded more insulation and to be less subject to popular review than trial court judges. The merit plan of judicial selection has made its greatest inroads in the recruitment of appellate judges who also tend to enjoy longer terms of office than their breathren at the trial level.[55] This appears to have been the result of court reform efforts to secure an initial foothold for the merit plan at the court level with the fewest number of judgeships where political groups with a stake in judicial selection have had the least to lose. However, by comparison with trial courts, appellate courts, and especially state supreme courts, are less frequently called upon to implement narrow procedural rules, more frequently asked to answer questions with importance beyond the immediate case at hand, required to exercise more discretion, and in general play "a (more) significant role in the policymaking process of their state."[56] For these reasons, when selecting the state's highest judges, it is particularly appropriate to strike the accountability/independence balance on the side of accountability.[57]

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53. *Id.* at 132.

54. COMPENDIUM, *supra* note 23, at 6.

55. *Id.* at 18-46; P. DUBOIS, *supra* note 6, at 252.

56. H. JACOB, JUSTICE IN AMERICA: COURTS, LAWYERS, AND THE JUDICIAL PROCESS 239 (4th ed. 1984); *see also id.* at 25-46, 236-39.

57. *See* P. DUBOIS, *supra* note 6, at 251-52.

III. ACHIEVING ACCOUNTABILITY BY ELECTION

Once accountability is recognized as an important value to be institutionalized in selection procedures, the critical question is whether judicial elections can actually serve as instruments or mechanisms of that accountability. Unlike the normative question of whether accountability is appropriate, the question of whether and under what conditions elections provide accountability lends itself to empirical analysis. And, indeed, scholarly interest over the last ten years has spawned a rich body of research investigating the factors influencing voter interest and participation in judicial contests, the determinants of voter choice, the extent of electoral competition, the degree of voter control over gubernatorial mid-term vacancy appointments, and the relationship between judicial behavior and methods of selection.[58] As will be discussed below, this research collectively suggests that elections, under particular conditions, can perform the accountability-conferring function that is expected of them.

Naturally, in evaluating the ability of elections to hold judges accountable, it is essential first to understand what is meant by electoral accountability. As evidence that elections cannot hold judges accountable, critics of judicial elections have focused on: the low level of voters' interest in judicial elections; voters' low level of specific knowledge and information about judicial candidates and issues; voters' lack of awareness of courts generally and records of judicial performance in particular; and the lack of meaningful competition. "Popular control over the judiciary and the maintenance of the principle of judicial accountability are impossible . . . if voters know not for whom or what they are voting."[59]

The problem with these criticisms, however, is that they are based on a fundamental misunderstanding of what elections are designed to do and what role voters can realistically be expected to play in selecting governmental officials. Although classical democratic notions about elections appear to demand that voters make well-informed decisions on the choice of political leaders depending upon voters' assessments of the specific policy stands of the candidates, the modern view of election theorists is that elections should be evaluated primarily in terms of their ability to allow voters to control the general direction and broad boundaries of public policy as determined by elected officials. Voters are neither equipped nor disposed to choose political leaders on the basis of specific policy stands. Rather, voters indirectly influence the general course of public policy by retrospectively judging the performance of officeholders and by attempting to select those candidates that they perceive as sharing their fundamental interests and values. As long as voters are allowed to exercise this judgment at regular and periodic intervals, are provided with a choice among opposing candidates, and are able to identify officials with the broad differences they represent for the direction of public policy, elections can be said to secure the popular accountability of

58. *See* Volcansek, *supra* note 4, at 81-84.

59. P. DUBOIS, *supra* note 6, at 33.

elected officials.[60]

As Hall[61] has noted, "historically, political parties and party identification have been the most important mechanisms through which voters have exercised this accountability." Although voters are not well-informed on specific policy issues and do not view politics or parties in highly ideological terms, voting studies confirm that citizens are capable of making political evaluations in terms of the general interests advanced by each party and the performance of the party in office. In most subpresidential elections, "the party cue remains a preeminent factor in structuring the vote and one which allows voters to exercise indirect control over the past and future direction of governmental policies."[62]

Once these notions of electoral accountability are understood, it is possible to veiw the evidence concerning the judicial electorate and judicial elections in a more favorable light. When measured against standards comparable to those applicable to other kinds of elections, judicial elections conducted under certain conditions can be seen to provide voters with opportunities for holding judges accountable that are no less meaningful, effective, or rational than voters' participation in most kinds of elections.

Thus, with respect to the abilities of voters, critics have frequently pointed to research results that show that voters lack the interest in and knowledge about judicial candidates to make intelligent and rational choices. Citizens' lack of interest and information is said also to be reflected in their low levels of participation in judicial elections. Without information or interest, voters fail to participate in the selection and retention of judges, and thus undercut whatever ability elections might have for holding judges accountable.

Political scientists have devoted much attention to the question of how levels of voter participation affect the composition and representativeness of electorate, the outcome of elections, and the legitimacy of political regimes.[63] These concerns are no less relevant in the context of judicial elections, and thus the issue has been extensively examined.[64] The results of that research consistently demonstrate that voter participation in judicial elections is not affected as much by voter interest and knowledge as much as it is by the institutional arrangements under which judicial elections are often conducted. To be sure, as in other kinds of elections, there is an ". . . important degree of self-selection on the basis of informedness (which) occurs in

60. *Id.* at 31-32; Adamany & Dubois, *supra* note 51, at 768; Hannah, *Competition in Michigan's Judicial Elections: Democratic Ideals vs. Judicial Realities*, 24 WAYNE L. REV. 1267, 1296-99 (1978).

61. Hall, *supra* note 21, at 351-52.

62. P. DUBOIS, *supra* note 6, at 31.

63. *See* Adamany & Dubois, *supra* note 51, at 731-35.

64. *See, e.g.*, P. DUBOIS, *supra* note 6; Adamany & Dubois, *supra* note 51, at 742-56, 776-77; Berg & Flynn, *Voter Participation in Municipal Court Elections in Los Angeles County*, 2 LAW & POL'Y Q. 161 (1980); Dubois, *Public Participation in Trial Court Elections: Possibilities for Accentuating the Positive and Eliminating the Negative*, 2 LAW & POL'Y Q. 133 (1980) [hereinafter cited as Dubois, *Public Participation*].

the judicial electorate."[65] Knowledgeable voters are more likely to vote,[66] and voters are more likely than nonvoters to be knowledgeable.[67] By and large, however, judicial election turnout is affected by the same factors that affect turnout in other kinds of elections. Judicial elections scheduled concurrently with those races that tend to draw voters to the polls in the first place (i.e. presidential and gubernatorial contest) enjoy greater voter participation than those scheduled at other times. And even when held concurrently with the high visibility elections, judicial election participation can be depressed by the absence of competition and the type of balloting used. In this regard, partisan judicial elections are far better attended by voters than nonpartisan and merit retention elections. Not only are partisan elections more frequently contested and competitive than the other forms of judicial balloting, but the party label on the ballot has been found to stimulate voter participation in the absence of specific information about the candidates and the issues. Regardless of how much or how little voters may know or care about judicial elections, participation in those contests is heavily influenced by the institutional arrangements under which they are conducted.[68]

Participation, then, is not a particularly good indicator of voter interest in and knowledge about judicial elections. Nevertheless, empirical research also suggests with some consistency that most judicial voters do not fill the shoes of the model citizen of democratic government, one fully informed and attentive to the candidates and issues at stake in an election. Judicial elections are of extremely low salience for most voters and thus few voters are motivated to inform themselves to the extent possible about the choices they are asked to make.[69]

This does not mean, however, that the judicial electorate is incapable of playing a meaningful role in selecting judges. In the first place, the judicial electorate is not, by its nature, wholly uninterested in judicial elections. One survey has shown that voters consider judicial elections to be as important or more important than elections for other state officials.[70] In fact, when judicial election are highly competitive and controversial, voters demonstrate a remarkable ability to learn about candidates, to correctly match them with their issue positions, and to vote accordingly.[71] The main problem with ju-

65. Lovrich & Sheldon, *Voters in Contested, Nonpartisan Judicial Elections: A Responsible Electorate or a Problematic Public?*, 36 W. POL. Q. 241, 247-48 (1983).

66. Sheldon & Lovrich, *Knowledge and Judicial Voting: The Oregon and Washington Experience*, 67 JUDICATURE 235, 238-39 (1983); Lovrich & Sheldon, *supra* note 65, at 247-48, 253-54.

67. Griffin & Horan, *Merit Retention Elections: What Influences the Voters?*, 63 JUDICATURE 78, 85-86 (1979); Lovrich & Sheldon, *Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?*, 9 JUST. SYS. J. 23, 32-35 (1984).

68. P. DUBOIS, *supra* note 6, at ch. 2.

69. Klots, *The Selection of Judges and the Short Ballot*, 38 J. AM. JUDICATURE SOC'Y 134 (1955), *reprinted in* G. WINTERS, JUDICIAL SELECTION AND TENURE: SELECTED READINGS (1973); Ladinsky & Silver, *supra* note 32; McKnight, Schaefer & Johnson, *Choosing Judges: Do the Voters Know What They're Doing?*, 62 JUDICATURE 94 (1978).

70. Sheldon & Lovrich, *supra* note 66, at 242.

71. *See, e.g.*, C. PHILIP, P. NEJELSKI & A. PRESS, WHERE DO JUDGES COME FROM? (1976); Baum, *The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas*, 66 JUDICATURE 420 (1986).

dicial elections is that, due to the formal restrictions placed on candidates by the Code of Judicial Conduct and the Code of Professional Responsibility,[72] they rarely present the kinds of substantive issues that lead voters to perceive that they have a stake in the outcome. As in other kinds of elections, when voters perceive the election to be important and that their vote may affect the result, they are both more likely to participate and more likely to invest the time and energy required to learn more about the candidates and their issue stands.[73]

More importantly, even in its most quiescent state, the judicial electorate is not, as a rule, demonstrably less prepared to participate in the election of judges than are voters for the selection of most other kinds of public officials. Even for races as significant as those for the United States Congress and state legislatures, the level of specific voter knowledge is remarkably low. As noted above, when judging elections by their ability to let voters indirectly control the broad course of government, voters need not have detailed information about candidates and issues. Critics' concern that voters are unable to judge the qualifications and personal qualities of those seeking the bench are inapposite; voters are rarely in a position in any kind of election to make such judgments. The relevant question is whether voters are able to identify those in power, to express satisfaction or dissatisfaction with government performance, and to select as officeholders those who most share the voters' perspective concerning the appropriate direction of government policy.

In most kinds of elections, party affiliation has served as the mechanism by which voters make these assessments. Because they are aware of the differences between the parties on those issues that are most salient to them and tend to identify with the party that most closely reflects their own attitudes on public issues,[74] voters' reliance on the partisan label choices is, in a very real sense, a rational act. This is no less true in judicial elections. "Knowing relatively little about the candidates, voters can be expected to rely heavily on what they do know, and studies suggest that the most readily available cues are important in structuring the vote."[75] Thus, research has repeatedly demonstrated that where the partisan cue is available, judicial voters will rely upon it.[76] The availability of the party label both prompts voters to exercise a choice, thereby increasing the percentage of the eligible electorate participating in the election, and results in the expression in the aggregate of the voters' preferences for the direction of judicial policy.

Where the party label is not present, such as in nonpartisan and merit retention elections, voters face more difficulty in making voting decisions.

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72. Gary, *supra* note 35.

73. L. MILBRATH, POLITICAL PARTICIPATION: HOW AND WHY DO PEOPLE GET INVOLVED IN POLITICS 101-02 (1965).

74. G. POMPER, VOTER'S CHOICE: VARIETIES OF AMERICAN ELECTORAL BEHAVIOR (1975).

75. L. Baum, Explaining the Vote in Judicial Elections: The 1984 Ohio Supreme Court Elections 3 (1986) (unpublished paper).

76. P. DUBOIS, *supra* note 6, at 70-79; Adamany & Dubois, *supra* note 51, at 756-60; L. Baum, *supra* note 75.

Progressive reformers, of course, had hoped that the nonpartisan ballot would focus voter attention on the individual qualifications, personal qualities, and issue positions of the candidates without regard to their partisan connections.[77] Similarly, advocates of the merit retention system argued that the uncontested format would permit voters to focus their judgment solely on the professional competence of the incumbent, unclouded by comparisons with potential replacements or inappropriate discussions of judges' views on controversial political, economic, and social issues.[78] Unfortunately, the reality of judicial elections is that voters are ill-suited to performing in the manner expected by reformers.

In the absence of the party label, voters seek out whatever guidance they can. Notably, some voters are so hopelessly confused that they refuse to cast ballots in these elections.[79] Some voters may find comfort in those forms of guidance that they can glean from the ballot itself. Voters can choose to reward or punish an incumbent, may spot a candidate whose name sounds familiar, or may rely upon whatever ethnic or sexual cues they can pick up from the candidates' names. Other forms of voting help may be offered in publicized newspaper and bar association endorsements, in the candidates' pre-election statements as published in voters' pamphlets, or in the campaign materials distributed by the candidates themselves.[80]

Recent research conducted on nonpartisan judicial elections confirms that where an occupational ballot label is provided voters are most likely to rely heavily upon it in making a voting choice.[81] Incumbents and other individuals holding "judicial" positions are most favored, followed by individuals bearing labels such as deputy district attorney, city attorney, and so forth. Indeed, occupational ballot labels were found generally to be far more influential in affecting voter choice than bar and newspaper endorsements, the voters' pamphlet, the candidates' own publicity efforts as indicated by campaign spending, and other ballot cues to be found in the candidates' names (*e.g.*, sex, ethnicity).

In the absence of ballot labels, voters may be forced to rely upon name recognition alone, a reliance that may be misplaced with respect to candidates who share the names of famous state or local political figures but not the family lineage.[82] Bar and newspaper endorsements, the voters' pamphlet, and the candidates' own campaign efforts may influence a very small attentive public, but most nonpartisan judicial races remain too low in visibility for these factors to have much effect upon the large majority of voters.

Similarly, in the uncontested merit retention elections, voters appear to adopt a rather simplistic decision-rule: vote for the incumbent. Most in-

77. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 L. & SOC'Y REV. 395, 395-96 (1984).

78. S. CARBON & L. BERKSON, *supra* note 30, at 1-20.

79. *See* P. DUBOIS, *supra* note 6, at 47-48; Dubois, *Public Participation*, *supra* note 64, at 135.

80. *See* Dubois, *supra* note 77, at 401-11.

81. *Id.* at 401-03.

82. P. DUBOIS, *supra* note 6, at 79-92; Barber, *supra* note 41, at 778-81.

cumbents are retained with healthy vote margins, even in the face of adverse publicity and newspaper and bar recommendations against retention.[83] Indeed, researchers have found that there appears to be no relationship between the amount of information possessed by voters about the record and qualifications of the incumbent and the voting decision for or against retention.[84]

Thus, in both nonpartisan and merit retention elections, it can be seen that most voters make a voting decision only after they have stepped inside the voting booth, drawing whatever cues they can from the information contained on the ballot itself. This situation naturally tends to favor incumbents, both because incumbents are more likely to possess a name familiar to some voters and also because there appears to be an understandable tendency on the part of voters to favor incumbents in the absence of unfavorable information. As Griffin and Horan have suggested in the context of retention elections,[85] the presence of an incumbent "informs the voter that it is, after all, an experienced and, presumably qualified judge" who is seeking re-election.

This portrait of the voter in nonpartisan and merit retention elections is meant only to describe the typical situation. It is not meant to suggest that voters can never be stimulated to become more psychologically involved in these races and to consider information other than that found within the four corners of the ballot. For instance, Stookey and Watson found that the influence of the legal profession in merit retention elections may depend upon the way in which it chooses to make its opinion known.[86] A bar association that engages in an aggressive campaign to make its views known can influence newspaper coverage and thereby affect voter information levels and perhaps even the direction of the vote. Stookey and Watson found that voters who were aware of the bar's opposition to certain candidates were over three times more likely to vote against those judges than voters who were not aware of the bar activity.[87] Few bar associations take this active "special interest group" approach to judicial elections, however, preferring instead to play a "public service role" that seeks to provide information to the voters that will "assist the deliberations rather than determine their result."[88]

Similarly, recent research suggests that, under certain conditions, nonpartisan judicial elections may stimulate greater voter involvement. A study of

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83. *See* S. CARBON & L. BERKSON, *supra* note 30, at 21-64; Jenkins, *Retention Elections: Who Wins When No One Loses?*, 61 JUDICATURE 79 (1977); Rubenstein, *Alaska's Judicial Evaluation Program: A Poll the Voters Rejected*, 60 JUDICATURE 478 (1977); Stookey & Watson, *Merit Retention Elections: Can the Bar Influence Voters?*, 64 JUDICATURE 234 (1980).

84. Griffin & Horan, *supra* note 67; Griffin & Horan, *Judicial Retention Election Decisions: A Search for Correlates*, 19 SOC. SCI. J. 93 (1982).

85. K. Griffin & M. Horan, Determinants of Voting Behavior in Merit Retention Elections for Supreme Court Justices (Mar. 27, 1981) (paper presented at the Annual Meeting of the Western Political Science Association in Denver).

86. Stookey & Watson, *supra* note 83, at 240.

87. *Id.* at 240-41.

88. J. GUTERMAN & E. MELDINGER, IN THE OPINION OF THE BAR: A NATIONAL SURVEY OF BAR POLLING PRACTICES 9 (1977).

nearly 125 nonpartisan elections held from 1976-1980 in California for the state's major trial court found that voters in the initial primary elections were primarily influenced by the occupational ballot labels. However, in the far more visible and controversial run-off elections, voters placed considerably less reliance upon the ballot labels and were more influenced by other sources of guidance, such as bar and newspaper endorsements, the voters' pamphlet, and the candidates' campaign efforts as indicated by campaign spending.[89]

Equally as significant, when the primary elections were analyzed separately according to the population size of the counties in which they were held, voters in counties with populations of less than 500,000 were found to be far less dependent upon the ballot labels than voters in the most populous counties and far more likely to be influenced by the other sources of available information.[90] Although voter surveys will be required to confirm the implications of this aggregate electoral research, it appears that judicial elections conducted in modestly-sized electoral districts are able to achieve a greater visibility and thus more focused public attention and interest than those held in the large metropolitan counties. As a result, voters in less populous districts are not only less likely to rely upon ballot labels in making vote choices, but are far more likely to participate than are voters in the metropolitan areas.[91]

Taken together, these findings suggest that not all nonpartisan judicial elections operate alike in all electoral situations. Presumably, to the extent that these elections can be made to allow voters to exercise a retrospective judgment upon judicial performance and to select those candidates who appear to share voters' preferences for the broad direction of public policy, they too can serve as instruments of accountability. In small to moderately-sized electoral districts, where voters are better able to minimize their reliance on the meaningless voter cues provided by ballot labels and where there are greater opportunities for interpersonal campaign contacts with the candidates, perhaps some degree of electoral accountability is possible.

Yet the barriers to accountability under this form of ballot are numerous. Because these elections are frequently uncontested or only weakly competitive, incumbents are rarely forced to defend their records.[92] Moreover, constrained as they are by the formal proscriptions and the informal norms governing judicial campaigns, these elections infrequently allow voters the opportunity to evaluate candidates' generalized "judicial philosophies," much less their specific political and ideological viewpoints. Voters are usually confined to evaluating candidates' assertions concerning their legal training and experience for judicial office, their opinions on various matters related to court administration, or even their dedication to the concept of

89. Dubois, *supra* note 77, at 422-27.

90. *Id.* at 427-31.

91. *Id.*; *see* Dubois, *Public Participation*, *supra* note 64, at 139.

92. P. DUBOIS, *supra* note 6, at 50; Dubois, *supra* note 77, at 399.

judicial elections.[93]

Nor are the endorsements of bar associations and newspapers much guidance with respect to the candidates' political views or policy stands, since both institutions are predisposed to favor incumbents without regard to the political views of either the incumbent or his opponent.[94] In the case of bar associations, this allegiance may stem from the dominant professional view that judges should be evaluated solely upon the technical performance of their duties and not the results of their decisions. Others have explained it in terms of lawyer' conservative bias in favor of continuity[95] or perhaps even their sympathy for lawyers who have sacrificed lucrative legal practices for judicial service.[96] In the case of newspapers, editors seem to share the predominant bar views concerning the standards by which judges should be judged, and thus demonstrate a slavish tendency to adopt bar endorsements that they may perceive as based upon the considered opinions of those professionals who should be in the best position to assess the competence of judicial incumbents and challengers.[97]

Thus, if the desired goal is to allow voters some means to make election choices congruent with their general views about the appropriate direction of public policy, partisan ballots are far superior to nonpartisan and merit retention ballots. Because of the close connection between voters' party identifications, their general ideological outlooks, and their issue preferences,[98] the party label, at least in theory, allows "a voter properly to identify a judicial candidate likely to make decisions consistent with his policy preferences."[99]

Of course, as has been noted elsewhere, "[t]hat the partisan judicial ballot structures voter choices in politically meaningful directions would be a hollow finding if judicial decision-making is unrelated to the labels upon which voters are basing their decisions."[100] Fortunately, empirical research has repeatedly confirmed that there are basic differences between the Democratic and Republican judges who sit on state appellate courts.[101] Although the degree of difference between Democratic and Republican judges varies across different types of cases, may vary over time, and certainly varies across state courts,[102] party remains the single most influential factor distinguishing the decision-making tendencies of state judges, with Democratic

93. Ladinsky & Silver, *supra* note 32, at 151.

94. *See* P. DUBOIS, *supra* note 6, at 68.

95. B. HENDERSON & T. SINCLAIR, *supra* note 3, at 158.

96. R. WATSON & R. DOWNING, *supra* note 5, at 233.

97. P. Dubois, Judicial Elections in California: A Multivariate Appreciation of Recent Events 31 (June 2, 1983) (paper delivered at the Annual Meeting of the Law and Society Association in Denver).

98. *See* P. DUBOIS, *supra* note 6, at 28-32, 92-100.

99. Adamany & Dubois, *supra* note 51, at 778.

100. Dubois, *supra* note 64, at 100.

101. P. DUBOIS, *supra* note 6, at 154-62, 178-234; Adamany & Dubois, *Public Participation*, *supra* note 51, at 762-65.

102. *See, e.g.*, P. DUBOIS, *supra* note 6, at 178-234; Stecher, *Democratic and Republican Justice: Judicial Decision-Making on Five State Supreme Courts*, 13 COLUM. J.L. & SOC. PROBS. 137 (1977); Steinberg, *Sympathetic Voting Dimensions on the New York Court of Appeals*, 41 ALB. L. REV. 699 (1977).

judges tending to support a liberal viewpoint compared to their Republican brethren. This usually means that, on the whole, Democratic judges are more likely than Republican judges to favor "the interest of the lower or less privileged economic or social groups", which include: (1) the defendant in criminal cases; (2) the administrative agency in business regulations cases; (3) the claimant in unemployment compensation cases; (4) the defendant in cases involving claims of constitutional rights in criminal cases; (5) the government in business tax cases; (6) the tenant in landlord-tenant cases; (7) the consumer in sales-of-goods cases; (8) the injured party in motor vehicle accident suits; and (9) the employee in workmen's compensation cases.[103]

Perhaps equally important, party affiliation has been found to distinguish judges regardless of how they are selected. Even judges selected under presumably nonpartisan "merit" selection systems are distinguishable by party.[104] This undoubtedly occurs because all methods of judicial selection recruit individuals who bring with them to the bench "the experiences, perceptions, attitudes, and values of partisans."[105] Although judges serving on these courts have no identifiable partisan electoral constituency to which they must respond for continuance in office, they nevertheless are influenced by those differing attitudes, values, and political orientations that distinguish individuals who identify with each of the major parties.

Thus, it is argued that partisan judicial elections are a desirable method of selection if the goal to be achieved is judicial accountability.[106] Partisan judicial elections "enable voters to associate judges in a general way with many of the decisions they have made and candidates with those they are likely to make as sitting judges."[107] They are, like election for other kinds of officials, "blunt instruments of accountability" which are effective in maintaining popular control over the outer limits of governmental decision-making."[108]

Some commentators have not taken kindly to this conclusion.[109] Some have objected specifically to the notion that judges ought to be accountable,[110] failing to recognize that the question of whether accountability is desirable is quite separate from the question of whether it is possible. Others argue that it is insufficient to evaluate judges on the basis of their "policy output" and instead insist that judicial accountability demands some mechanism by which "the quality of doctrinal reasoning" and adherance to the "well-recognized rules of the judging craft" can be evaluated.[111] However, as discussed earlier, this is nothing more than evidence of the conflict be-

103. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843, 846-47 (1955).

104. P. DUBOIS, *supra* note 6, at 185-218, 231-34.

105. *Id.* at 238.

106. *Id.*

107. *Id.*

108. *Id.* at 239.

109. *See, e.g.*, Ellis, *supra* note 47; Goldstein & Porter, *Judicial Policymaking & the Quest for Accountability: Recent Variations on an Ancient Air*, 16 POLITY 165 (1983); May & Goldman, *Judicial Selection: An Analysis*, 46 TEX. B.J. 316 (1983).

110. May & Goldman, *supra* note 109, at 318.

111. *See* Goldstein & Porter, *supra* note 109, at 172-76.

tween the concept of political accountability and the legal profession's desire to hold judges and courts accountable to the values that lawyers hold dearest.[112]

More to the point are criticisms directed to the question of whether the existing evidence supports the conclusion that partisan elections are capable of holding judges accountable. Some critics appear to persist in the notion that party-based voting is "blind" or "irrational,"[113] notwithstanding modern election theory and evidence on voter attitudes to the contrary. At other times, critics question the claim that "partisanship is a significant variable in judicial decision-making," for "[i]f partisanship is not very important in judicial decision-making, is the party label a legitimate factor in voting?"[114] With the large number of state court decisions that are decided unanimously, the presence of legal questions that admit of no partisan resolution (*e.g.*, family law), and the fact that the relationship between party and judicial decision-making is inconsistent (*i.e.*, Democratic judges are not always more liberal than Republican judges on all issues at all times), critics see partisan elections as imperfectly suited to achieving policy accountability.[115]

To be sure, understanding the factors that influence or determine judicial behavior is no easy task. Social scientists have studied nonunanimous cases not because they believe that they represent the whole of judicial decision-making, but because these cases hold the potential for identifying the underlying differences in judges' attitudes and values. The actual frequency of nonunanimous cases varies considerably among state courts, however, and has been linked to "the controversialism of issues before a court, the backgrounds and terms of service of the judges, the informal and formal norms governing contentiousness among colleagues, and the presence of institutional arrangements" (such as a resident court) that promote harmony.[116] Regardless of the frequently of "open disagreement" as evidenced in nonunanimous cases, it is assumed that judges' differing political and legal prespectives affect the resolution of many cases in which no public disagreement or dissent is expressed.[117]

It may also be conceded that many legal issues do not present questions for which there are clear partisan answers and that judges often do not always behave in ways that would have been predicted by their partisan affiliation. The most relevant observation here is that party is also not a consideration in the resolution of many legislative issues and does not explain a good portion of the behavior of elected legislators either.[118] As discussed earlier, elections achieve accountability indirectly by setting only the general direction and broad boundaries of public policy; partisan elections

112. Wasby, *supra* note 29, at 146.
113. May & Goldman, *supra* note 109, at 317.
114. *Id.* at 318.
115. *See id.*
116. Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57, 73 (1969); Hall, *supra* note 21, at 344-45.
117. *See* P. DUBOIS, *supra* note 6, at 164-65.
118. *See id.* at 238-39.

well serve that function in the selection of legislators and seem equally valuable for the selection of judges. Although in both the legislative or judicial settings there is considerable "slippage" between officeholders' partisan labels and their behavior, no one has yet "suggested a realistic and meaningful alternative basis upon which voters may cast their ballots and still hope to exercise some control over those they elect."[119]

IV. CONCLUSION

American attitudes about judicial selection appear to embody conflicting expectations about the role of judges in a democratic society. It is thought that judges need to be provided with political independence and insulation so that they can keep the legislative and executive branches within the powers specifically delegated to them, safeguard fundamental individual rights and liberties against government intrusion, and perhaps even serve as the guardian of society's long-term interests against passing popular passions. At the same time, however, citizens want accountable judges who will faithfully administer those criminal and civil laws that their elected representatives have enacted, and otherwise made decisions that a majority of citizens would agree are most likely to protect the health, safety, welfare, morals, and general well-being of the population.

These conflicting expectations are well-exhibited in the institutional arrangements governing judicial selection in the American states. In recognition of the need for independence, judges enjoy terms in office that are longer than those afforded other kinds of public officeholders. In recognition of the importance of accountability, a large majority of states still provide for the initial selection and subsequent retention of their judges by popular election in one form or another.

American respect for the value of judicial independence has been significantly strengthened by "the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance."[120] In the debate over judicial selection, competitive judicial elections are portrayed as threatening to undermine public support for the judiciary by forcing judges to abandon their impartial application of legal principles for the sake of winning reelection. By threatening to remove judges whose decisions do not conform to the majority will that is dominant at the moment, elections are said to "politicize the judiciary by institutional design" and to threaten the "ideals of impartial and nonpartisan judicial decision-making."[121]

The position in favor of accountability and judicial elections assumes both a different view of the judicial function and of the basis of popular support and respect for the courts. In this view, the process of judicial decision-making, particularly at the level of state supreme courts, is far from straight-

119. *Id.* at 239.
120. Ladinsky & Silver, *supra* note 32, at 137.
121. May & Goldman, *supra* note 109, at 318.

forward or predetermined by legal precedents and the principles of syllogistic legal reasoning. Rather, judges must often exercise their discretion and in so doing are influenced by their own political, economic, social, and moral viewpoints. And, in a democratic political system, voters are entitled to periodically select those who make law and public policy, including those who interpret their laws and give meaning to their constitution.

Judges need not deny their personal attitudes and values as influences in their decision-making to remain impartial between the litigants in any one case. "To decide impartially is to leave the final decision open until all the information is received," but "judgment need not free itself of all bias. . . . Umpires may feel strongly about preventing pitchers from throwing at batters and (still) retain their impartiality."[122] To preserve the appearance of impartiality, the formal codes of appropriate judicial campaign conduct need only ensure that judicial candidates will not announce or promise how they will decide particular cases. They need not be so extensive as to require candidates to conceal the underlying attitudes and values that will inform their decisions or their general views on important political and social policy issues.[123] In this view, public faith in the courts is just as likely to be undermined by the appearance of unresponsive and unreviewable decision-makers as it is by the exposure of the human basis of legal judgment.[124]

122. L. CARTER, *supra* note 39, at 297-98.

123. *See* Grossman, *A Political View of Judicial Ethics*, 9 SAN DIEGO L. REV. 803, 815 (1972); Kaminsky, *supra* note 2, at 498-99.

124. Kaminsky, *supra* note 2, at 509; Ladinsky & Silver, *supra* note 32, at 169.