

KNOWING IS HALF THE BATTLE

A PROPOSAL FOR PROSPECTIVE
PERFORMANCE EVALUATIONS IN
JUDICIAL ELECTIONS



KNOWING IS HALF THE BATTLE: A PROPOSAL FOR PROSPECTIVE PERFORMANCE EVALUATIONS IN JUDICIAL ELECTIONS

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This article proposes a two-pronged, comprehensive approach to providing proper, relevant information to voters on candidates in contested judicial elections. Every sitting judge seeking reelection would be subject to judicial performance evaluation (JPE), a neutral review of the judge's skills related to the process of judging that considers the judge's impartiality, case management skills, communication skills, command of substantive and procedural law, temperament on the bench, and commitment to public service. At the same time, candidates without prior judicial experience would be subject to a parallel review called prospective performance evaluation (PPE), which would examine their applicable skills and experience using virtually identical criteria. A diverse evaluation committee would collect and analyze the relevant data for both sitting and aspiring judges, and the data and analysis for each candidate would be disseminated to voters before the election. Collectively, these evaluations would afford voters in states with contested judicial elections adequate, reliable, relevant information on the candidates, allowing them to make more informed choices for judicial office.

The article unfolds in three parts. Part I looks at the current state of contested judicial elections and explores the consequences of voters lacking sufficient, relevant information about judicial candidates. Part II examines existing methods for collecting and analyzing relevant data on judges, both with respect to sitting judges seeking retention and to nominees seeking a new appointment to fill a vacancy on the bench. Part III describes a proposal for prospective performance evaluations as a means of providing accurate, relevant information on judicial candidates directly to voters.

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I. THE UNINFORMED VOTER

Thirty-three states choose some or all of their judges through contested popular elections.¹ But judicial races generally draw less attention than races for prominent executive or legislative positions,² and when judicial races do draw attention it is often because partisan political issues highlight the campaign. As a result, less information is generally available on judicial candidates than for candidates in other races, and what information is available is often unreliable or colored with a heavily partisan tint. Accordingly, all too frequently voters are confronted at the polls with an “information problem”: they face a slate of judicial candidates about which they know nothing particularly relevant, or even nothing at all.

A. Lack of Quality Information

The “information problem” in contested judicial elections consists of two separate but related problems. First, voters face an ongoing lack of relevant information on the candidates—that is, information that emphasizes the candidates’ qualifications with respect to the proper role of a judge. Data and neutral analyses of each candidate’s experience and skills related to the process of judging—such as the candidate’s ability to manage a heavy caseload, move nimbly across different areas of law, and treat all parties with dignity and without bias—are all too frequently unavailable or ignored in the course of an election. In 2004, for example, less than one-third of all television advertisements in races for state highest courts focused on the candidates’ qualifications, experience, and integrity.³ Instead, campaign ads emphasized negative qualities of the opposition—the number of negative television ads nearly doubled from 2000 to 2004—or the candidate’s own qualities that were plainly irrelevant to the application of existing law or even the holding of judicial office, such as the candidate’s nickname.⁴

1. These states include Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Washington, West Virginia, and Wisconsin.

2. See 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, 168 (2004) (noting that “[j]udicial elections have traditionally been low salience, with poor voter turnout and little media attention.”).

3. DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2004*, vii (2005).

4. See Gary C. Byrne & J. Kristian Pueschel, *But Who Should I Vote for For County Coroner?* 36 J. POL. 778, 783 (1974) (concluding in a California study that “candidates who

Lack of quality information about judicial candidates has several related consequences. First, it contributes to diminished voter turnout in judicial elections. Under a well-documented phenomenon known as “roll-off,” voters cast votes for offices at the top of the ballot (such as President or Governor) but decline to vote for offices lower down on the ballot. The roll-off effect is particularly strong in judicial elections.⁵ Between 1980 and 1995, about one-fourth of those who went to the polls skipped voting for a supreme court seat.⁶ For lower-level judgeships, the lack of voter interest is even more pronounced.⁷ In the 2002 judicial elections in New York, for example, voter participation in elections for civil court judges was no higher than 22% in any of the four counties encompassing New York City.⁸

The decision not to vote cannot be attributed merely to general voter apathy. Rather, a significant portion of votes not cast in judicial elections results from voters’ rational conclusion that they lack sufficient knowledge to cast an informed vote. A 2004 study of New York voting habits concluded that nearly 60% of voters did not vote in that state’s partisan judicial elections specifically because they lacked information about the candidates.⁹ Another study of judicial elections in Wyoming found that nearly one-third of voters who lacked information on a justice standing for retention chose not to vote or could not recall their vote when asked.¹⁰

Diminished voter turnout means that judges are chosen by only a small fraction of eligible voters. Even worse, many of those who do vote base their decisions on factors utterly unrelated to the candidate’s ability to perform judicial work. Instead, voters cast their ballots based on factors such as

use a nickname [on the ballot] have an enormous 79 percent advantage over those who do not.”). *But see* Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643, 663 (2002) (noting that in judicial retention elections, the use of a nickname on the ballot did not have a statistically significant effect for justices such as Orville “Jack” Armstrong and Daniel M. “Mike” Hanlon who had emphasized their nicknames for voters).

5. See Steven Zeidman, *To Elect or Not To Elect: A Case Study of Judicial Selection in New York City 1977–2002*, 37 U. MICH. J.L. REFORM 791, 822–23 (2004); Nicholas P. Lovrich et al., *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 28, 30 (1989).

6. Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter’s Perspective*, 64 OHIO ST. L.J. 13, 19 (2003).

7. *Id.* at 20.

8. See Zeidman, *supra* note 5, at 823–35.

9. See Report of the Commission to Promote Public Confidence in Judicial Elections 38 (2004) (on file with author), available at <http://www.courts.state.ny.us/reports/JudicialElectionsReport.pdf> [hereinafter Feerick Commission Report].

10. See 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).

the candidate's ethnicity,¹¹ gender,¹² name,¹³ party affiliation,¹⁴ or length of time on the bench.¹⁵ Furthermore, a significant number of voters apparently cast a vote without any rationale whatsoever. In one study, 38% of those surveyed who had just cast a vote could not articulate a reason why they had voted the way they did.¹⁶

B. The Growth of Bad Information

The second, and more disturbing, aspect of the "information problem" is the growing tendency of voters to be exposed to bad information on judicial candidates. Here "bad information" means content that states or implies that the judicial candidate, upon ascending the bench, will act in a way that is inconsistent with the role and responsibilities of a neutral arbiter beholden to the rule of law. As the Florida Supreme Court recently noted:

[J]udicial elections present a great risk—a risk that the public will be misinformed about the proper role and responsibilities of judges and that because of that misinformation, confidence in our justice system will be undermined or shaken if the public perception is that judges may act in a partisan manner—rather than strictly adhere to the Rule of Law.¹⁷

11. See Larry Aspin et al., *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 3 (2000). See also Susannah A. Nesmith, *16 Judge Seats Draw 35 Candidates*, MIAMI HERALD, Sep. 1, 2006, at 6B (noting the electoral advantage of Hispanic and Jewish-sounding surnames in Florida judicial elections).

12. See Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300, 308–09 (1992) (noting voter reliance on low-information cues, including gender of the candidates, in elections for associate justices of the Ohio Supreme Court in 1986 and 1988).

13. In Texas, for example, several candidates with familiar-sounding names (e.g., George Busch, John Marshall, Sam Houston Clinton, Gene Kelly) have run for judicial office on the strength of their names alone. See, e.g., Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 5302, 100–02 (1986); Charles Bleil, *Can a Twenty-First Century Texas Tolerate Its Nineteenth Century Judicial Selection Process?*, 26 ST. MARY'S L.J. 1089, 1092–94 (1995).

14. See Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1491 (2005) (discussing "'party sweeps' in which popular top-of-the-ticket candidates have swept judges of the opposing party out of office and elected judges of a popular candidate's party for no other reason than that the judges shared the popular candidate's party affiliation.').

15. See Jona Goldschmidt, *Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise?*, 49 U. MIAMI L. REV. 1, 6 (1994); Griffin & Horan, *supra* note 10, at 74; Baum, *supra* note 6, at 23 (noting the advantage of an incumbency designation on the ballot).

16. See Griffin & Horan, *supra* note 10, at 73–74.

17. *In the Matter of Judge Carven Angel*, 31 FLA. BAR NEWS (Jul. 1, 2004); see also *In re Angel*, 867 So. 2d 379 (Fla. 2004).

The most potent example of bad information consists of candidates' pronouncements about their personal positions on hot-button political issues. Such pronouncements have multiplied in the wake of the Supreme Court's decision in *Republican Party of Minnesota v. White*,¹⁸ which held that certain canons of the Code of Judicial Ethics do not prevent judicial candidates from expressing their political views.¹⁹ The impact of the *White* decision has been hard felt. In the 2003–04 election cycle alone, candidates in Alabama, Georgia, Kentucky, Montana, North Carolina, Ohio, and Pennsylvania all ran on expressly partisan or issue-oriented platforms.²⁰ Furthermore, even where the candidates did not wish to make statements on issues that might come before them on the bench, special interest groups have tried to force their hands. During the 2006 campaign, such groups sent questionnaires to judicial candidates in several states, asking the candidates to state their personal positions on a variety of controversial social issues, including abortion, gay marriage and civil unions, capital punishment, assisted suicide, and the display of the Ten Commandments in public buildings and schools.²¹ The surveys also posed a perennial favorite question to each candidate: which Justice of the United States Supreme Court most reflects your judicial philosophy?²² Notably missing from the surveys were questions about the candidate's relevant education, legal experience, or community service. It was unsurprising, then, that the majority of candidates in Iowa and Florida who received surveys declined to answer them, and the handful that did respond in Iowa declined to answer questions concerning social issues, instead encouraging voters to look to factors such as "the judge's knowledge of the

18. 536 U.S. 765 (2002).

19. *Id.* at 787.

20. GOLDBERG ET AL., *supra* note 3, at 28–31.

21. These surveys were distributed with the half-hearted caveat that *of course* if the candidate were elected, he would be expected to follow existing precedent. *See, e.g.,* Iowans Concerned About Judges, 2006 Judicial Voters' Guide Questionnaire for Judicial Candidates (on file with author), available at <http://www.iowansconcernedaboutjudges.org/doc/Survey.pdf> [hereinafter Iowa Questionnaire]; Florida Family Policy Council's 2006 Statewide Judicial Candidate Questionnaire, http://www.flfamily.org/uploadfile/upload/Florida_Final.pdf (last visited April 13, 2007) [hereinafter Florida Questionnaire].

22. Iowa Questionnaire, Question 1; Florida Questionnaire, Question 6. This is a particularly silly question because even the most earnest answer to this question is likely to be of little or no use to voters. A recent survey concluded that only 24% of Americans could name even two Supreme Court justices. *See New National Poll Finds: More Americans Know Snow White's Dwarfs Than Supreme Court Judges*, BUSINESS WIRE, Aug. 14, 2006. At best, a typical voter might recognize a justice's name and associate it with a broad assumption about expected case outcomes (e.g., "Justice Scalia is conservative"). Accordingly, even if a judicial candidate had a sophisticated, nuanced reason for wanting to emulate the style of, say, Justice David Souter, such a response is highly unlikely to be appreciated by the voters he or she is trying to reach.

law, fairness, demeanor, timeliness of decisions, etc.”²³ In the final analysis, at best such surveys give voters no useful information on whether their judicial candidates would be competent jurists, and at worst they inundate voters with irrelevant information.

Even leaving the impact of *White* aside, contested judicial elections have become indisputably partisan. Six states—Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia—initially select all of their judges on partisan general election ballots; eight other states—Florida, Indiana, Kansas, Michigan, Missouri, New Mexico, New York, and Tennessee—select some portion of their judges that way.²⁴ Nineteen other states utilize so-called nonpartisan judicial elections, meaning that the candidate’s party affiliation is not listed on the general election ballot. But in some nonpartisan election states, candidates are still nominated by their parties for the general election ballot. Furthermore, even if the ballots do not denote political affiliation, the races themselves have become plainly politicized. In Kentucky, for example, the news media openly discussed the party affiliation of judges and judicial candidates during the 2006 election season, with the clear implication that such affiliation influenced official action.²⁵ Similarly, Wisconsin’s recent supreme court election had overtly partisan tones despite its official nonpartisan designation.²⁶

The dissemination of bad information in judicial elections, and the partisan tone that has resulted, has been fueled largely by the money and resources of political parties and special interest groups. The costs of judicial elections have risen exponentially in the past twenty-five years, and this growth has only accelerated since the turn of the century. In 2000, candidate spending in the twenty states with supreme court races rose to almost \$45.5 million, a 61% increase over the prior high, and spending set records in ten

23. Letter from Hon. Kurt L. Wilke, District Court Judge, Iowa Second Judicial District, to Daniel Dlouhy, Iowans Concerned About Judges (Aug. 21, 2006) (on file with author), available at <http://www.iowansconcernedaboutjudges.com/doc/Wilke.pdf>.

24. Some judges may be appointed to fill interim vacancies on the bench, but they must then run on partisan ballots to retain their seats in the next election.

25. Joseph E. Lambert, *Keeping Judicial Elections Respectable*, BENCH & BAR (Frankfort, Ky.), Sept. 2006, at 4.

26. The Democratic Judicial Campaign Committee and the greater Wisconsin Committee, a Democratic-oriented special interest group, openly supported and financed one candidate, Linda Clifford. See Press Release, Justice at Stake Campaign, Special Interests the Only Winners in Wisconsin’s Record-Shattering Supreme Court Race (Apr. 3, 2007) (on file with author). Clifford’s opponent, Annette Ziegler, was characterized as a “rule of law” candidate in contrast to Clifford, who was a “trial lawyer-backed . . . liberal immigration attorney.” Press Release, American Justice Partnership, Reform Candidate Wins Resounding Victory Over Trial Lawyer-Backed Opponent in Wisconsin Supreme Court Contest (Apr. 3, 2007) (on file with author).

states.²⁷ That year, interest groups in five states alone (Alabama, Illinois, Michigan, Mississippi, and Ohio) collectively spent \$16 million on hotly-contested supreme court elections.²⁸ From there, new spending records continued to be set: between 2000 and 2006, campaign contributions in the twenty-two states using some form of contested elections to place judges on the state's highest court have exceeded \$150 million.²⁹

More money means more television time, which in some cases has translated into an increase in attack ads. The number of states experiencing network television ads for highest court elections grew four-fold between 2000 and 2004,³⁰ and only two states with contested elections have managed to avoid broadcast television advertisements through the 2006 election cycle. In 2004, more than \$24 million was spent on television ads in highest court races—one-fourth of all dollars raised by the candidates.³¹

In many parts of the country, candidates for judicial office must now raise hundreds of thousands, or millions, of dollars to wage an effective campaign. The sources of that money are troubling, because the funds put pressure on the candidates to show favoritism to their contributors if they ascend to the bench. Where money comes from political parties, a candidate may feel pressured to decide cases in line with the party's agenda, especially if she has to win a party primary in the next election cycle in order to advance again to the general election ballot.³² Where money comes from law firms or individual lawyers, the judge may feel pressure to decide cases in favor of the donors who appear before her, or (for high court justices) to grant petitions for certiorari. Indeed, one study has already borne out this fear: between 1994 and 1998, the Texas Supreme Court accepted 56% of petitions for certiorari filed by attorneys who had donated \$250,000 or more to one or more of the justices, but only 5.5% of petitions from non-contributing petitioners.³³ Even if an elected judge strives not to show favoritism to donors, the perception of favoritism is inescapable.³⁴

27. See Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1405 (2003).

28. See *id.*

29. Press Release, Justice at Stake Campaign, *supra* note 26.

30. GOLDBERG ET AL., *supra* note 3, at vi.

31. *Id.*

32. See Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1426 (2001).

33. 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, 280 (2002).

34. Indeed, attorneys themselves may feel pressured to donate to campaigns in fear that not doing so will adversely affect their clients should the candidate be elected. See Orrin W. Johnson & Laura Johnson Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH L. REV. 525, 549–50 (1992).

Choosing judges based on cues unrelated to the candidates' relevant skills and experience is fraught with danger and has disastrous, if predictable, results. A number of studies have concluded that choosing judges through appointment or merit selection³⁵ results in an overall higher quality judiciary than choosing judges through contested elections.³⁶ Some anecdotal evidence supports this proposition. In Texas alone, multiple judges have been elected despite near universal acknowledgement that they were unqualified. In 1976, a candidate named Don Yarbrough defeated a well-respected judge with seventeen years of service in large part because Yarbrough had a name that was very similar to a number of well known Texas politicians. Yarbrough was indicted for perjury and forgery shortly thereafter and resigned in disgrace one year after taking the bench.³⁷ In the same state in 1994, a legislative landslide for the Republican Party carried a judicial candidate with no formal support and a criminal history to victory over a Democratic incumbent with twelve years of judicial experience and near-total

35. Throughout this article, the term "merit selection" is used to refer to the judicial selection process by which a nominating commission reviews the qualifications of judicial candidates and presents a slate of the most qualified candidates to the governor or other appointing authority; the appointing authority selects one candidate from that slate and appoints him or her to the bench; and the newly appointed judge periodically faces the voters in unopposed retention elections. "Merit selection" is the most common term for this process, although it is also known as the "Missouri Plan" or the "Non-Partisan Court Plan." See generally RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND BAR* (1969). The author's use of the term "merit selection" here does not mean to imply that individual judges selected by other means lack merit to hold their positions.

36. Judicial quality is not a clearly defined concept, and the several studies that have tried to measure it have each measured "quality" in different ways. Regardless of how quality is measured, however, many studies have concluded that a higher quality judiciary results from merit selection programs. See Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 33 (1995) (comparing rates of disciplinary actions or removal for elected and appointed judges in Florida and New York); WATSON & DOWNING, *supra* note 35, at 283–84 (finding that the average bar rating for appointed judges in Missouri was higher than the average rating for elected judges, even though some elected judges received very high ratings); Daniel Berkowitz & Karen Clay, *The Effect of Judicial Independence on Courts: Evidence from the American States*, 35 J. LEGAL STUD. 399, 399 (2006) (concluding that states initially settled by civil law countries and states that were members of the Confederacy during the Civil War—mostly southern states employing judicial elections—"granted less independence to their judiciary in 1970–1990 and had lower-quality courts in 2001–2003"); F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 206 (1999) (measuring quality of courts by the level of judicial independence, and concluding that independence is higher in states using appointive systems). See also Norman Krivosha, *Acquiring Judges by the Merit Selection Method: The Case for Adopting Such a Method*, 40 SW. L.J. 15, 19 (1986) (discussing a poll of jurisdictions with merit selection systems and noting that "[a]lmost without exception, the conclusion was that the quality of the bench had improved by reason of a state adopting the merit selection system.").

37. See Bleil, *supra* note 13, at 1092–93.

support of the bar and the media.³⁸ Similarly, in Illinois, a candidate was elected to the Circuit Court of Cook County, even after it was disclosed in federal court that he had been implicated in corrupt payments to judges in that same county.³⁹ According to another report, “in Minnesota a fresh law school graduate with an arrest record for domestic violence” received over 100,000 votes for district court judge even though he ran against a highly qualified and respected opponent, while in another election “an inexperienced candidate of questionable competence” nearly unseated a respected sitting judge.⁴⁰

The spiraling cost of judicial elections has also directly impacted public confidence in the courts. Nationwide, 76% of Americans agreed in a 2001 poll that campaign cash influences judicial decision-making.⁴¹ In Illinois, that number was 87%,⁴² and in Pennsylvania, it was about 90%.⁴³ In Texas, 83% of all adults surveyed said they believed campaign contributions influence judicial decisions “very significantly or fairly significantly”—a number which included 69% of court personnel and 79% of attorneys.⁴⁴ Even 48% of Texas *judges* admitted that they believed money had an impact on judicial decisions.⁴⁵

Finally, the rapid infusion of money and partisan information into contested elections has had adverse consequences not just for voters, but for the judges they elect. Sandra Day O'Connor warned in her concurring opinion in *White* that “if judges are subject to regular elections[,] they are likely to feel that they have at least some personal stake in the outcome of every publicized case” because they “cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt [the judges’]

38. See *id.* at n.15 and accompanying text.

39. See Darrell McGowen, *Life Tenure—An Indispensable Ingredient to an Independent Judiciary*, 75 ILL. B.J. 620, 620–21 (1987).

40. League of Women Voters of Minnesota Education Fund, *Choosing Minnesota’s Judges* (Aug. 1998) (on file with author), available at <http://www.lwvmn.org/EdFund/ChoosingMinnesotasJudges.asp>.

41. Memorandum from Stan Greenberg, Chairman and CEO, Greenberg Quinlan Rosner Research, and Linda A. DiVall, President, American Viewpoint, to Geri Palast, Executive Director, Justice at Stake Campaign, concerning Justice At Stake Surveys of American Voters and State Judges (Feb. 14, 2002) (on file with author), available at <http://www.justiceatstake.org/files/Pollingsummary/FINAL.pdf>.

42. The 87% figure includes statewide respondents who indicated that campaign contributions influence decisions of Illinois judges “a lot,” “quite a bit” or “some.” See SURVEY RESEARCH OFFICE, CTR. FOR STATE POLICY & LEADERSHIP UNIV. OF ILL. AT SPRINGFIELD (UIS), ILLINOIS STATEWIDE SURVEY ON JUDICIAL SELECTION ISSUES, WINTER 2004-2005 23 (2005) (on file with author).

43. Behrens & Silverman, *supra* note 33, at 283.

44. *Id.*

45. *Id.*

reelection prospects.”⁴⁶ That warning is playing out in courts across the country, particularly in cases involving capital punishment and in-state business interests. One lengthy study concluded that judges were much more likely to impose the death penalty in states with contested elections than in states with a merit selection system, who in turn imposed the death penalty much more frequently than judges in states who did not have to face voters at all.⁴⁷ Another study of appellate courts in Texas, Kentucky, Louisiana, and North Carolina concluded that “[d]istrict-based election, close margins of victory, approaching end of term, conditioning from previous representational service, and experience in seeking reelection influence liberal justices to join conservative majorities in death penalty cases.”⁴⁸ One Georgia Supreme Court justice even admitted that the elected justices of that court may have overlooked errors in some death penalty cases, leaving remedies to federal *habeas corpus* petitions because federal judges have lifetime appointments and are more insulated from public disapproval.⁴⁹ With respect to tort claims, another study demonstrated that states with elected judiciaries had damage awards against out-of-state businesses, which were about 40% higher on average than in states with non-elected judiciaries, even though awards against in-state companies were not significantly higher.⁵⁰

Fortunately, the consequences of bad information (if not all the drawbacks of contested judicial elections⁵¹) are susceptible to immediate remedy:

46. *White*, 536 U.S. at 788–89 (O’Connor, J., concurring).

47. See 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). See also F. Andrew Hanssen, *The Political Economy of Judicial Selection: Theory and Evidence*, 9 KAN. J.L. & PUB. POL’Y 413, 422–23 (2000) (reaching the same conclusion that “[j]udges in elective systems respond more, on average, to political pressures than do judges in [merit selection] systems,” who in turn respond more to political pressures than judges appointed for life).

48. Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POLITICS 427, 442 (1992).

49. See *id.* at 799.

50. See Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341, 350 (2002).

51. Some of the problems with judicial elections cannot be resolved by additional information to voters, including unrestrained campaign spending and threats to minority voting rights. In 1991, the Supreme Court held that state judicial elections fall within the ambit of the Voting Rights Act of 1965, which prohibits the imposition of a voting qualification or prerequisite in a manner that results in the denial or abridgement of the right to vote on account of race or color. See *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers’ Ass’n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991). As a result, some states with judicial elections had to modify their judicial circuits and districts to assure that minority voting strength was not unconstitutionally diluted. Some have also argued that contested elections are inferior means of ensuring racial, ethnic, and gender diversity on the bench, although studies on these topics have been inconclusive. See, e.g., Barbara Luck Graham, *Do Judicial Selection Systems Matter? A Study of Black Representation on State Courts*, 18 AM. POL. Q. 316, 333

an influx of credible, relevant information. One set of commentators has explained, "The more knowledgeable voters are, the more tolerant of the competing demands of judicial independence and democratic accountability they become . . . [t]he task for those who wish to maintain balance between accountability and responsibility may well be to increase the amount of information available to the . . . electorate."⁵² Voters concur. More than two-thirds of voters in a 2004 poll agreed that "receiving a nonpartisan voter guide containing background information on judicial candidates would make them more likely to vote in judicial elections."⁵³ Another poll of registered voters in New York found that an astonishing 88% "believe that voter guides are a useful way to educate the public about judicial elections."⁵⁴ The public has indicated that it is hungry for information. The challenge is to feed that hunger with information that is nourishing and relevant.

II. EXISTING SYSTEMS OF EVALUATING JUDICIAL CANDIDATES

As long as states continue to choose judges through popular elections, voters should be entitled to as much relevant information on each candidate's skills and experience as is available. Happily, the means to collect and analyze such information already exist in most jurisdictions. Most states already have a process for collecting data on potential judges when vacancies occur on the bench, to assist the governor or other nominating authority in selecting the best possible candidate. Nearly half the states also conduct formal judicial performance evaluations for sitting judges, reviewing each judge's performance on the bench against neutral criteria related to the process of judging and in most cases disseminating that information to the public. Where no official evaluation programs exist, state and local bar associations frequently conduct their own reviews of judges and judicial candidates which, while lacking the official imprimatur of state-run evaluations, nonetheless provide some additional information to those who select judges.

(1990) (concluding that gubernatorial or legislative appointment is the superior method for ensuring racial diversity on state trial courts); Robert C. Luskin et al., *How Minority Judges Fare in Retention Elections*, 77 JUDICATURE 316, 320 (1994) (determining that there is no significant difference between the retention rates of white, black, and Hispanic judges initially appointed under merit selection systems); Becky Kruse, *Luck and Politics: Judicial Selection Methods and Their Effect on Women on the Bench*, 16 WIS. WOMEN'S L.J. 67, 75-78 (2001) (noting conflicting studies concerning the success of women ascending to the bench in appointive systems and elective systems, perhaps because the sample size is relatively small).

52. Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Knowledge and Judicial Voting: The Oregon and Washington Experience*, 67 JUDICATURE 235, 244 (1983).

53. See Randall T. Shepard, *Electing Judges and the Impact on Judicial Independence*, TENN. B.J. June 2006, at 25, n.16 (citing Zogby International Survey of 1,204 American voters, commissioned by Justice at Stake and conducted March 17-19, 2004).

54. Feerick Commission Report, *supra* note 9, at 39.

The information collected and analyzed by state commissions and bar associations has proven beneficial to appointment authorities, as well as voters in retention elections, and would be equally relevant to voters in the course of a contested judicial election.

A. Judicial Performance Evaluation

Judicial performance evaluation programs have an established history of providing relevant useful information to voters in judicial elections. Currently nineteen states, plus Puerto Rico and the District of Columbia, have formal JPE programs, in which sitting judges are periodically evaluated on their performance on the bench.⁵⁵ Several other states have unofficial evaluation programs operated by state and local bar associations,⁵⁶ and at least one more was considering implementation of a formal evaluation program in the near future.⁵⁷ In many of these states, the collected information and analysis is broadly disseminated to the public through the media and other channels. In states where sitting judges face retention elections to stay in office, dissemination of JPE results has led to an electorate that is more informed and more confident in their votes.⁵⁸

JPE programs have been used for more than thirty years. In 1975, Alaska became the first state to adopt a formal JPE program,⁵⁹ and in many ways Alaska remains a model for the nation. Judges are evaluated at the end of each term in office by the Alaska Judicial Council, a seven-member commission consisting of three attorneys, three non-attorneys, and the chief justice of the state supreme court.⁶⁰ Judicial performance is evaluated by looking at a broad and deep set of data. First, the Judicial Council surveys professionals who interact with the judge on a regular basis (including

55. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT Appendix A (2006) [hereinafter SHARED EXPECTATIONS].

56. *See id.*

57. In Minnesota, a citizen commission chaired by former governor Al Quie recently issued a report recommending that the state eliminate judicial elections in favor of a merit selection system featuring nominating commissions, gubernatorial appointment, and retention elections for judges. Central to the commission's proposal was the establishment of a Judicial Performance Evaluation Commission and regular performance evaluations of all sitting judges. *See* CITIZENS COMMISSION FOR THE PRESERVATION OF AN IMPARTIAL JUDICIARY, FINAL REPORT AND RECOMMENDATIONS 16–20 (Mar. 26, 2007) (on file with author), available at <http://keepmnjusticeimpartial.org/FinalReportAndRecommendation.pdf>.

58. *See* KEVIN M. ESTERLING & KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS 41 (1998).

59. *See, e.g., id.* at 23.

60. Press Release, Alaska Judicial Council, Retention Election Evaluation of Judges by Judicial Council (June 27, 2006) at 2–3 (on file with author), available at <http://www.ajc.state.ak.us/Retention2006/PressReleaseVote.pdf>.

members of the bar, peace and probation officers, social workers, guardians ad litem, and court-appointed special advocates⁶¹), asking them to evaluate the judge in nine areas of performance: legal ability; impartiality/fairness; integrity; judicial temperament; diligence; special skills; respect for parties, attorneys, and staff; reasonable promptness in issuing decisions; and overall performance.⁶² Survey questions are tailored to the courtroom experience of each group of respondents, and survey participants are requested to rate only those judges for whom they have an actual basis for evaluation.⁶³

Alaska similarly distributes surveys to its jurors and court staff. Jurors are asked to evaluate the judge with whom they served in the areas of impartiality, respectfulness, attentiveness, control over proceedings, intelligence and skill as a judge, and overall performance.⁶⁴ Court staff are asked to evaluate the judge in five categories: judicial temperament, diligence, integrity, impartiality, and overall performance.⁶⁵

Beyond survey data, the Alaska Judicial Council examines how each trial judge's rulings stand up on appeal,⁶⁶ as well as detailed questionnaire responses from selected attorneys who conducted trials before the judge,⁶⁷ the judge's own self-evaluation,⁶⁸ information gleaned from an interview with the judge, the judges recusal⁶⁹ and peremptory challenge rates,⁷⁰ com-

61. See UNIVERSITY OF ALASKA ANCHORAGE BEHAVIORAL HEALTH RESEARCH AND SERVICES, ALASKA JUDICIAL COUNCIL RETENTION SURVEY 1 (2004) (on file with author).

62. *Id.*

63. *Id.* at 2. Evaluations based on criteria other than direct professional contact (e.g., social contact or professional reputation) are accepted but are noted as such in the final evaluation. Most respondents do in fact base their responses on direct professional experience with the judge.

64. See Memorandum from Alaska Judicial Council Members to Staff on Juror Survey Report 4 (Apr. 17, 2006) (on file with author), available at <http://www.ajc.state.ak.us/Retention2006/JurorSrvy06/JurorSurvey.pdf>.

65. Memorandum from Alaska Judicial Council Members to Staff on Court Employee Survey Report 5 (Apr. 17, 2006) (on file with author), available at <http://www.ajc.state.ak.us/Retention2006/CrtEmpSurvey06/courtemp.pdf>.

66. This review appears to be unique to Alaska, and the Judicial Council has acknowledged that it might be difficult to measure properly (in part because issues may not be divided out cleanly in appellate opinions). Still, the Judicial Council may take notice of a high rate of rulings being overturned. See Memorandum from Alaska Judicial Council to Staff on Appellate Evaluation of Judges Eligible for Retention in 2006 2 (Apr. 24, 2006) (on file with author), available at <http://www.ajc.state.ak.us/Retention2006/AppReview06.pdf>.

67. See Alaska Judicial Council, Retention Evaluation Information, <http://www.ajc.state.ak.us/Retention/retent.htm> (last visited Apr. 10, 2007) [hereinafter Retention Evaluation Information].

68. See *id.*

69. Memorandum from Alaska Judicial Council to Staff on Recusal Records for Judges Eligible for Retention in 2006 1 (April 18, 2006) (on file with author), available at <http://www.ajc.state.ak.us/Retention2006/PeremptoryChallenge06.pdf>.

70. See Memorandum from Alaska Judicial Council to Staff on Peremptory Challenge Rates for Judges Eligible for Retention in 2004 1 (May 26, 2004) (on file with author), avail-

ments from public hearings,⁷¹ and reports from a sophisticated network of volunteer judicial observers.⁷² Based on a careful review on the collected information for each judge, the Judicial Council makes a recommendation as to whether the judge should be retained. The recommendation, along with a supporting narrative, is then disseminated to voters in advance of the judge's retention election.

Several other states have adopted Alaska's general model, adjusting the system to meet the specific needs of their respective voters. Rather than a seven-member commission, for example, Arizona uses a statewide commission of up to thirty-four members, composed of lawyers, judges, and laypersons, which opens its evaluation meetings to the public.⁷³ Colorado uses both a statewide performance evaluation commission for appellate judges and twenty-two local commissions for district and county judges.⁷⁴ Colorado also has statutory requirements concerning the appointment of members to each ten-person commission: the Governor and Chief Justice each appoint one attorney and two non-attorneys, and the Speaker of the House and the President of the Senate each appoints one attorney and one non-attorney.⁷⁵

The evaluation process also differs somewhat from state to state.⁷⁶ For example, Arizona and Colorado have express provisions which allow a

able at <http://www.ajc.state.ak.us/Retention04/disqual%202004.pdf>. Because Alaska permits one peremptory disqualification as of right in each case, the Judicial Council cautions that peremptory challenge rates "should only be used as a signal of a potential issue with a judge," not necessarily a determinant of bias or other grounds for disqualification. *See id.* at 3; *see also* Marla N. Greenstein, *Judicial Disqualification in Alaska Courts*, 17 ALASKA L. REV. 53, 61-62 (2000).

71. *See* Retention Evaluation Information, *supra* note 67.

72. The Alaska Judicial Observers compile annual results on each judge. Volunteer observers are provided with approximately forty hours of training and are instructed to sit in on court proceedings at unscheduled intervals. As many as fifteen observers are assigned to each judge. They observe both civil and criminal cases, and review all courtroom activities, from arraignments and motion hearings to jury trials. Observers provide both numerical evaluations and written comments in response to straightforward questions about the judge's behavior, such as "Did the judge pay close attention to the testimony?" and "Did you understand the judge's explanations and decisions, or did you leave feeling confused?" The data from all observers is compiled into a one-page evaluation for each judge, which sets out the number of observers, the total number of hours observed, the types of cases observed, and the average rating the judge received in each category. *See* ALASKA JUDICIAL OBSERVERS 2006 BIENNIAL REPORT 1-8 (2006) (on file with author), available at <http://www.ajc.state.ak.us/Retention2006/JudicialObservers.pdf>.

73. ARIZ. R. P. JUD. PERF. REV. 2(a) & (d).

74. *See* COLO. REV. STAT. §§ 13-5.5-102(1)(a), 13-5.5-104(1)(a).

75. COLO. REV. STAT. § 13-5.5-102(1)(a).

76. For a more extensive discussion of innovations in different state JPE programs, *see* Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 203-06 (2007).

judge to appeal the commission's finding.⁷⁷ New Mexico expands its pool of survey recipients to include, among others, law clerks and law professors (for appellate judges) and courtroom interpreters and psychologists (for trial judges).⁷⁸ Furthermore, nearly all jurisdictions employing some form of judicial performance evaluations require that the evaluation commission be balanced by party affiliation, status as an attorney or a layperson, gender, and/or the authority appointing members of the commission.⁷⁹

Utah has instituted performance benchmarks for its sitting judges, creating a clear threshold for acceptable judicial performance. Specifically, each Utah judge is expected to meet or surpass each of the following standards: (1) a favorable rating by at least 70% of the respondents on at least 75% of the attorney survey questions; (2) for trial judges, a favorable rating by at least 70% of the respondents on at least 75% of the juror survey questions; (3) compliance with rigid timing requirements for disposition of cases; (4) at least thirty hours of judicial education a year; (5) substantial compliance with the Code of Judicial Conduct; and (6) physical and mental fitness for office.⁸⁰ Compliance with the listed standards creates a presumption that the judge will be certified for retention, rebuttable only by "reliable information showing non-compliance with a performance standard," or "formal or informal sanctions by the Supreme Court of sufficient gravity or number or both to demonstrate lack of substantial compliance with the Code of Judicial Conduct."⁸¹ Failure to meet all of the standards creates a presumption against certification, which "may be overcome by a showing of good cause to the contrary."⁸² Utah and Arizona also decline to make explicit recommendations on retention, instead providing voters with an analysis

77. See Colorado Commissions on Judicial Performance, Rules Governing Commissions on Judicial Performance, Rule 15(b), <http://www.cojudicialperformance.com/main.cfm?webdiv=529&top=182> (last visited Apr. 13, 2007); A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 704 (1998).

78. See New Mexico Judicial Performance Evaluation Commission, How We Evaluate Judges, <http://nmjpec.org> (follow hyperlinks under "How We Evaluate Judges" for information on evaluation methods for each bench).

79. See, e.g., ARIZ. R.P. JUD. PERF. 2(a) & 5(a); COLO. REV. STAT. §§ 13-5.5-102(1)(a) 13-5.5-104(1)(a); New Mexico Judicial Performance Evaluation Commission, Who Can Serve on the JPEC?, <http://www.nmjpec.org/who> (last visited Apr. 6, 2007); TENNESSEE JUDICIAL EVALUATION COMMISSION, TENNESSEE APPELLATE JUDGES EVALUATION REPORT 2006 i (2006) (on file with author), available at http://www.tba.org/judicialcampaign/judeval_2006.pdf.

80. See UTAH VOTER INFORMATION PAMPHLET (General Election Nov. 5, 2002) 60 (on file with author), available at http://elections.utah.gov/GOV_election_pamphletWEB.pdf.

81. *Id.*

82. *Id.*

as to whether the judge meets acceptable standards for judicial performance.⁸³

JPE programs, and in particular the widespread dissemination of evaluation results to voters, have proven to have many benefits. A seminal 1998 study on four states with long-established JPE programs reported that the majority of voters in those states made their retention election choices, at least in part, on the basis of the performance evaluation information they received.⁸⁴ The same voters agreed that the official information added to their confidence in the quality of judicial candidates.⁸⁵ For this reason alone, JPE is appropriate for sitting judges in every state with judicial elections. JPE also benefits sitting and aspiring judges by publicly stating the criteria by which their performance on the bench is to be evaluated, and by providing sitting judges with concrete, constructive feedback about their strengths and weaknesses on the bench.

Furthermore, JPE is a prophylactic against the increasingly outcome-directed tone of judicial elections. By its very nature, JPE focuses voters on the criteria relevant to the act of judging, not the outcome of one or two cases. While JPE does not inoculate all judges from partisan attacks, on the whole it has shown the potential to reduce both their frequency and severity. Indeed, the most notorious examples of efforts to remove sitting judges from the bench—Rose Bird, Joseph Grodin, and Cruz Reynoso in California;⁸⁶ David Lanphier in Nebraska;⁸⁷ and Penny White in Tennessee⁸⁸—occurred in states where official, formal evaluations of each judge's performance were not available to voters at the time of the election.⁸⁹

83. In Arizona, members of the performance commission publicly vote on whether each judge "Meets" or "Does Not Meet" judicial performance standards. *See* ARIZ. R.P. JUD. PERF. 2(g)(1). In Utah, the commission merely certifies a judge for retention based upon performance against the predetermined benchmarks. *See* UTAH VOTER INFORMATION PAMPHLET, *supra* note 80, at 60.

84. The study polled voters in Alaska, Arizona, Colorado and Utah. Sixty-six percent of those polled in Alaska responded that the official evaluation information they received assisted or solely decided their vote; for Arizona, Colorado and Utah the figures were 66.1%, 76.3%, and 73.0%, respectively. *See* ESTERLING & SAMPSON, *supra* note 58, at 39.

85. *See id.*

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

87. *See* Traceil V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 69–72 (1999).

88. *See id.* at 69–72.

89. Without objective evaluations to point to, several of the justices struggled to find resonant, nonpartisan campaign themes. Chief Justice Bird aggressively fought for her seat in 1986 by emphasizing the importance of judicial independence, a message that failed dramatically with the voters. Bird's first election consultant later explained, "although polling indicated that judicial independence was the one message that would not work, [Bird] adopted it as the sole basis of her campaign." Wold & Culver, *supra* note 86, at 350; *see also* Bill Zim-

B. Formal Evaluations for Judicial Nominees

JPEs are not the only existing mechanisms for measuring a would-be judge's aptitude for the bench. Increasingly, states that fill mid-term vacancies by gubernatorial or legislative appointment (including many states that otherwise hold judicial elections) are recognizing the need for careful screening and evaluation of judicial nominees before they are appointed. In January 2007, New York Governor Eliot Spitzer signed an executive order establishing judicial screening committees "to ensure that judicial officer appointments are of the highest quality."⁹⁰ The order created screening committees at the state, departmental, and county levels, each charged with actively recruiting candidates for appointment; reviewing and evaluating all candidates' qualifications; recommending candidates for appointment who are determined by the committee to be "highly qualified"; and preparing written reports on the qualifications of each candidate determined to be "highly qualified" for the governor's review.⁹¹ Screening committee members are themselves selected by a range of appointing authorities, including the governor, attorney general, chief judge of the court of appeals, other judges, and members of the legislative leadership, thereby ensuring that committees cannot be stacked by one branch of state government.⁹² Committee members are explicitly instructed to give primary consideration to each candidate's integrity, independence, intellect, judgment, temperament, and experience, and they shall not give any consideration to the age, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status or political party affiliation of the candidate.⁹³

Within a few weeks of the New York order, Ohio Governor Ted Strickland similarly established the Ohio Judicial Appointments Recommendations Panel (OJARP) by executive action.⁹⁴ The panel consists of five at-large members appointed for two year terms. As vacancies open across the

merman, *The Campaign That Couldn't Win: When Rose Bird Ran Her Own Defeat*, L.A. TIMES, Nov. 9, 1986, at V:1 (arguing that "[t]o base a political campaign on the independence of the judiciary was to commit electoral suicide."). Despite this failure, Justice White ran on her own platform of judicial independence in 1996, with the same result. *See Reid, supra* note 87, at 72. Justice Lanphier tried a different tactic in 1996, engaging in very little active campaigning in order "to maintain the dignity of the office." But dignity did not win the day in the face of partisan attack ads. *See id.*

90. Exec. Order No. 4 (Jan. 1, 2007) (on file with author), *available at* http://www.ny.gov/governor/executive_orders/exeorders/4.html.

91. *Id.*, § A.

92. *See id.*, §§ A–B.

93. *Id.*, § A(2)(b).

94. *See* Press Release, Office of the Governor, Strickland Establishes Judicial Appointments Recommendation Panel (Jan. 29, 2007) (on file with author).

state, six members from each region with a vacancy open are appointed to assist the at-large members.⁹⁵ Although all members are appointed by the governor, the panel is designed to reflect the opinions of lawyers and laypeople, labor and business interests, as well as the state's diverse citizenry.⁹⁶

The use of nominating commissions to fill vacancies in New York and Ohio largely mirrors the use of similar commissions to propose judicial nominees in merit selection or traditional appointment states. In each state, members of nominating commissions review the qualifications of candidates, identify the top candidates for each open position, and forward their analysis to the appointing authority so that he or she can make a more informed judgment. Similar to JPE commissions, nominating commissions across the country differ somewhat in their composition, but there is a general consensus that they should reflect a cross-section of the population in the state or district in which they serve. Accordingly, many states have explicit rules requiring representation—or even balance—on nominating commissions with respect to party affiliation, attorney/non-attorney status, gender, and sometimes race or ethnicity.⁹⁷

Also like their JPE counterparts, many judicial nominating commissions establish specific criteria that must be (or must not be) considered in evaluating whether an aspiring judge is qualified. California's Commission on Judicial Nominees Evaluation, for example, evaluates all candidates on the qualities "of impartiality, freedom from bias, industry, integrity, honesty, legal experience, professional skills, intellectual capacity, judgment, community respect, commitment to equal justice, judicial temperament, communication skills, [and] job-related health."⁹⁸ In addition, trial court candidates

95. *See id.*

96. *See id.*

97. *See id.*; *see also* COLO. CONST. art. VI, § 24(2)–(3) (requiring partisan balance); FLA. STAT. § 43.291 (2006) (providing that "to the extent possible, the membership of the commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered"); Commonwealth of Massachusetts Exec. Order 466 §1.1 (Feb. 15, 2005) (stating that "to the extent practicable, the [nominating] commissioners shall reflect diversity of race, gender, ethnicity, geography and, among commissioners who also are members of the bar, various practice areas and size of practice."); TENN. CODE ANN. 17-4-102 (2006) ("Each speaker in making the appointments to the judicial selection commission shall appoint persons who approximate the population of the state with respect to race, including the dominant ethnic minority population, and gender.").

98. Rules and Procedures of the Commission on Judicial Nominees Evaluation, Rule II, § 6 (rev. June 23, 2005) (on file with author), *available at* http://calbar.ca.gov/calbar/pdfs/public-comment/2005/JNE_Rules.pdf. The California system uses its nominating commission in a unique way. Rather than using the commission to identify and evaluate possible judicial candidates for the appointing authority's ultimate selection, California allows the governor to identify his preferred nominee, whose name is then submitted to the Commission on Judicial Nominees Evaluation for formal evaluation. *See* Deborah

are evaluated on “decisiveness, oral communication skills, [and] patience,” and candidates for the appellate bench are evaluated on “collegiality, writing ability, [and] scholarship.”⁹⁹ Hawaii explicitly sets out a similar list in the rules for its Judicial Selection Commission.¹⁰⁰ Rhode Island likewise directs its Judicial Nominating Commission to consider nominees’ “intellect, ability, temperament, impartiality, diligence, experience, maturity, education, publications, and record of public, community, and government service.”¹⁰¹ To this end, Rhode Island applicants are required to complete a detailed written questionnaire setting forth their relevant educational and professional history, financial, business, and community involvement, and history of disciplinary conduct (if any).¹⁰²

The practice of Colorado’s nominating commissions illustrates a comprehensive evaluation and nominating process. Colorado adopted a merit selection scheme for all of its judges in 1966.¹⁰³ Mirroring the commission structure for its JPE program, the state uses separate nominating commissions for each of its twenty-two judicial districts, as well as a statewide nominating commission for selection of appellate judges. By design, each commission has a minority of attorneys and a majority of non-attorneys.¹⁰⁴ All commission members are provided with a handbook which identifies “qualities of good judges,” such as fairness and impartiality, appropriate demeanor and temperament, legal knowledge and skill, character and reputation, management ability, research and writing ability, collegial decision-making, ability to manage docket and court personnel, and ability to deal effectively with a wide variety of people.¹⁰⁵ The handbook also sets out, among other things, testimonials from sitting judges about the day-to-day aspects of their jobs on the supreme court, court of appeals, urban and rural district courts, and county courts.¹⁰⁶

Kiley, *Merit Selection of California Judges* (Mar. 2, 1999) (on file with author), available at http://www.mcgeorge.edu/government_law_and_policy/publications/ccglp_pubs_mje_merit_selection_of_california_judges.htm.

99. *Id.*

100. See Supreme Court of the State of Hawaii, Judicial Selection Commission Rules, Rule 10 (on file with author), available at <http://www.state.hi.us/jud/ctrules/jsr.htm>.

101. R.I. GEN. LAWS § 8-16.1-4 (2006).

102. See State of Rhode Island Judicial Nominating Commission, Personal Data Questionnaire for Candidates (on file with author), available at <http://www.state.ri.us/jnc/resources/pdq.pdf>.

103. E.g., Gregory J. Hobbs, Jr., *Colorado Judicial Merit Selection—A Well-Deserved 40th Anniversary Celebration*, COLO. LAW. Apr. 2006, at 13.

104. See COLO. CONST. art. VI, § 24(1) & (2).

105. See COLORADO JUDICIAL NOMINATING COMMISSION HANDBOOK 23–26 (1997) (on file with author).

106. See *id.* at 27–35.

The commission reviews each judicial applicant's basic eligibility requirements to hold the position (including whether the applicant need be an attorney, and if so, for how long he or she must have been licensed to practice in the state); the applicant's employment history and professional and community activities; letters of reference; and a short essay written by the applicant explaining why he or she is seeking the particular judgeship.¹⁰⁷ Commission members are instructed to find candidates with the intelligence, experience, and flexibility to succeed on the bench:

It is rare to find an applicant with in-depth experience in all subject matters of the law, and you should be aware that many attorneys specialize in a particular field of law. Specialization is not a disqualification and may provide an expertise that is needed on the bench. Look for evidence that the applicant is willing and able to learn the different substantive areas of the law. Evaluate whether the applicant appears to be a quick learner who can perform well under pressure.¹⁰⁸

The Colorado commissions also interview selected applicants. Commission members are encouraged to ask open-ended questions designed to elicit the candidate's familiarity with the job duties, organization and thought process, and any bias. For example, commissioners may ask, "What sort of control do you feel a judge should exercise over his or her courtroom and case load?" or ask the candidate to describe how he or she would "get up to speed" in an area of law with which he or she was not already familiar.¹⁰⁹

Ultimately, the commission selects nominees through a group decision-making process in which all commissioners are permitted to voice their opinions or concerns about a given candidate.¹¹⁰ The commission must evaluate both the qualities of the applicants and the needs of the bench (such as the court's workload and whether the open position has a significant administrative component).¹¹¹ The commission transmits a list of up to three nominees to the governor, who conducts his own review and interviews of the nominees. The governor must choose one of the nominees within fifteen days of receiving the commission's list.¹¹²

Nominating commissions also reach out to the bar to collect relevant information on prospective judges. The Alaska Judicial Council, for example, polls members of the state bar as to their impressions of candidates for

107. *Id.* at 11–12.

108. *Id.* at 11.

109. *Id.* at 16.

110. *Id.* at 19.

111. COLORADO JUDICIAL NOMINATING COMMISSION HANDBOOK 19 (1997) (on file with author).

112. *Id.* at 20.

nomination to the bench. Specifically, bar members are asked to rate each candidate on a five-point scale on six criteria: professional competence, integrity, judicial temperament, fairness, suitability of experience, and overall professional qualifications.¹¹³ Respondents must identify the level of professional contact they have had with the candidate and are encouraged (although not required) to submit written comments.¹¹⁴

Other states ask the state bar association to offer its own formal determination on each candidate's qualifications. In South Carolina, for example, the Judicial Qualifications Committee of the state bar has the opportunity to assess judicial candidates and provide feedback to the state Judicial Merit Selection Commission.¹¹⁵ The Judicial Qualifications Committee, consisting of twenty-five active members of the bar, interviews each candidate and at least thirty members knowledgeable about the candidate; evaluations are based on whether the candidate meets established criteria and are posted on the bar association's website.¹¹⁶ Similarly, in California, before the governor appoints or nominates a judge, the name is submitted to the state bar for evaluation of the individual's qualifications.¹¹⁷

On the federal level, for decades the American Bar Association has collected information on candidates for the federal judiciary and has announced recommendations on those candidates, ranging from "not qualified" to "well-qualified." Like state nominating commissions, the ABA Standing Committee on the Federal Judiciary evaluates a candidate in several areas of integrity, professional competence, and judicial temperament.¹¹⁸ Following President Bush's nomination of Samuel Alito to the United States Supreme Court in October 2005, the ABA Standing Committee contacted over 2000 individuals nationwide to survey their perceptions of then-Judge Alito's professional qualifications.¹¹⁹ In addition, three different reading groups reviewed hundreds of the Judge's published and unpublished opinions, articles, legal memos, and oral argument transcripts and briefs.¹²⁰ Three mem-

113. Alaska Judicial Council, Procedures for Nominating Judicial Candidates, <http://www.ajc.state.ak.us/Selection/procedur.htm> (last visited Apr. 10, 2007).

114. See *id.*

115. See S.C. Code Ann. § 2-19-25; see also Kimberly C. Petillo, *The Untouchables: The Impact of South Carolina's New Judicial Selection System on the South Carolina Supreme Court, 1997-2003*, 67 ALB. L. REV. 937, 940 (2004).

116. Kevin Eberle, *Judicial Selection in South Carolina: Who Gets to Judge?*, S.C. LAW., May-June 2002, at 23.

117. See Cal. Gov't Code 12011.5.

118. See, e.g., Letter from Stephen L. Tober, Chair, ABA Standing Committee on the Federal Judiciary, to the Honorable Arlen Specter, Chair, Senate Committee on the Judiciary, concerning nomination of Judge Samuel A. Alito, Jr. to the Supreme Court (Jan. 9, 2006) at 2 (on file with author), available at <http://www.abanet.org/scfedjud/SCpage/Alito-letter.pdf>.

119. See *id.* at 2-3.

120. See *id.* at 4.

bers of the Standing Committee also interviewed the nominee directly.¹²¹ According to the Standing Committee, its ultimate evaluation of the nominee was “based upon a comprehensive, non-partisan, non-ideological peer review of [his] professional qualifications,” and did not take into account the nominee’s ideology or political views, or any of the nominee’s views on any issues that might potentially come before him on the bench.¹²²

Some state and local bar associations, as well as community organizations, have also disseminated evaluations of candidates in judicial elections to fill the void left by the lack of official state evaluations.¹²³ The Pennsylvania Bar Association Judicial Evaluation Commission, for example, conducts evaluations of all candidates for appellate seats in each election cycle. Each candidate is asked to complete a detailed “personal data questionnaire” about his or her education, experience, professional and community service, health, academic or teaching experience, and whether the candidate has been subject to any personal or professional discipline.¹²⁴ The Commission also interviews each candidate, as well as individuals who have had personal and professional dealings with each candidate. Ultimately, each candidate is rated as “Highly Recommended,” “Recommended,” or “Not Recommended.”¹²⁵ The ratings are based on ten criteria: legal ability; trial or other experience which ensures knowledge of courtroom procedures and evidentiary

121. *See id.* at 5.

122. *Id.* at 1–2. It is important to note that the ABA rating system has not been without controversy. Although the Standing Committee has unanimously offered its highest recommendation of “well-qualified” to both Democratic and Republican nominees for the U.S. Supreme court in the last thirty years (including eight out of the nine sitting Justices), some have charged that overall, its recommendations reflect a liberal bias. *See, e.g.,* James Lindgren, *Yes, the ABA Rankings Are Biased*, *OPINION JOURNAL*, Aug. 6, 2001, <http://www.opinionjournal.com/extra/?id=95000927>. In 2001, the Bush Administration announced that it would cease seeking an ABA rating on a judicial nominee before submitting the nominee’s name to Congress. *See* Letter from Alberto R. Gonzales, Counsel to the President, to Martha W. Barnett, President, American Bar Association (Mar. 22, 2001) (on file with author), available at <http://www.whitehouse.gov/news/releases/2001/03/print/20010322-5.html>.

123. *See, e.g.,* CHICAGO BAR ASSOCIATION JUDICIAL EVALUATION COMMITTEE, GUIDELINES FOR JUDICIAL SELECTION, (2002), available at <http://www.chicagobar.org/public/attorney/judicial/guidelines.asp>; LOS ANGELES COUNTY BAR ASSOCIATION, FINAL REPORT OF THE JUDICIAL ELECTIONS EVALUATION COMMITTEE (2004), available at <http://www.lacba.org/showpage.cfm?pageid=3560>; MUNICIPAL LEAGUE OF KING COUNTY, ALL CANDIDATES, (2006), <http://www.munileague.org/cec/2006/report/alpha.htm>.

124. The completed questionnaires for candidates in the 2007 election cycle are available on the PBA website, <http://www.pabar.org/public/committees/JEC/07ratings.asp> (last visited Apr. 12, 2007).

125. *See* PBA JUDICIAL EVALUATION COMMISSION’S EVALUATION PROCEDURES: APPELLATE JUDICIAL CANDIDATE PROCEDURES (on file with author), available at <http://www.pabar.org/public/committees/JEC/EvaluationProcedure.pdf>.

rules; a record of excellent character and integrity; financial responsibility; judicial temperament; suitable mental and physical capacity; community involvement; administrative ability; devotion to improving the quality of justice and demonstrated sound professional judgment.¹²⁶

Reviewing the qualifications of aspiring judges helps assure a higher quality judiciary. In 2000, the American Bar Association's Commission on State Judicial Selection Standards concluded that "those jurisdictions that were best able to achieve the goal of a 'qualified, inclusive and independent judiciary' . . . were those that relied on a 'credible, deliberative body' to review the qualifications of judicial candidates pursuant to recognized selection criteria."¹²⁷

III. THE VALUE OF PROSPECTIVE PERFORMANCE EVALUATIONS

The expanding number of official nominating commissions and judicial performance evaluation commissions nationwide illustrates a growing recognition that those who select judges (be they governors, legislators, or the voting public) are entitled to the greatest amount of relevant information available on each candidate. Prospective performance evaluation represent the next logical outgrowth of that realization. In combination with JPE programs for sitting judges, PPE programs for candidates without prior judicial experience would provide voters with a clear, concise, relevant, and widely available source of information in contested judicial elections.

A. A Model for Prospective Performance Evaluations

A properly designed PPE program would consist of the following elements: (1) a conscientious evaluation commission whose membership is representative of the demographics in the jurisdiction in which the candidates are running; (2) an established procedure for collecting relevant data on each candidate and clear criteria for evaluating the candidate; (3) guidelines for recommendations as to each candidate's degree of qualification for the position sought; and (4) an organized means of disseminating the collected information and recommendation on each candidate to voters in advance of the election.

126. See generally Pennsylvania Bar Association Evaluation Commission Ratings Criteria (on file with author), available at <http://www.pabar.org/public/committees/JEC/RatingsCriteria.pdf> (last visited Apr. 12, 2007).

127. James J. Alfini & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICK. L. REV. 683, 692-93 (2002).

1. *Evaluation Commission*

The evaluation commission in a PPE program would be charged with setting fair and appropriate criteria for evaluating judicial candidates, collecting relevant information on all eligible candidates, evaluating that information in light of the predetermined criteria, and disseminating the collected data and the commission's own analysis on each candidate to the public in advance of judicial elections. As an initial matter, however, the commission itself must be composed in a manner that both maximizes the likelihood of a fair evaluation for every judicial candidate and simultaneously promotes public confidence in the evaluation system. Prior experience with nominating and judicial performance evaluation commissions suggests that both the perception and reality of fair evaluations are enhanced when the commission is balanced between attorneys and non-attorneys, along partisan lines, and in the manner in which members are appointed to the commission.

Attorneys (and other legal professionals) should be represented on the commission in roughly equal proportion to laypersons. Attorneys provide necessary expertise on the court system, the role of the judge, and neutral measures for evaluations. At the same time, non-attorneys provide insight into the concerns of the general public and are apt to raise questions that may elude those already entrenched in the judicial system. Furthermore, the mere presence of non-attorneys on the commission may cause the public to see prospective performance evaluations as something more than an exercise by legal insiders, thereby creating greater public confidence in the system.¹²⁸

Partisan balance is similarly important. A commission that has balanced representation between political parties is more likely to put a judicial candidate's political affiliation aside and focus on his or her politically neutral qualifications. As a simple example, consider a ten-member commission composed of eight Democrats and two Republicans. The Democrats on the commission might be tempted to give higher ratings to all candidates with Democratic affiliations, or at least put an extra thumb on the scale, knowing that they could outvote Republican partisans on the commission. (Obviously the same possibility exists with a commission composed of eight Republicans and two Democrats). If the partisan split were five and five, however, even the most ardent partisans would recognize that they could not outvote the other party in their recommendations, and would presumably move on to other, more relevant, considerations of judicial excellence. Put simply, partisan balance reduces the opportunity for partisan mischief.¹²⁹

Finally, there should be at least rough balance among the authorities who appoint members to the evaluation commission. A commission whose

128. See SHARED EXPECTATIONS, *supra* note 55, at 82.

129. *Id.*

membership is appointed by a variety of authorities—say, the governor, legislative leaders, bar associations, the courts and community groups—is more likely to be perceived as cautious and balanced than a commission appointed entirely by one person, particularly if that person is also the appointing authority for the state's judges.¹³⁰

Depending on the size of the commission and the pool of potential commission members, other forms of diversity on the commission may also be desirable. Several studies of nominating commissions have suggested that a diverse commission is more likely to avoid making recommendations that favor a particular race, religion, or gender,¹³¹ and the same principles would appear to apply equally well to prospective performance evaluation commissions. Likewise, a growing trend is the deliberate inclusion of representatives from different community interests on evaluation commissions. Ohio's new nominating commission for judicial vacancies, for example, includes seats for both labor and business interests.¹³² A recent proposal by Governor Edward Rendell in Pennsylvania would assign seats on a state nominating commission for representatives of civic organizations, organized labor, the business community, non-legal professionals, law school deans, and public safety organizations.¹³³ In states and localities where it is politically expedient to involve certain community interest groups, creative balancing such as that currently being attempted in Ohio and Pennsylvania can be accomplished to assure wide representation on the PPE commission.

2. *Evaluation Criteria*

Whether a fresh face on the court or a long-term veteran, a judge is expected to bring the same set of skills to the courtroom. Accordingly, all judicial candidates should be evaluated on a comprehensive set of criteria related to the process of judging. These criteria include, at a minimum: (1) the candidate's command of relevant substantive law and procedural rules for the position he or she is seeking; (2) the candidate's historical ability to treat others in professional and personal settings in a manner free from bias, and to avoid impropriety or the appearance of impropriety; (3) the candidate's ability to express him-self or herself clearly, both orally and in writing; (4) the candidate's demonstrated demeanor in the courtroom and other professional settings; (5) the candidate's ability to be prepared for hearings, meet-

130. See, e.g., Norman L. Greene, *Perspectives on Judicial Selection*, 56 MERCER L. REV. 949, 963–64 (2005).

131. See Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 730–32 (2002) (discussing various studies).

132. See *supra* notes 94–96 and accompanying text.

133. See *To Improve Accountability, Governor Rendell Unveils Historic Reform Proposal*, PRNEWswire, Mar. 26, 2007.

ing, trials, and other events, to meet deadlines, and to use court time efficiently; and (6) the candidate's commitment to public service. These criteria mirror those typically used by nominating commissions to select potential judges for appointment by a state governor or legislator, and by evaluation commissions to ascertain whether a sitting judge should be recommended for retention.¹³⁴

3. *Methods of Collecting Data*

While evaluation criteria may be the same for sitting and prospective judges, the actual information that must be collected is somewhat different. Obviously, a candidate who has not served on the bench cannot be reviewed on his or her control over a courtroom. However, wholly adequate analogues for judicial activity can be measured in law practice, and nearly all candidates without judicial experience have been engaged in the practice of law prior to their candidacy.¹³⁵ The data collected on candidates with legal but not judicial experience might include:

- information confirming the candidate's statutory and constitutional eligibility for office;
- a listing of the candidate's relevant work experience and participation in professional and civic activities;
- review of the candidate's ongoing standing to practice law in every jurisdiction to which he has been admitted, including an inquiry as to whether the candidate has ever been charged with a violation of applicable codes of professional conduct;
- evaluation of selected submissions to the court, including a variety of motions and briefs, or if the candidate is not a litigator, a similar example of high-quality written material;
- review of the candidate's ability to meet case management principles, including the number of times the candidate has requested continuances or discovery extensions on behalf of a client, and the reasons given therefore;
- public comments about the candidate's skills and abilities related to the process of judging;
- one or more interviews with the candidate;
- surveys of members of the bar, and in particular attorneys who have worked with or on the opposite side of the candidate in recent cases or transactions; and

134. See SHARED EXPECTATIONS, *supra* note 55, Appendix J.

135. Nearly every state requires that judges be admitted to practice law in the state, be members of the state bar association, or both. See SHARED EXPECTATIONS, *supra* note 55, Appendix A.

- surveys of non-attorneys who have interacted with the candidate in courtroom, mediation, deposition, or transactional settings, including judges, mediators, arbitrators, court and law firm staff, stenographers, experts, and perhaps jurors and lay witnesses.

Surveys are an important component of prospective performance evaluations and are deserving of special mention. All surveys should be designed to be scientifically valid and should be sent to a large enough sample to allow the commission to draw reasonable conclusions from the information gleaned. The commission should endeavor to maximize the number of valid survey responses by making it as easy as possible to return the survey instrument (perhaps by allowing respondents to complete the survey online) and by sending reminders to survey recipients who do not respond by a set deadline. Survey responses should be anonymous and, ideally, should be tabulated by an independent party, with results sent to the commission.¹³⁶ If the design of the survey permits individual written responses, those responses should also be collected by an independent entity to prevent the possibility that the respondent will be identified.

Surveys should also be tailored to the specific knowledge of desired respondents. Members of the bar, judges, and arbitrators might be asked to identify the types of cases (e.g., civil, criminal, domestic) and/or settings (e.g., trial, hearing, conference, deposition, transaction) in which they interacted with the candidate, as well as their perceptions about the candidate's preparation for hearings or trial, the clarity of his or her oral and written advocacy, and his or her mastery of the relevant rules of procedure and substantive law.¹³⁷ Court staff might be asked about the candidate's treatment of others in the courtroom and compliance with technical court rules. Each survey should ask multiple questions addressing each of the six process-oriented criteria for evaluation—knowledge of law and procedure, integrity and freedom from bias, clarity of communication, professional demeanor, administrative capacity and preparation, and commitment to public service.¹³⁸

136. In JPE programs, assuring the anonymity of survey respondents has been essential. Many respondents, particularly attorneys, are more comfortable responding anonymously because doing so reduces the risk that the judge will hold negative comments against them or their clients. See Todd D. Petersen, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 107 (1995). Anonymity also tends to result in more valuable and complete feedback. See Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375, 1377 (2001).

137. For an example of a model survey designed to capture this type of information, see SHARED EXPECTATIONS, *supra* note 55, at Appendix E.

138. Here the contrast with the outcome-oriented questionnaires that have proliferated since the *White* decision should be evident. See *supra* note 21 and accompanying text.

For the rare occasion where a judicial candidate is not an attorney or sitting judge, the evaluation commission should strive to collect information on the candidate in as similar a form as possible. For example, surveys for candidates from the business community may be tailored to reach out to the candidate's customers, employees, and competitors, and surveys for professors might target (among others) the candidate's students and academic peers. The commission should endeavor to give each candidate a fair and comprehensive evaluation within the six set criteria discussed above; if some information is simply unavailable (for example, if the candidate does not engage in a profession with any significant writing component), the commission should take into account whether that lack of information is anomalous or whether it truly reflects the candidate's level of preparation to hold a judgeship. Ultimately, of course, the goal of prospective performance evaluations is to help voters distinguish between unqualified, excellent, and outstanding judicial candidates; if a candidate simply lacks the relevant experience to hold judicial office, the commission must not be afraid to point that out to the voters.

4. *Recommendations*

Finding qualified candidates is not a purely objective process; there is no algorithm that will produce the one perfect candidate for all seats on the bench. A balanced and conscientious evaluation commission, guided by set criteria and relevant information on the candidates, however, should be able to assess the candidates in a meaningful way. The commission may choose to affix one of four final recommendations to each candidate:

- ***Highly qualified***—The candidate has the requisite skills, experience, temperament, administrative capacity, knowledge, and commitment to public service to be an outstanding judge, and that skill set is commensurate with the specific judicial position he or she seeks.

- ***Qualified***—All criteria indicate that the candidate would be a competent judge, but the candidate's skill set is not among the highest echelon of potential judges.

- ***Not qualified***—The candidate lacks at least one of the requisite skills, temperament, administrative capacity, knowledge, or commitment to hold the judicial office that he or she seeks.

- ***Not yet qualified***—The candidate may have promising skills and ability, but lacks requisite experience to hold judicial office at the current time.

This proposed rating scale is meant to review candidates solely in terms of their ability to discharge the specific office they seek. The commission need not rank the candidates relative to each other, or assign only one candidate a certain rating. In other words, if multiple candidates running for

the same seat are all highly qualified, the commission should not hesitate to offer that recommendation for all of them. Likewise, if all candidates are not qualified for a position, the commission should not feel tempted to inflate their recommendations. Similarly, there is no set model of a “highly qualified” or “not qualified” candidate. An attorney with twenty years of trial experience may be highly qualified for a trial court position, while a thoughtful, active law professor may be highly qualified for an appellate seat. Similarly, a candidate may be deemed “not qualified” because of one significant flaw (e.g., demonstrated racial or gender bias) or because the whole of the candidate’s qualifications are simply subpar. In any event, the evaluation commission’s recommendations should be limited to the candidate’s degree of qualification; the commission should not recommend that voters choose one candidate over another.

5. *Dissemination of Information*

Ultimately, the commission’s work is of little use unless it is widely disseminated to the public in a form that can be easily digested and used. The challenge is that different segments of the public absorb and digest information in different ways. Accordingly, the commission should develop both short-form and long-form reports for public consideration. Short-form reports should be designed for newspapers and voter guides, and should include a summary of the survey data and the candidate’s strengths and weaknesses, a narrative containing the candidate’s biography, and the commission’s recommendation on the candidate’s qualifications.¹³⁹ Long-form reports should set out the survey results and other collected data more comprehensively and should be made available on the internet (through an official commission website) and in hard copy. Both long and short-form reports should set out the methodology adopted for evaluation, and the criteria used to evaluate each judicial candidate.¹⁴⁰ Finally, comprehensive public information campaigns should be developed to urge voters to learn about the judicial candidates prior to election day and to inform voters that evaluation results will be available in voter guides, newspapers and other media outlets, and on the internet.¹⁴¹

139. See SHARED EXPECTATIONS, *supra* note 55, at 90.

140. *Id.*

141. *Id.* See also Alaska Judicial Council, Jay Hammond on Judicial Evaluations, <http://www.ajc.state.ak.us/Retention00/retgen00.htm> (containing an audio file of a radio advertisement designed to encourage voters to review JPE results before the election).

B. Addressing Objections to Prospective Performance Evaluations

Change is never easy, even when the problem to be solved is well-known.¹⁴² Perhaps the most significant barrier to prospective performance evaluations is the belief that candidates who lack judicial experience cannot be evaluated in the same way as sitting judges. It is true that some candidates cannot be measured specifically on their past performance on the bench. The evaluation criteria, however, are identical; no matter how much prior judicial experience a candidate has, he or she is expected to demonstrate excellent legal knowledge, integrity, temperament, communication skills, administrative capacity, and commitment to public service. It is no coincidence that nationwide, nominating commissions use the same criteria to evaluate new judges as JPE commissions use to evaluate sitting judges.

Another potential concern about prospective performance evaluations is that they will not live up to their nonpartisan promise. If the evaluation commission is itself partisan or otherwise biased, voters may be presented with officially neutral information that in fact favors a candidate for reasons other than that candidate's process-directed qualifications. This is a legitimate concern, but it has been addressed successfully in states with nominating and/or judicial performance evaluation commissions. As discussed above, a thoughtfully constructed PPE commission will reflect partisan balance, which is likely to lessen the probability of analyses becoming infected with partisan considerations. Concerns about a "runaway commission" making recommendations on improper grounds can also be alleviated by establishing guidelines for rating candidate qualifications.

Yet another possible objection is the cost of prospective performance evaluations. The expense of conducting such evaluations, however, is far less than it might initially appear. If service of the evaluation commission is made sufficiently important and prestigious, members are more likely to serve on a volunteer basis. The expense of disseminating the information can also be kept down by employing existing media, voter guides, and the internet. Full-time staffing need not be more than a few persons at most. And even distributing, retrieving, and compiling surveys—typically one of the greatest expenses—can be accomplished for the cost of a few thousand dollars per candidate, or less than 1% of what might be spent on election advertising in a heated judicial race.¹⁴³

142. "[T]here is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things." NICCOLO MACHIAVELLI, *THE PRINCE* 23 (Harvey C. Mansfield, Jr. trans., Univ. of Chi. Press 1985) (1513).

143. Virginia estimated its "average" cost of evaluating its sitting judges to be approximately \$3400 per judge, which included travel and meeting expenses, copying and printing costs for surveys, mailing costs for distribution and return of surveys, independent consulting

Other barriers to implementation of robust prospective performance evaluations are more philosophical. Some have argued, for example, that cues such as the candidate's party affiliation are beneficial to voters in making their choices because party designation serves as a sufficiently accurate shorthand for the judge's philosophy.¹⁴⁴ Taking that argument a step further, others have asserted that it is in fact hopelessly naïve to divorce a judicial candidate from her politics, because judges are political animals and in effect do legislate from the bench.¹⁴⁵ The candor associated with this sort of advocacy is impressive, the arguments less so. The notion of the judge as a politician and high-level policymaker likely has little resonance for individual litigants, whose primary concern is a fair opportunity to argue their cases before unbiased jurists.¹⁴⁶ Even if there is a visceral appeal to electing judges whose policy preferences correlate with one's own, virtually no one wants a day in court in front of a judge who has already made up his or her mind. Furthermore, in some cases a candidate's party affiliation may not reflect a particular philosophy at all, but rather the political reality of the jurisdiction. For example, in 1985, Dallas County, Texas District Judge Richard Mays abruptly changed his party affiliation from Democratic to Republican, explaining, "My political philosophy about general things has nothing to do with me being a judge. That's not the reason I'm switching parties. The reason I'm switching is that to be a judge in Dallas County you need to be a Republican."¹⁴⁷

Another argument rests on democratic theory. Individuals and institutions should be permitted to engage fully in the democratic process, which means (among other things) actively funding and promoting their judicial candidates within constitutional limits and allowing all eligible candidates to run free of government interference. Based on this argument, prospective performance evaluations threaten vibrant democratic participation because

to tabulate survey results, staffing, training and travel expenses for facilitator judges and courtroom observers, and compiling lists of attorneys and jurors. *See* REPORT OF THE JUDICIAL PERFORMANCE EVALUATION TASK FORCE SUBMITTED TO THE SUPREME COURT OF VIRGINIA 36-39 (2001) (on file with author), available at http://www.courts.state.va.us/publications/judicial_performance_eval_task_force_report.pdf. JPE programs in other states have been even less expensive. *See* SHARED EXPECTATIONS, *supra* note 55, at 63-64.

144. *See* David W. Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57, 72 (1969) (concluding that voters "should choose candidates with whom they share a party preference since party affiliation is a good forecaster of judicial conduct.").

145. *See, e.g.*, Mark C. Miller, *A Comparison of the Judicial Role in the United States and in Canada*, 22 SUFFOLK TRANSNAT'L L. REV. 1, 17 (1998).

146. *See, e.g.*, TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 106 (1990) (explaining that the legitimacy of the courts in the public eye is strengthened over time when individual litigants perceive that their courtroom experience was fair).

147. Champagne, *supra* note 14, at 80.

evaluation results will have the imprimatur of the government telling its citizens how to vote. As long as evaluations do not overtly recommend a specific candidate, however, they are no more offensive to democratic participation than fiscal impact statements for ballot initiatives, which are readily included in some voter guides.¹⁴⁸

Finally, prospective performance evaluations are likely to be resisted by some judicial candidates, either on philosophical grounds (opposition to evaluations of any sort) or more pragmatic ones (fear of exposing the candidate's own questionable qualifications). Candidate participation, however, is not a necessary condition to the success of the evaluation process. While candidate support of evaluations is certainly beneficial, nearly all evaluation data can be collected and analyzed even if the candidate does not cooperate, and voters may draw their own conclusions from a candidate's refusal to participate directly in the evaluation process. Furthermore, even if some candidates are not evaluated at all, asymmetrical information on the entire slate of candidates would still be more preferable than forgoing evaluation entirely. One commentator has noted, "one must be mindful that the purpose of [judicial evaluation] programs is to provide voters with information upon which to base their vote. If some information is better than no information, then the delivery of information on only one candidate, so long as such information is reliable, does provide assistance to the voter."¹⁴⁹

C. Anticipated Benefits of Prospective Performance Evaluations

States' previous experience with both nominating commissions and judicial performance evaluations strongly suggests that the application of JPE and PPE to contested judicial elections would generate a more informed voting public. At a minimum, such evaluations would serve voters who are already seeking credible, relevant information on judicial candidates, allowing them to cast a more informed vote. Moreover, if evaluation results are properly disseminated to the public with adequate time before the election, they are apt to inform a much larger segment of the voting population, helping voters determine the qualities of various judicial candidates, increasing voter confidence, and perhaps increasing voter participation at the polls.¹⁵⁰

148. See, e.g., LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, ANALYSIS OF THE 2006 BALLOT PROPOSALS (Research Pub. No. 554) 16 (2006) (on file with author), available at http://www.state.co.us/gov_dir/leg_dir/lcsstaff/Bluebook/BlueBook2006.pdf (setting out the estimated fiscal impact of a proposed change to the state constitution regarding property tax reduction for disabled veterans).

149. David C. Brody, *The Relationship Between Judicial Performance Evaluations and Judicial Elections*, 87 JUDICATURE 168, 172-73 (2004).

150. In one study of four states in which official evaluation information was made available to voters, between 64% and 72% of voters in each state agreed or strongly agreed with the

The existence of prospective performance evaluations is also more likely to discourage unqualified or marginally qualified candidates from seeking judicial office because fundamental defects in their knowledge, experience, or temperament are likely to be exposed well before the election. A familiar-sounding name or even a popular party affiliation is far less powerful with voters if accompanied by hard data and a narrative evaluation demonstrating that the candidate is simply not qualified to preside over a wide range of cases. Broad dissemination of the evaluation criteria would also serve as a guideline for expectations once victorious candidates took the bench.

Of course, prospective performance evaluations alone are unlikely to change fully the dynamic of judicial elections. Larger issues of money, partisanship (officially sanctioned or otherwise) and special interests will continue to play a central role as long as states continue to elect all or part of their judiciaries. But at its best, PPE has the broad potential to change the way the public thinks about judges. By emphasizing process-oriented measures of judicial performance, and diminishing the importance of individual case outcomes and party affiliations, prospective performance evaluations help frame the discussion about judicial activity in terms consistent with the constitutional expectation of three separate, co-equal branches of government. Judges are seen as interpreters of law, not creators, and as resolvers of disputes, not participants in a larger political drama. The promise of prospective performance evaluations as an educational tool therefore extends beyond informing voters in individual elections to helping the public, and judges, internalize expectations about the proper role of the judge.

statement: "I am more likely to vote in a judicial election because of the official information." ESTERLING & SAMPSON, *supra* note 58, at 41. See also Cynthia Canary, *Know Before You Go: A Case for Publicly Funded Voters' Guides*, 64 OHIO ST. L.J. 81, 87 (2003).

