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ChooseYourJudges.org: Treating Elected Judges as Politicians

Ric Simmons

CHOOSEYOURJUDGES.ORG:

TREATING ELECTED JUDGES AS POLITICIANS

Ric Simmons[*]

I. INTRODUCTION

The United States is the only country in the world that elects its judges,[1] and for nearly two hundred years, we have been debating

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whether or not we *should* elect our judges.[2]   Proponents of judicial elections argue that using elections is the only way to protect the independence of the judicial branch while still ensuring there is a check on judicial power,[3] while those opposed to judicial elections contend that elected judges are overly influenced by poll numbers and that the fundraising and attack advertisements that accompany judicial elections threaten the integrity of the judiciary.[4]

Although academics will continue this debate for decades to come, in the real world the question has been settled for quite some time. Forty-one states feature some form of judicial elections,[5] which means that nearly 90% of all state judges face election in some way.[6] Americans overwhelmingly support the idea of judicial elections; recent attempts to reform or eliminate judicial elections have been soundly defeated in state after state.[7]   In other words, whether we like it or not, judicial elections are here to stay.

Given this reality, we should look to reforming the judicial election process, rather than continue the endless debate about the wisdom of the elections themselves.   And undoubtedly the biggest problem with judicial elections today is the ignorance of voters about the candidates

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1.   *See* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266 (2008).

2.   *See* Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 627 (2009).

3.   *See infra* notes 36-39 and accompanying text. The Federalist Society has been one of the most vocal groups supporting judicial elections. *See, e.g.*, Michael DeBow, Diane Brey, Erick Kaardal, John Soroko, Frank Strickland & Michael B. Wallace, *The Case for Partisan Judicial Elections*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES (Jan. 1, 2003), http://www.fed-soc.org/publications/pubid.90/pub_detail.asp.

4.   *See infra* notes 40-45 and accompanying text. Opponents of judicial elections include The American Bar Association, former governors of Michigan and Pennsylvania, the current and former chief justices of numerous states, and former United States Supreme Court Justice Sandra Day O'Connor. *See* Matthew J. Streb & Brian Frederick, *Judicial Reform and the Future of Judicial Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 204, 205 (Matthew J. Streb ed., 2007).

5.   *See infra* notes 18-20 and accompanying text.

6.   *See* Rachel P. Caufield, *The Changing Tone of Judicial Election Campaigns as a Result of White*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS, *supra* note 4, at 34.

7.   *See* Streb & Frederick, *supra* note 4, at 206 (noting that in recent years voters rejected proposals to do away with contested elections in South Dakota (2004), Florida (2000), and Louisiana (1997, 1999, and 2003)). More recently, in 2010, voters in Nevada once again rejected a proposed change which would have moved the state from competitive elections to retention elections. *See Statewide Ballot Results*, http://www.silverstate2010.com/Ballots.aspx (last visited Oct. 14, 2011) (Nevada Secretary of State website showing that the proposed constitutional amendment failed 58% to 42%). *See also* Roy A. Schotland, *New Challenges to State's Judicial Selection*, 95 GEO. L.J. 1077, 1082 (2007).

who run in judicial elections.[8]   This ignorance is well-documented: approximately 80% of the electorate cannot even identify any candidates for judicial office. [9]   Thus, the vast majority of these voters base their decisions solely on information from the ballot itself.[10]   Depending on the state, this may or may not include party affiliation, incumbency, or area of residence.   When these are included on the ballot, they have each been found to have a strong influence on voters' decisions.[11]   Name recognition also has a strong influence,[12] as do the assumptions voters make about the candidate based on the name of the judge (e.g., the candidate is a woman or Jewish or of Irish descent).[13]   A significant percentage of the electorate responds to this ignorance by simply not voting in judicial elections at all; approximately 25% of voters who go to the polls fail to vote in at least one of the state supreme court elections, and over 34% do not vote for judges in the lower appellate courts.[14]

Unsurprisingly (and disturbingly), this vacuum of information is being filled at an ever increasing pace by misleading attack ads which distort a candidate's record and/or focus on one specific case in a judge's career (for example, a criminal case in which a defendant was released on bail and subsequently committed another crime, or a personal injury case in which the judge ruled in favor of a large corporation instead of a sympathetic plaintiff).[15]   Frequently, the judge had no discretion in making the controversial decision, but the sensationalist nature of the case still has its intended effect on the electorate.[16]

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8. *See* Caufield, *supra* note 6, at 34-35 (citing recent studies that have shown that "most voters attain a low level of knowledge about judicial candidates" and "voters have preciously little information upon which to base their voting decisions.").

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

10. Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L. J. 13, 21 (2003).

11. *See, e.g.*, Tom W. Rice & Alisa A. Macht, *Friends and Neighbors Voting in Statewide General Elections*, 31 AM. J. POL'Y SCI. 448, 450 (1987).

12. Milton Lodge et al., *An Impression-Driven Model of Candidate Evaluation*, 83 AM. POL'Y SCI. REV. 399, 411-17 (1989).

13. Philip L. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 L. & SOC'Y REV. 395, 419 (1984).

14. Baum, *supra* note 10, at 19-20; *see also* Jordan M. Singer, *Knowing is Half the Battle: A Proposal for Prospective Performance Evaluations in Judicial Elections*, 29 ARK. L. REV. 725, 726-28 (2007).

15. In the 2010 Illinois Supreme Court election, opponents of Chief Justice Robert Kilbride ran an ad in which actors portrayed violent felons who "thanked" Kilbride for "siding with us over law enforcement and victims."   See *Judicial Elections 2010*, JUSTICE AT STAKE, http://www.justiceatstake.org/state/judicial_elections_2010/index.cfm (last visited Oct. 14, 2011) for a video of the ad.

16. One particularly reprehensible example of this tactic came in the Michigan Supreme Court race in 2010. Opponents of judicial candidate Mary Beth Kelly ran an attack ad telling the story of

In some cases, a judge's decision in the area of abortion, the death penalty, or gay rights can unintentionally transform his or her re-election campaign into a minor skirmish of the culture war. Special interest groups (frequently from out-of-state) will pour money into a campaign to defeat or re-elect the judge based on his or her "values." The most recent example of this came in the 2010 Iowa Supreme Court elections, in which over $1 million of out-of-state money funded a successful campaign to remove three Supreme Court justices because of their votes striking down the state's same-sex marriage ban.[17] Although moral values are obviously important to many voters, the amount of money spent by these special interest groups tends to over-emphasize these issues, which represent only a small fraction of the cases that a judge will decide in his or her career.

In order to combat this problem of voter ignorance, I recently created a website designed to provide voters with information about judicial elections. The website, chooseyourjudges.org, allows voters to take a short quiz to determine the type of judge the voter would like to elect. The website then matches the voters' answers with a database of judicial candidates and provides the voter with recommendations about which candidates to vote for in his or her jurisdiction.

The website went live on October 1, 2010, approximately four weeks before election day. It covered fifty-seven judicial candidates across five different states. Over the next month, it attracted over 150,000 hits, and over 6,000 voters took the quiz and received recommendations for their judicial elections. The website also provided facts about judicial elections, commentaries about issues surrounding the selection of judges, and a blog that reported and analyzed current events for the 2010 judicial elections.

Creating the website posed unique practical challenges, such as how to gather the information about the candidates and how to present it to the voter in a way that was meaningful and useful to a non-lawyer.

Ihab Maslamani, an illegal immigrant who had been through the juvenile justice courts a number of times on non-violent offenses. In 2009, Maslamani went on a three-day crime spree which included robbery and murder. The ad then notes that Mary Beth Kelly was the judge who presided over Maslamani's juvenile cases, and notes that she failed to deport him or put him in prison during that time. The ad does not point out that as a state juvenile court judge, Judge Kelly had no authority to deport Mr. Maslamani, or that the sentencing rules for juvenile court are so lenient that it would be difficult to put Maslamani in prison as a juvenile. *See* Peter Hardin, *Election 2010: Soft-on-Crime Charges Fly in MI*, JUSTICE AT STAKE (Oct. 28, 2010), http://www.gavelgrab.org/?p=15002#more-15002.

17. *See* Editorial, *A Blow to the Courts*, N.Y. TIMES, Nov. 8, 2010, http://www.nytimes.com/2010/11/09/opinion/09tue3.html?partner=rssnyt&emc=rss.

But it also raised even more fundamental questions about the purpose of judicial elections and the role voters are meant to play in the process. This Article describes these challenges and questions, and then proposes my own initial solutions to them, in hopes of beginning a debate about the role of voters in judicial elections. The Article also describes in detail the algorithm that I designed for recommending judicial candidates to voters, and invites suggestions and comments for improving the algorithm for the 2012 election cycle.

Part II of the Article provides a brief background of the judicial election process, describing the evolution of judicial elections in this country and the different ways that we elect judges. Part III of the Article describes the challenges inherent in providing useful information to voters in judicial elections. Part IV explains how I addressed these challenges, using a judicial opinion categorization algorithm that had previously only been used by political scientists to study judicial voting records retrospectively. Part V reviews some of the results from the data gathered about judicial voters, and Part VI concludes by discussing the role of judicial elections in our society. Finally, various appendices describe the quiz and the algorithm used on the website.

II. ELECTING OUR JUDGES—A BRIEF OVERVIEW

The term "judicial elections" is a convenient shorthand, but it masks the variety of different ways that states select their judges. As we will see, judicial selection methods have evolved over time and now differ radically from state to state.

A. Diversity of Judicial Selection Methods

There are three primary different methods of choosing judges in this country. The first is the appointment method, in which the executive of the state nominates an individual to become a judge, and (usually) the state senate must confirm the nominee before he or she takes office. This is the method followed by the federal government (as mandated by the United States Constitution), and by nine states.[18]

The second method is known as "retention elections," in which the executive will appoint a judge to the bench, and then after a certain term, voters are asked whether or not they want to retain the judge. The judge

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18. *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y (2011), http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state. Within those nine, New York also uses contested elections for some of its lower court judges.

is the only candidate placed on the ballot, and the voters simply vote yes or no as to whether the judge should serve another term. If the judge is voted out of office, the governor will appoint another judge to begin the next term. Twenty states use the retention election system for at least some of their judges.[19]

Finally, there are "contested elections," in which judges run for their seats in more or less the same way that other elected officials run for office: they are nominated by a party (usually through a primary election), and then they run against a nominee from the other party in the general election. If elected, they serve their terms and then must run for re-election against another challenger. The remaining twenty-one states choose their judges through the competitive election system.[20]

B.   History

How did the different states end up with such an unusual and inconsistent method of choosing their judges? The answer has a lot to do with the rather schizophrenic history of judicial selection in our country. In colonial times, judges were either chosen by legislative election, appointed by the (Royal) governor, or nominated by the governor and confirmed by the legislature of the state.[21] This latter method—what we now refer to as merit selection—was codified in the Federal Constitution as the method of selecting all Article III federal judges,[22] and was also adopted by the first twenty-nine states that entered the union.[23]

Around the beginning of the nineteenth century, selection by appointment became more and more controversial for three reasons. First, the election of Thomas Jefferson heralded the arrival of a new, more democratic type of politics—one in which the people, rather than the elites, had a more direct say in how their country was run and who was running it. Allowing governors to choose their own judges ran contrary to this movement.[24] Second, many of the judges being

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19. *Id.* Within these twenty, California, Florida, Indiana, Maryland, Missouri, Oklahoma, South Dakota, and Tennessee use contested elections for some of their lower courts.

20. *Id.* Within these twenty-one, South Carolina and Virginia use legislative contested elections.

21. *See* Polly J. Price, *Selection of State Court Judges*, *in* STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 9, 12 (Theodore J. Boutrous et al. eds., 1996).

22. *See* U.S. CONST. art. II, § 2.

23. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 716 (1995).

24. *Id.* at 715.

appointed were unqualified for the position, as governors would use the appointments as a way to reward loyal party members or others to whom they owed political favors. Voters, it was argued, would choose better quality judges than the system of patronage that "merit selection" had become.[25] And finally, reformers argued that judges—as their own independent branch of government—should derive their power and their legitimacy directly from the voters and not be dependent upon the other two branches.[26]

In 1812, Georgia became the first state to switch from merit selection to judicial elections,[27] and ultimately twenty-one out of the original twenty-nine states also made the switch.[28] New states that joined the union followed the same pattern: every state from Iowa (admitted in 1846) through Alaska (admitted in 1959) opted for judicial elections.[29]

As the twentieth century began, however, criticism of judicial elections began to build. The country was becoming bigger and more anonymous, so voters no longer knew the names of the judicial candidates on the ballot. Party affiliation was becoming more and more significant, and voters were reduced to simply voting for judges along party lines. Thus, judges were effectively chosen by party bosses, a process which was hardly conducive to creating a quality judiciary.[30] Some states tried to combat this development by instituting "non-partisan elections," in which judicial candidates appeared on the ballot without any party affiliation.[31] As might be expected, this solution, which essentially meant giving the voters even *less* information about the candidates for whom they were voting, did not improve the situation, as irrelevant factors such as ballot position became even more significant in deciding the outcome of the elections.[32]

In the 1940s, some states began experimenting with retention elections, which proponents like to call "merit selection", as a compromise between appointments and competitive elections.[33] As noted above, this is now the method used by twenty states. However, it

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25. Shepherd, *supra* note 2, at 633.
26. *Id.* at 632.
27. *Id.* at 630.
28. *See Methods of Judicial Selection*, *supra* note18.
29. Shepherd, *supra* note 2, at 631.
30. *See* Croley, *supra* note 23, at 723.
31. *See* Ryan L. Souders, Note, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 544 (2006).
32. *See* Croley, *supra* note 23, at 724.
33. *See* Souders, *supra* note 31, at 545.

does not solve the fundamental problem of judicial elections: the lack of information on the part of the voters about the candidates that they were meant to be evaluating. As a result, incumbents in retention elections are nearly always retained.[34] Thus, the voters in retention states do not act as a real check on the judge's power.

And so the debate continues to this day, with some states clinging to the original appointment method while others apply a various mix of contested, retention, partisan, and non-partisan elections. Scores of articles and books have been written defending and (mostly) attacking judicial elections.[35] What follows is a very brief summary of the key points on both sides of the debate.

C. *Arguments in Favor of Electing Judges*

Supporters of judicial elections argue that the judiciary deserves (and requires) independence from the other two branches.[36] They also point out that judges make important decisions that affect the entire population and that, in a democratic society, government officials who wield this amount of power should be chosen by the electorate.[37] Under this argument, judicial campaigns are an opportunity to have a serious debate about important issues—from the scope of government power to the reach of anti-discrimination laws to the administration of criminal justice policy.

Proponents of judicial elections further point out that it is impossible to remove politics from the judicial selection process; even the appointment process is political, as evidenced by the contentious confirmation hearings that occasionally occur for federal appellate and Supreme Court nominees.[38] And, the appointment process leads to a lack of transparency—governors may appoint judges on the advice of special interests or in order to advance specific agendas, and the electorate as a whole may never know much about who the appointee is or why he or she was appointed.[39]

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34. *See* Larry Aspin, *Judicial Retention Election Trends: 1964-2006*, 90 JUDICATURE 208, 210 (2007).

35. *See* Pozen, *supra* note 1, at 267.

36. *Id.* at 273.

37. *Id.*

38. *Id.* at 285.

39. *See* Shepherd, *supra* note 2, at 634.

D. *Arguments Against Electing Judges*

Opponents of judicial elections cite three primary objections. The first objection is that voters are simply unqualified to choose their own judges.[40] Most voters know next to nothing about the judicial candidates on the ballot and it is difficult to learn how well a judge is doing his or her job. Unlike campaigns for legislative and executive office, which focus on well-known political issues, judicial qualifications and philosophies are more difficult to explain to lay voters.[41]

A second objection is the appearance of impropriety. Judges who are campaigning must raise money, and most of that money comes from the lawyers who practice in front of them, or the companies and special interest groups that have cases that will be heard by them. Even if judges are in fact able to ignore past campaign donations (or the possibility of future ones) when they decide cases, the image of judges presiding over cases while their campaign committee solicits money from the attorneys and parties who appear in front of them creates a bad impression of the legal system.[42] A recent poll showed that 76% of Americans believed that campaign contributions to judges affected the outcome of cases, and that nearly 50% of judges agreed.[43] And, a recent study has shown that the amount of money being spent on judicial elections is significant: nearly $207 million in supreme court races nationwide from 2000-2009.[44]

Finally, opponents of judicial election argue that elections tend to politicize the judiciary: judges end up deciding cases based on political calculations rather than legal arguments.[45] For example, a judge who is sentencing a convicted criminal may truly believe that under the law the criminal deserves only probation and drug treatment, but will worry that a lenient sentence will be used against her in the upcoming election. Or, a judge evaluating the constitutionality of an affirmative action program or an abortion law will decide the case based on the most recent opinion polls rather than simply applying the law. A stream of negative advertisements in recent judicial elections, many of them demeaning to

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40. See Pozen, *supra* note 1, at 293.
41. *Id.*
42. *Id.* at 295.
43. *See* JAMES SAMPLE, ADAM SKAGGS, JONATHAN BLITZER & LINDA CASEY, JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE, at 67-68 (Charles Hall ed., Aug. 2010), *available at* http://www.justiceatstake.org/resources/the_new_politics_of_judicial_elections.cfm.
44. *Id.* at 1.
45. *See* Pozen, *supra* note 1, at 282.

the candidate and a few outright deceptive, have contributed to the argument that politicizing the judiciary tends to oversimplify complex legal issues and lower the integrity of the court system.

Opponents of judicial elections argue that although it is appropriate for legislators, governors, and even Presidents to consider the will of the majority in making decisions, judges should be immune to political pressure and indifferent as to the political fallout of their decisions. If the judge must constantly worry about how the electorate (most of whom are not trained lawyers) will perceive her decisions, her ability to make decisions based on neutral legal principles will be compromised.

Essentially, opponents argue that judicial independence is more important than judicial accountability. When an individual seeks to become a judge, he or she should not be pandering to the whims of voters on specific issues, and once the judge is in office, he or she should not have to worry that a legal decision may be unpopular.

E.   The Current State of the Debate

Popular sentiment regarding judicial elections has shifted back and forth throughout the country's history, but for the most part, it has favored judicial elections. Certainly that is the current preference of the electorate; recent attempts to switch from a contested to an appointment or even a retention election system have consistently failed at the ballot box.[46]

Given this reality, this Article accepts as a premise that this country will be electing judges for the foreseeable future. Accepting this premise provides certain benefits: by moving past the legitimate but well-worn arguments about the costs and benefits of judicial elections, we can examine the process of the elections themselves and ask serious questions about how the process can be improved—questions which have not yet received serious attention over all of the heat of the judicial elections debate. One of these questions concerns the voters themselves: what information do they need before they make their decision to vote for or against a judicial candidate? As we will see in the next section, this is a more difficult question than it first appears.

III. THE CHALLENGE: GETTING INFORMATION TO THE VOTERS

Imagine that there is an upcoming gubernatorial, presidential, or legislative election. You have the ability to give every voter a fact sheet

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46.   *See* Streb & Frederick, *supra* note 4, at 206.

about each candidate, and your goal is to give them as much information as you can in a non-partisan, neutral format, so that each voter can make an informed decision based on his or her preferences. This task would probably not be too difficult. You would have to pick and choose the top five or six issues that you think are important (or, more accurately, that you think would be important to the voter)—whether they are taxes, education, international relations, gay marriage, etc. In addition, you would probably include some information about each candidate's background and prior political experience. But there would be little controversy about what kind of information you should transmit to the voter, and the information would be relatively easy to gather: incumbents will have clear voting records on most of these issues, and every candidate will have made public statements on these issues in speeches, in his or her campaign literature, or in response to questions from the media.[47]

Now imagine that you have been given the same task in an upcoming judicial election. What information would you provide to the voters? Although there is a widespread consensus that voters do not get enough information about whom to vote for in judicial elections, there is very little discussion about what *kind* of information the electorate should receive when voting for judges. Most of the existing evaluative criteria are designed for jurisdictions where judges are appointed, not elected. For example, the United States Senate Judicial Nominations Commission for the State of Ohio seeks out and interviews candidates for federal judgeships who are ultimately nominated by the President and confirmed by Congress. The Commission sets out the following twelve criteria for evaluating judicial candidates: legal ability, administrative ability, communication skills, decisiveness, diligence, diversity, trial experience, impartiality, integrity, reputation, social awareness, and temperament.[48] Members of the Commission, who are likely familiar with the candidates' characters and records, and who have the time and ability to conduct interviews of each candidate and his or her colleagues, have a good chance of determining how each candidate meets these criteria. But the average voter in a state judicial election

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47. Indeed, there are many websites that provide this information to the voter for non-judicial elections. *See, e.g.*, PROJECT VOTE SMART, http://www.votesmart.org (last visited Oct. 15, 2011).

48. The United State Senate Judicial Nominations Commission for the State of Ohio (on file with author).

will have no way of independently evaluating any of these qualifications.[49]

Even when organizations seek to provide criteria for state judicial elections, the results are disappointing. The American Bar Association has recommended the following eight criteria for evaluating judicial candidates in elections: integrity, legal knowledge and ability, professional experience, judicial temperament, diligence, health, financial responsibility, and public service.[50] A few of these are somewhat puzzling, such as "health" and "financial responsibility." And, it is unclear how the average voter would be able to evaluate a candidate on most of these grounds—evaluating a judge's "temperament," for example, or "diligence," or even "legal knowledge."

This leads us to the first fundamental question we face in trying to provide useful information to voters in judicial elections: what are voters meant to be adding to the process? If the formal judicial candidate evaluations are dominated by factors beyond the ability of the average voter to assess, why are voters involved in the process at all?[51] In order to give voters some actual input into the judicial selection process, we must use criteria that provide voters with a way to make a meaningful choice in their selections—that is, provide them with information that they can easily understand and that allows them to apply their own preferences and values in order to come to a conclusion.

Broadly speaking, there are two different types of information which meet this definition: the candidate's background and qualifications (including the endorsements by "experts" such as bar associations and newspaper editorial boards), and the candidate's legal

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49. States that appoint judges use similar criteria. For example, the California Commission on Judicial Nominees evaluates candidates based on "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." Jud. Nom. Eval. Comm. Rules and Proc., Rule 7.25 (effective July 17, 2009), *available at* http://rules.calbar.ca.gov/Rules/Title7Miscellaneous.aspx (follow "Division 1. Commission on Judicial Nominees Evaluation" hyperlink). The Rhode Island Commission evaluates "intellect, ability, temperament, impartiality, diligence, experience, maturity, education, publications, and record of public, community, and government service." R.I. GEN. LAWS ANN. § 8-16.1-4 (West 2010). Again, these standards are of little help to the average voter, who will have no real way of evaluating most of these factors.

50. ABA JUDICIAL ADMIN. DIV., GUIDELINES FOR REVIEWING QUALIFICATIONS OF CANDIDATES FOR STATE JUDICIAL OFFICE (1984).

51. One response would be to use this as an argument against judicial elections: if there is a general consensus that judicial candidates should be evaluated according to certain criteria, and voters do not possess the means to conduct that evaluation, then voters should not be participating in judicial selection. But, we began this discussion determined to sidestep that debate, and ready to accept (whether reluctantly or enthusiastically) the reality that judicial elections are here to stay.

or political philosophy. The first type of information is already readily available. But as we will see, it does little to distinguish between candidates in any given election. The second type of information is potentially very useful, but it is hard to gather, difficult to translate to a lay voter, and may be considered a controversial method of evaluating judges.

A.   Background and Qualifications of Candidates

1. Background

A judge's prior educational and professional experiences, such as how long a candidate has already served as a judge or whether they worked for a prosecutor's office or a corporate law firm in their career, are legitimate qualifications for a voter to consider. Certainly it is a fair assumption that prior judicial experience will make a judge more qualified to continue serving on the bench, and perhaps (but only perhaps) a voter can learn something about a candidate's potential decisions based on whether the candidate worked as a prosecutor or a defense attorney. These factors also have the added benefit of being relatively easy for lay voters to understand.

Unfortunately, the backgrounds of most judicial candidates are relatively similar to one another because there is very little that stands out as unusual or extraordinary in a judicial candidates' prior education or work experience. If voters only relied on background information, they would be faced with nearly identical candidates in every election. Some evidence of this is found in the campaign advertisements used by judicial candidates; although many invariably describe a candidate's own personal or professional background, they rarely compare their own candidates' backgrounds to their opponents' because there usually is not enough of a difference to matter.

Even where some differences do exist, they end up being very rough predictors of the quality and judicial philosophy of a particular judicial candidate. For example, it is hard to predict how a candidate's background as a former prosecutor will reveal how the candidate will rule on a medical malpractice case or a case interpreting an environmental regulation. In the end, this information, though easy to

provide and legitimately relevant to a voter's choice, is only a first step towards giving the voter the information that he or she needs.[52]

2. Endorsements by "Neutral" Associations

As in any other election, there are various organizations that provide endorsements or recommendations for judicial elections. Some of these organizations, such as newspapers and local or state bar associations, are relatively neutral as to the ideology or judicial philosophy of the candidate. These groups have the ability and the time to research many different aspects of a candidate's qualifications. Thus, they will know much more about each candidate than an average voter or even an extraordinarily diligent voter. A local bar association, for example, will typically send multi-page questionnaires to the candidates, conduct interviews of each candidate, and survey other attorneys about the candidate. Furthermore, the members of many of these organizations are themselves lawyers, with the knowledge and skills necessary to evaluate each candidate's disposition, intelligence, writing ability, legal acumen, and other relevant qualifications.

Thus, another potentially useful way to provide information to voters about judicial elections would be to collect all of the endorsements from various organizations and package them together for a voter to evaluate. There are, in fact, a number of websites which already provide this service, such as Voting for Judges,[53] which provides information on judicial candidates in the state of Washington, and Vote for Judges,[54] which does the same for judicial candidates in Chicago.

But these neutral evaluations suffer from two significant limitations. First, many of them tend to be overly positive, especially in retention elections; most bar committee evaluations will recommend retention at least 99% of the time.[55] Thus, voters looking for guidance

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52. As it turns out, in most elections this background information is already being disseminated to voters through a candidate's campaign literature and television advertisements. Indeed, this is frequently the only positive information a voter may have about a judicial candidate.

Like candidates for any elected office, judicial candidates also publicize their family backgrounds—the number of children and grandchildren they have, for example, or how long they have been married to their spouses. Although this information apparently makes for good campaign fodder, it does little to help voters decide how the candidate will act if elected as a judge.

53. *See Ratings and Endorsements*, VOTINGFORJUDGES.ORG (Nov. 2, 2010), http://www.votingforjudges.org/10gen/rating/index.html.

54. *See* VOTEFORJUDGES.ORG, http://voteforjudges.org (last visited Oct. 16, 2011).

55. *See, e.g.*, *2010 Judicial Performance Reviews*, COLO. OFFICE OF JUD. PERFORMANCE EVALUATION, http://www.coloradojudicialperformance.gov/retentionlist.cfm?year=2010 (last visited Oct. 16, 2011) (Colorado bar committee recommending retention for 133 of 135 candidates);

from these evaluations in retention elections will find little in the way of a critical evaluation of the judge's record.

Neutral evaluations in contested elections are more discriminating. They generally classify a candidate as "excellent," "good," "adequate," or "unqualified," and a significant number of judges receive marks in each category.[56] Thus, presenting this information to voters could provide them with useful distinctions between candidates.[57]

But the real problem with these evaluations is not that they offer too *little* help but rather that they have the potential to offer too *much* help. If voters are expected to simply follow the recommendations of the local bar association, it seems redundant to have them involved in the process at all. Instead, it would be more efficient to have a merit selection system where the bar association recommends candidates directly to the governor, who then chooses a judge from the recommendations. States that choose to have lay voters select their judges obviously believe that voter participation adds something of value to the selection process. Thus, the voters ought to do more than simply rubber stamp the opinion of the "experts." Again, an analogy with other types of elections is instructive: assume that voters in an election for Senator or President were provided with reports from

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Judicial Performance Reports, ARIZ. COMM'N ON JUD. PERFORMANCE REV.: JUD. PERFORMANCE REP., http://azjudges.info/reports/lastname.cfm (last visited Oct. 16, 2011) (Arizona bar committee recommending retention for 64 of its 64 candidates); *Judicial Performance Evaluations of Judges Standing for Retention in 2010*, ALASKA JUD. COUNS. (July 5, 2010), http://www.ajc.state.ak.us/retention/retent2010/ret10.html (follow "Judicial Council Recommendations: Press Release – Council's Vote" hyperlink) (Alaska bar recommending retention for 27 of its 28 candidates); *Information About Judges Appearing on Your Ballot*, http://www.utcourts.gov/knowcts/docs/Voter_Information_Pamphlet.pdf (last visited Oct. 16, 2011) (Utah bar committee recommending retention for 126 of its 126 candidates).

56. *See, e.g.*, *PBA Judicial Evaluation Commission Reissues Ratings for Judicial Candidates*, PA BAR ASS'N (Oct. 8, 2009), http://www.pabar.org/public/news%20releases/pr100809.asp; *2010 JCEC Candidate Ratings*, DETROIT METRO. BAR ASS'N, http://www.detroitlawyer.org/topic.jsp?topicId=809 (last visited Oct. 16, 2011); 2010 General Election Contested Ratings, JUDGE4YOURSELF.COM (July 2010), http://www.judge4yourself.com/jcrc-ratings.html.

57. It is not clear, however, whether voters will care about these endorsements. Other studies have shown that these endorsements have no influence on whether judges get re-elected—that is, a judge who receives an "unqualified" recommendation is just as likely to be retained as a judge who receives a positive recommendation. *See* Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 744-45 (2002) (concluding that negative recommendations by bar associations do result in a lower percentage of the vote, but not a sufficient amount to change the outcome of the vote). Whether this is because most voters do not know about the recommendations or because they do not care about them is an open question—though data from visitors to our website indicates it is not one of the more influential factors. *See infra* Part V.A.

"neutral" political experts who had painstakingly researched and interviewed each of the candidates and published evaluations for each candidate stating whether he or she was "qualified" or "unqualified" to be Senator. This would certainly be useful information, but most voters would not be satisfied with simply checking in with the professional evaluations and voting accordingly. Instead, the voters would (and do) seek out more information about each candidate's political views in order to ensure that the candidate—aside from being "qualified"—shares at least some of the voters' political beliefs and social values. Candidates for legislative bodies and executive offices campaign explicitly on their political positions, and once elected they are expected to make decisions based on these positions. These decisions may stem from the candidate's own moral values, a cost/benefit analysis of the possible solutions to a problem, or simply what seems to be best for the state or the country.

While information about a candidate's political positions is easily available in legislative and executive races, it is far less accessible in judicial races. As we will see, there are a number of different ways to gather and communicate this information to voters, each with their own challenges.

B. Political Positions

Before examining different methods of evaluating a candidate's political positions, we should first test our analogy. Is it fair to treat judicial elections like other types of elections? Should we encourage voters to evaluate candidates based on the candidate's political beliefs? Should judicial candidates even *have* political positions on issues? This premise essentially treats judges as policymakers, not just neutral interpreters of the law. The judicial branch is supposed to be above politics; judges are meant to decide cases based on neutral legal principles, not their own personal ideology or even what is best for the citizens. To a great extent, this characterization of judges is true: when a judge decides a case, he or she must be guided by the law set out by the other two branches, or by the Constitution. In their decisions, judges frequently point out that they are not passing judgment on the wisdom of the law they are enforcing; they are only interpreting the law, or ensuring that the law is consistent with the Constitution or other superseding legal authority.[58]

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58. This theory of judicial decision-making is known as the "legal theory." It is well-established that most decisions made by judges—especially those at the trial court level—are in

But as everyone knows, the truth is a bit more complicated. Nobody truly thinks of judges as completely beyond politics. For example, it is common to speak of a "liberal" judge or a "conservative" judge. Every time the President nominates a new Supreme Court Justice, the Senate and the country as a whole eagerly pore over the nominee's prior judicial record and writings, trying to discern the political leanings of the potential Justice in an attempt to predict how he or she may rule on the significant legal disputes of the day. Elections for state supreme court justices frequently turn on blatantly political issues, and even trial court judges who set bail and make sentencing decisions are viewed through a political prism as being "soft" or "tough" on crime.

Thus, we have a dissonance between the theory of a neutral, non-partisan judge and the reality of a judge who has (and acts on) political beliefs. At its core, the problem is one of terminology. When people attempt to apply political labels to judges, they invariably create confusion, because the labels were developed to apply to true politicians, not judicial officers. What, for example, is a "conservative" judge? Someone who votes that anti-abortion laws are constitutional? Someone who narrowly interprets an affirmative action law? Someone who imposes (or upholds) long prison sentences for convicted criminals? Although in the political realm, these three positions are linked as "conservative" positions, there is nothing to link them together in the judicial world—that is, there is really no reason to believe that a judge who supports one of these positions will support either of the other two.

To make matters worse, the judicial realm has its own unique additions to the concepts of what is conservative or liberal: is the judge a "strict constructionist" who refuses to examine legislative history or consider policy arguments when interpreting a statute? Does the judge show judicial restraint and defer to the other two branches of government when reviewing a statute or regulation? These two judicial philosophies are thought to be "conservative," but they bear no relationship to what we think of as politically "conservative." For example, a judge who exercises "judicial restraint" should (in theory) apply that philosophy to anti-abortion laws and to affirmative action laws, preferring to let them both stand in the face of a constitutional challenge. Some judges, who are more political in nature, may use strict constructionism or legislative history as merely a tool, to be used when convenient to advance a political agenda, but ignored when they would

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accordance with this theory; that is, the decision that is made is mandated by the law the judge is interpreting. *See* Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 31-32 (2001).

lead to an undesirable result. Other judges might be truly apolitical and only adhere to a specific judicial philosophy, while others might disdain any overarching judicial philosophy and simply apply the law as they see fit in each situation.

Given these challenges, what is the best way to evaluate and communicate a judge's political beliefs—or lack thereof—to the voters? There are essentially four possible methods, none of which are mutually exclusive: party affiliation, endorsements by partisan associations, judicial ideology or philosophy, and patterns in the judge's prior decisions. We will consider these in the next four sections.

1. Party Affiliation

If we continue our analogy with other types of elections to its logical conclusion, the first and most important indicator of a judge's political beliefs would be his or her party affiliation. This information is already available in many judicial elections,[59] and the terms "Democrat" and "Republican" are easily understood by almost every voter.

But are the terms helpful or misleading in the judicial context? Are voters who simply vote the party line in judicial elections usually getting what they expect? Political scientists have been intrigued by this question for decades, and they have conducted hundreds of surveys and written dozens of articles attempting to translate judges' decisions into familiar political categories. These scholars also take a further step, attempting to find correlations between voting patterns and other variables, such as the political affiliation of the President who nominated them.

The first step in these studies is to classify a judge's various decisions as "liberal" or "conservative," as described by Professor Daniel R. Pinello in a recent survey article:

> Scholars have used consistent definitions of liberal and conservative judicial action. In criminal justice cases, votes favoring the defendant are liberal; those for the prosecution, conservative. In government regulation of the economy, choosing the regulator is liberal; the regulated, conservative. Preferring workers in labor regulation cases is

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59. Thirteen states have some form of partisan elections. Within these thirteen, Ohio has only partisan primaries, Michigan has partisan nominations for only the Michigan Supreme Court, and Tennessee, New York, Missouri, and Indiana only use partisan elections for their lower court elections. *See Methods of Judicial Selection*, *supra* note 18.

liberal; employers, conservative. In civil rights and liberties, votes for the claimed right are liberal; against the right, conservative.[60]

These broad categories probably fit the general political conception of "liberal" and "conservative" rather well, though they leave out some significant "culture war" issues, such as abortion, gay rights, or gun rights. But of course the more detailed the analysis, the more choices the analyst must make about whether each type of decision is liberal or conservative. By far the most prominent (and comprehensive) database of Supreme Court decisions is the "Spaeth Database," created by Howard Spaeth, a political science professor at Michigan State University.[61]   The database categorizes legal issues into fourteen different major categories,[62] which he also subdivides into hundreds of minor sub-categories.

The database then classifies each of the sub-categories of these issues as "conservative" or "liberal."[63]   For example, the database classifies "pro-female [rulings] in abortion cases" and "pro-accused" rulings in criminal cases as liberal.[64]

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60. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 222 (1999).

61. *See The Supreme Court Database*, http://scdb.wustl.edu/ (last visited Oct. 16, 2011).

62. Criminal Procedure, Civil Rights, First Amendment, Due Process, Privacy, Private Action, Attorneys, Unions, Economic Activity, Judicial Power, Federalism, Interstate Relations, Federal Taxation, and Miscellaneous. *Id.*

63. Howard Spaeth, Lee Epstein, Ted Ruger, Keith Whittington, Jeffrey Segal & Andrew D. Martin, *Supreme Court Database Codebook: brick_2011_03*, at Variable 36 (Aug. 30, 2011), http://scdb.wustl.edu/documentation.php?s=2 (follow "2011 Release 03" hyperlink).

64. *Id.* The classifications are as follows:

In the context of issues pertaining to criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys: "liberal" means pro-person accused or convicted of crime, or denied a jury trial; pro-civil liberties or civil rights claimant, especially those exercising less protected civil rights (e.g., homosexuality); pro-child or juvenile; pro-indigent; pro-Indian; pro-affirmative action; pro-neutrality in religion cases; pro-female in abortion; pro-underdog; anti-government in the context of due process, except for takings clause cases where a pro-government, anti-owner vote is considered liberal except in criminal forfeiture cases or those where the taking is pro-business; violation of due process by exercising jurisdiction over nonresidents; pro-attorney; pro-accountability and/or anti-corruption in campaign spending; pro-privacy vis-a-vis the 1st Amendment where the privacy invaded is that of mental incompetent; and pro-jurisdiction and pro-disclosure except for employment and student records. "Conservative" means the reverse of above.

In the context of issues pertaining to unions and economic activity: "liberal" means pro-union except in union antitrust (which is conservative); anti-business; anti-employer; pro-competition; pro-liability; pro-injured person; pro-indigent; pro-small business vis-a-vis large business; pro-debtor; pro-bankrupt; pro-Indian; pro-environmental protection; pro-economic underdog; pro-consumer; pro-accountability in governmental corruption; anti-union member or employee vis-a-vis union; anti-union in union antitrust; and pro-trial in arbitration. "Conservative" means the reverse of above.

Even with all of the subcategories, some of the categorizations still paint with a rather broad brush ("pro-liability" in all cases pertaining to "economic activity," for example, or "pro-federal power" in every case involving federalism). Other categorizations require quite a bit of interpretation on the part of the individual coding the decisions. For example, what types of cases are "pro-underdog" or "pro-economic underdog?" Still others require an interpretation of complicated concepts. For example, "pro-judicial activism" is a tricky category because many people disagree as to what constitutes "judicial activism."

Most troubling of all are the judgment calls that the database is forced to make about the ideological direction of a decision in each of these sub-categories. Some are relatively uncontroversial. For example, few people would disagree with the assertion that "pro-union" decisions are "liberal." But other judgments depend on how you define "conservative" and "liberal". For example, would a liberal always be pro-neutrality in religion cases? Or would a liberal always be pro-competition in economic activity cases?

Studies using the Spaeth Database are quite common. The database was the basis of a front page article in the July 25, 2010 New York Times article describing how the United States Supreme Court has shifted to the right over the past few decades and is now the "most conservative court in decades."[65] The Spaeth Database was also the basis for a landmark article by William M. Landes and Richard A. Posner in 2008,[66] which ranked the most recent forty-three Supreme Court Justices from most conservative to most liberal and concluded that

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In the context of issues pertaining to judicial power: "liberal" means pro-exercise of judicial power; pro-judicial "activism"; and pro-judicial review of administrative action. "Conservative" means the reverse of above.

In the context of issues pertaining to federalism: "liberal" means pro-federal power and anti-state. "Conservative" means reverse of above.

In the context of issues pertaining to federal taxation: "liberal" means pro-United States. Conservative means pro-taxpayer.

65. Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 24, 2010, http://www.nytimes.com/2010/07/25/us/25roberts.html?pagewanted=all.

66. William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 2, at 775-831 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126403. Landes and Posner adjusted the ideological categorizations for some of the issues in their analysis. For example, pro-First Amendment cases had been originally categorized as liberal; Landes and Posner refined this by categorizing questions of commercial speech and accountability in campaign spending as unspecified. *Id.* at 42.

four of the top five conservative Justices over the past sixty-three years are currently sitting on the Court.[67]

The Spaeth Database is so widely recognized that there are not many alternative methods of categorizing judicial decisions (and the judges who issue them) as liberal or conservative. Professor Donald R. Songer has created a database for federal appeals court judges,[68] which makes many of the same choices as the Spaeth database[69] while recognizing that "some issues are not easily categorized along a liberal/conservative dimension" and that "some users may want to define liberal and conservative in at least partially different ways."[70] And, the State Supreme Court Data Project provides a comprehensive database of state court decisions over the past few decade, and categorizes state supreme court decisions by parties involved and legal issues involved, without classifying decisions as "liberal" or "conservative."[71]

Based on data such as those collected in the Spaeth and Songer databases, legal and political science scholars have conducted hundreds of studies on the voting behavior of judges. One meta-analysis of these studies concluded that judges appointed by Republicans tended to vote more conservatively than judges appointed by Democrats.[72] The aforementioned study by Landes and Posner also confirmed this rather uncontroversial finding.[73] In fact, the party affiliation of the appointer was the strongest indicator of all the factors in determining whether a judge would vote as a "liberal" or a "conservative" in non-unanimous cases.[74]

But as might be expected, the correlation is not perfect, and it is not consistent across different issues. A study of appellate court judges in the early 1960s found that the correlation between the appointing President's ideology and judicial decision-making was strong for

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67. *Id.* at 46. The top five conservative Justices are: Thomas, Rehnquist, Alito, Scalia, and Roberts.

68. *See U.S. Appeals Courts Database*, JUDICIAL RESEARCH INITIATIVE AT UNIV. OF S.C. (Nov. 19, 2010), http://www.cas.sc.edu/poli/juri/appct.htm.

69. *See* Donald R. Songer, *The United States Courts of Appeals Data Base: Documentation for Phase 1*, at 91-99, http://www.cas.sc.edu/poli/juri/cta96_codebook.pdf (last visited Oct. 16, 2011).

70. *Id.* at 91.

71. *See State Judicial Database Coding Rules*, MICH. ST. UNIV. (Feb. 1, 1999), http://www.ruf.rice.edu/~pbrace/statecourt/.

72. *See* Pinello, *supra* note 60, at 243. This is known as the "attitudinal" theory of judicial decision-making.

73. *See* Landes & Posner, *supra* note 66, at 15.

74. Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL'Y SCI. REV. 491, 496 (1975).

economic issues, but negligible for criminal and civil liberties issues.[75] However, when the study was repeated for the next five-year period, the correlation was at least as strong for criminal and civil liberties issues as it was for other types of cases.[76] Part of the difference could be explained by a difference in the methodology between the two studies, but the author of both studies also noted the late 1960s was a time when political liberties issues and criminal justice issues became politicized, and that this shift was reflected in the judges appointed during that time. A different article that looks at the conclusions of hundreds of judicial studies shows a very high correlation between the appointer's political affiliation and judicial decisions in civil rights and criminal justice cases—much higher than for other issues.[77] Meanwhile, studies of trial court judges, who are bound much more rigidly by the law of any particular case, find little or no correlation between political affiliation and judicial decisions.[78]

In short, although a correlation has been found between the political party of the appointer and the direction of the judge's decisions, there was quite a bit of variability for different specific issues. As another scholar noted, classifying a judge by ideology or political party is misleading because "it divides [judges] into only two—or perhaps three—large, undifferentiated groups."[79] If a President were trying to decide whether to appoint a candidate to a judgeship, for example, he or she would do more than simply check the party affiliation of the candidate. The President may want to "pursue a particular ideological agenda typically involv[ing] a certain type of liberalism or conservatism as well as positions on specific legal issues such as abortion, civil rights, and criminal procedure."[80] Party affiliation is not a sufficient indicator to predict with confidence how a judicial candidate will vote on any given issue. The same principle should hold true for voters in judicial elections. Although party affiliation is a strong indicator and should be

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75. *Id*. at 496-97.

76. *Id.* at 497.

77. *See* Pinello, *supra* note 60, at 241. It should be noted that this difference disappears if the statistics are calculated in a slightly different way. *Id*.

78. *See, e.g.*, Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995) (studying civil rights cases on the District Court level and concluding that "[i]n the mass of cases that are filed, even civil rights and prisoner cases, the law—not the judge—dominates the outcomes. Judges may treat most cases as ones in which political interests are irrelevant or cannot change the outcome. In the select few cases that are appealed or lead to published opinions, individual judges have a greater role in shaping outcomes.").

79. *See* George, *supra* note 58, at 37.

80. *Id.*

included in the information that is provided, voters deserve more detailed information in order to make a more informed decision.

2. Endorsements by "Partisan" Associations

For a more specific evaluation of a judicial candidate's political views, a voter could turn to endorsements by partisan organizations such as the AFL-CIO or anti-abortion groups. These policy-oriented recommendations are transparently political; they see judges as policymakers and they seek to educate their audience as to which judges are more likely to vote in the way that is favorable to their political ideology.

Some of these organizations, like the Chamber of Commerce and the AFL-CIO, are groups whose primary purposes have nothing to do with judicial elections, but who will lend their name to support a specific candidate in a specific election. For the most part, these endorsements follow the expected party line; pro-business groups tend to endorse Republican judges, while pro-labor groups tend to endorse Democratic judges.

More intriguing are the groups whose sole purpose is to provide recommendations in elections, including—and sometimes exclusively— judicial elections. For example, Ohio Election Central[81] bills itself as "A Project of Citizens for Community Values," and it provides recommendations for conservative voters for every level of local election in Ohio, including judges. Similarly, Judge Voter Guide[82] provides recommendations for conservative voters in judicial elections in the Los Angeles region. Judge Voter Guide sends all the questionnaires to all the candidates it reviews, asking questions such as: "The California Supreme Court struck down Proposition 22 and allowed same-sex marriage. Then they upheld the Proposition 8 vote. Then a federal judge declared it unconstitutional. As a judge, how would you go about determining how to rule in this type of case?"[83]

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81. *See* CITIZENS FOR COMMUNITY VALUES ACTION, http://www.ohioelectioncentral.com (last visited Oct. 16, 2011).

82. *See* Craig Huey, *Recommendations & Results for California Superior Court Judge*, JUDGE VOTER GUIDE, http://www.judgevoterguide.com (last visited Oct. 16, 2011).

83. Craig Huey, *Candidate Endorsement Questionnaire*, JUDGE VOTER GUIDE, http://www.judgevoterguide.com/candidate-endorsement-questionnaire (last visited Oct. 16, 2011). The questionnaires sent out by these organizations may not be a reliable gauge of how the candidate will actually rule in any given case, because almost no candidate will (or should) specifically state how he or she will vote on a given issue.

But just as a judge's party affiliations may be too broad to be useful for voters, the partisan evaluations are overly narrow. Partisan evaluations tend to be relatively one-dimensional because they usually only consider one political issue when evaluating the candidates—whether the candidate is likely to support worker's rights, for example, or whether the candidate will support "traditional family values." This specificity could be a benefit if the voter can find organizations that evaluate based on the specific issues that the voter cares about, but most voters will end up with large information gaps if they rely solely on partisan evaluations. Judges, like traditional politicians, make decisions about a wide variety of different issues. Furthermore, many of the partisan evaluations focus on "values" issues such as gun regulation, abortion, and gay rights, which motivate many special interest groups but in reality make up a very small percentage of the decisions made by judges.

3. Judicial Philosophy

If political labels such as "Democrat" or "liberal" are an inelegant fit to describe judges, and if partisan evaluations are too narrow, perhaps judicial candidates need their own set of broad categories and descriptors. Luckily, the legal academy and judges themselves have come up with many different ways to categorize judges and describe their legal philosophy. For example, "textualists" seek to only find a reasonable interpretation of the plain language of a statute and will not attempt to determine, much less apply, the legislative purpose of the statute,[84] while those who favor a "Living Constitution" believe that the Constitution was intentionally written using broad language and concepts which should evolve as society evolves.[85]

But using these categories raises a serious problem of translation because voters may not truly understand what it means to call a judge a "textualist." Other terms that are used to try to describe judges to voters, such as whether a judge is an "activist" or "soft on crime", are misunderstood at best and intentionally manipulated by opposing campaigns at worst. Furthermore, in many cases, it is difficult to determine what a judge's "judicial philosophy" actually is; few judges will openly admit to having an overarching judicial ideology, and

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84. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1762-63 (2010).
85. *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2355-57 (2002).

scholars and commentators may disagree as to how to categorize each judge. Thus, anyone wishing to educate voters about a candidate's judicial philosophy faces two problems: first, learning enough about a candidate to categorize him or her as a certain type of judge; and second, bridging the gap between the legal meaning of the category and the practical implications of the policy in order to present a candidate's judicial philosophy to the voters in a comprehensible and meaningful way.

But the biggest problem with using a candidate's "judicial philosophy" to educate voters is much more fundamental: most voters do not truly care about what that philosophy might be. Academics may enjoy debating whether a judge should consider joint committee reports found in legislative history when interpreting the meaning of a statute, or whether a judge should give a high level of deference to an administrative agency, but these issues are not particularly interesting or relevant to the average voter. Instead, voters are likely to care about results on particular issues. In cases involving criminal defendant's rights, does this judge tend to vote to protect the rights of the accused, or does she vote to enhance the powers of the police? Does the judge tend to interpret the law to encourage individual plaintiffs who seek damages against large corporations, or does he tend to protect the corporations from such lawsuits?

Unlike true politicians, judicial candidates face ethical constraints on providing prospective information about how they would vote on certain issues.[86] But like politicians, judges create a record with every

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86. The Model Code of Judicial Conduct states:

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.

(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

MODEL CODE OF JUDICIAL CONDUCT R. 2.10 (2008). This sets out two separate restrictions. Subsection (A) forbids a judge from commenting on how he or she would rule in a "pending" case, which is a relatively straightforward and sensible restriction. Subsection (B) is much broader, but less specific, prohibiting judges from making "pledges, promises, or commitments" about any "issues that are likely to come before the court" if the pledge or promise is "inconsistent with [] impartial performance." In truth, this gives judges quite a bit of leeway to commit themselves to general judicial philosophies, and many of them do so in their campaigns, saying they will "respect

case they decide, just as legislators leave a paper trail with the votes they cast in the legislature. By collecting data on how these judges vote, we can begin to perceive patterns in how they tend to vote in certain kinds of cases, and by communicating these patterns to the electorate, we can ensure that voters are making informed decisions about how they want their judges to vote in cases where the law may be ambiguous or unsettled.

4. Evaluating Prior Voting Records

Reviewing a judge's prior voting record offers a number of advantages over the other methods of evaluating a judge's political views. Unlike party affiliation, a judge's voting record can provide a detailed view of the judge's political predisposition on a number of specific issues. And unlike the endorsements made by policy-oriented associations, the information is collected and presented in a neutral, unbiased manner, and voters can receive information on voting patterns in many different types of cases—criminal procedure, personal injury, challenges to the tax law, employment discrimination—not just the one or two "values" issues which the policy-oriented associations focus on. And a prior voting record is easier for voters to understand than a term such as "activist" or "strict constructionist."

But categorizing elected judges based on their prior decisions carries some risks. The danger to this method, of course, is that judges will become little more than politicians, who are evaluated on the popularity of the policy decisions that they make instead of the quality of the legal analysis they conduct.

There are two responses to this critique. First, judges in most cases are bound by the law to reach a certain result, and therefore the majority of decisions a judge makes are unaffected by his or her ideology or policy preferences. If a particularly partisan judge ignores the law in order to reach a specific result, he or she will almost certainly be outvoted by the other judges on the panel. And if not, the decision will certainly be overturned on appeal. So the judicial system provides an effective check on judges who may be tempted to reach decisions for political rather than legal reasons. But more fundamentally, it seems a little late to worry about the risk that judges will turn into politicians. As noted above, forty-one states require at least some of their judges to

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precedent" or be "tough on crime" or "curb frivolous lawsuits." But these provisions might also make judicial candidates reluctant to say any more than is necessary about specific political issues.

stand for popular election,[87] and a strong majority of Americans consistently tell pollsters that judges should be elected.[88] This means that judges in these states are already politicians—politicians with a different role to play than legislators or executives, but politicians nonetheless. And if we expect the voters in these states to make informed decisions about the type of judge they would like to have on the bench, voters should know how the judges are likely to vote in those close cases where the law gives them the leeway to show their policy preferences.

IV. THE SOLUTION: CHOOSEYOURJUDGES.ORG

After considering the many different types of information potentially available to voters, I set out to create a website[89] that would provide the most pertinent information to voters. Based on my analysis of what information would be useful to voters, I included background information on each candidate, including endorsements and evaluations by neutral organizations such as bar associations and newspaper editorial boards.[90] I also included party affiliation because it provides a rough guide to how judges will act on the bench and has proven to be useful to voters in the past.

But the real contribution of the website was that it provided information that was not available to voters anywhere else: the prior voting record of judicial candidates,[91] categorized by topic. Essentially, I created the same kind of data that Professor Spaeth tracks in his database. But instead of examining it in hindsight, in order to study which factors might correlate to certain patterns of decisions (as has been the only use of the Spaeth Database so far), I used the data

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87. *See supra* notes 19-20.

88. *See id.*

89. *See* CHOOSE YOUR JUDGES, http://www.chooseyourjudges.org (last visited Oct. 16, 2011).

90. I decided not to include endorsements from partisan special interest groups because they are almost always duplicative of party affiliation—that is, a Republican candidate will almost invariably also be endorsed by the NRA, the Chamber of Commerce, and/or an anti-abortion group, while a Democratic candidate will almost invariably be endorsed by the AFL-CIO and the abortion rights organizations. Thus, including these partisan recommendations would not add any useful data to the process and would also tend to skew the evaluation of each judge by effectively double or triple-counting party affiliation and thus magnifying the significance of that variable.

91. Because I relied on prior voting record for this data, I could only gather the data for incumbent candidates or for sitting judges who were seeking a different judicial position. For candidates who had never been judges, I could only provide background information. *See infra* Part IV.C.

prospectively to provide voters with a guide as to whom they wanted to vote for.

The website does something else that is unique in judicial elections. Instead of merely presenting this information to the voter in a series of tables, the site asks the voter to take a short quiz to identify his or her preferences and then matches those preferences to a candidate for each race. I believed that this method was the most appropriate tool to use in assessing a voter's preferences and providing him or her with recommendations. First, asking the user to take a quiz is more user-friendly and engaging than presenting the voter with a series of tables containing names and information about each candidate. Second, I hoped that by requiring voters to answer the questions on the quiz, I would encourage them to think critically about the reasons why they have specific preferences. For example, why they might prefer a judge who had former experience as a defense attorney over one who had held political office, or whether a judge should tend to defer to the legislature when deciding if a statute is constitutional. This might lead to some amount of reflection on the part of the voter about what should or should not be the proper criteria for judicial candidates, a process which would result in more thoughtful, deliberative choices in judicial elections. Third, the interactive nature of the quiz should lead to more accurate results than any other method; when the website learns exactly what the voter believes and how strongly he or she cares about each issue, the algorithm can make refined comparisons between candidates. And finally, the voter must answer the questions before knowing which candidates prefer which position, thus removing any possible preconceptions they may have about a specific candidate or a specific political party. In this way, the site can gather an accurate idea of what kind of candidate the voter prefers without the answers being tainted by the voter knowing which candidate has those qualifications or agrees with those positions. The results may end up surprising some voters, who would not expect that their preferences would result in the given recommendation.

In creating the website, I had three major tasks. First, I had to collect data on the judge's background, endorsements, and prior voting record. This required an independent evaluation of each candidate's prior voting record in ten different categories in an attempt to determine patterns in the candidate's voting on specific issues. Second, I had to design a concise quiz that would fairly and accurately determine the voter's preferences. And finally, I had to design an algorithm that would

combine the previous two pieces of data in order to provide a useful set of recommendations to the voter.

A.   Gathering Data

It is relatively easy to gather background data for judicial candidates: information about their prior work experience, their party affiliations, and their endorsements is all available on their campaign website.   The challenge was in acquiring information about the candidates' political views. Candidates for the legislative or executive branch will frequently make statements about their positions on certain issues, but judicial candidates will not. They are limited by the judicial canon of ethics from making certain statements during a campaign. For example, they are not allowed to say how they will vote on a certain case if it comes before them.[92] Even within these limits, judicial candidates tend to provide very little information about their own beliefs and ideology. For example, a recent candidate for the Ohio Supreme Court was asked how his training, professional experience, and interests had prepared him for the position he was seeking, and he responded:

> I believe my training, professional experience and interest have prepared me well to serve as Justice of the Supreme Court of Ohio. My background is diverse and my personal life experiences will enable me to approach the work of the Court with a unique perspective, understanding and empathy.[93]

It is hard to imagine that this statement would provide anything even remotely useful to a voter who is trying to decide whether or not to vote for him. Unfortunately, these bland statements supporting fairness and dedication are the norm for judicial evaluation questionnaires. Thus, the only way to get a meaningful idea of how candidates will act as judges is to analyze their prior voting record.

As mentioned above, although this is a novel tool for evaluating judicial candidates prior to elections, there are many studies of judicial voting records in the political science field.[94] My website adopted the methods and some the categories of this political science research and

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92. *See, e.g.*, CAL. CODE OF JUD. ETHICS CANON 5 (2003); ILL. CODE OF JUD. CONDUCT CANON 7 (1994); OHIO CODE OF JUD. CONDUCT CANON 7(B) (2009).

93.   This was the response of candidate Peter Sikora to a League of Women Questionnaire when he was running for the Ohio Supreme Court in 2008. *Ohio Supreme Court Elections: 2002 – 2010*, JUDGEPEDIA,   http://judgepedia.org/index.php/Ohio_Supreme_Court_elections,_2002-2010#Candidate_ Questionnaire_4 (last visited Oct. 16, 2011).

94. *See supra* notes 60-80 and accompanying text.

applied it to state court judges who are involved in elections. In every case in which a candidate is already a sitting judge—that is, if he or she is an incumbent or a lower court judge seeking a higher office—we gathered data about that candidate's voting patterns.

The first step in gathering this information is to discard all unanimous opinions that the judge has participated in. In theory, the unanimous opinions say little to nothing about a judge's policy preferences or ideology because it is likely that the law in the case was unambiguous and mandated a certain result. Thus, my researchers recorded only the non-unanimous opinions that the candidate had participated in because in these cases, the law was sufficiently ambiguous that a judge's personal policy preferences could be detected. In other words, these were cases in which, when looking at the same facts and the same law, some judges decided the case one way and some decided them another way.

After discarding the unanimous opinions, my researchers examined hundreds of opinions for each judge, and categorized each opinion by subject matter: criminal procedure, substantive criminal law, medical malpractice, tax, and so on. We then looked for patterns in voting for each category—whether, in these close cases, the candidate was more likely to vote in favor of the prosecutor rather than the criminal defendant, or the large corporate defendant rather than the individual plaintiff. All of this information was then recorded in our database. A sample entry for our database can be found in Appendix A.

B.   The Quiz

Visitors to the website are not directly presented with information about the judicial candidates. Instead, they are asked a series of questions about the type of judge they would prefer. The first section of the quiz deals with the pedigree information. For example, whether the voter would prefer a candidate who has prior experience as an elected official, or whether the voter would prefer a candidate who has worked as a prosecutor. The second section of the quiz deals with substantive issues. For example, whether the voter would prefer a candidate who tends to vote against large corporations in personal injury cases.

For each question, whether it has to do with qualifications or substantive decisions, we ask the user to tell us how important that issue is to them. Some voters may have mild preferences on some issues, but very strong preferences on others; our recommendations should take these different levels of preference into account. We then match the voter's answer to the information in the candidate's database, and add

(or subtract) a number from the candidate's "score" based on whether the candidate's background or voting pattern coincided with the voter's preference.[95]   At the end of the quiz, the website calculates the total score for each candidate and return a recommendation based on the voter's preferences.

One challenge with this method is that judges—unlike legislators—do not make decisions purely on policy grounds or ideological preference. As noted above, this is why we only include non-unanimous decisions in our data set. However, it is important to communicate to the voters—most of whom, presumably, are not lawyers themselves—the fact that a judge's policy preferences have only a limited influence on his or her decisions. For this reason, we begin the substantive section of the quiz with a brief explanation:

> When an appellate judge reviews a lower court decision, he or she is usually bound by established legal principles which control the outcome of the case. However, if the legal question is a close one, or the law is ambiguous, a judge has the authority to interpret the law. Over the years certain patterns can be discerned in a judge's voting record in these close cases. In the following types of cases, what side would you like your judge to vote on?[96]

Another challenge with this method is that we must choose the right language to present the substantive issues to the voter. We must be careful about the language we use, so we avoid value-laden words. Instead of "Would you prefer a judge who tends to protect the rights of a criminal defendant," or "Would you prefer a judge who tends to support law enforcement," we opt for a neutral description of the type of case: "Cases involving questions of criminal procedure (for example, police authority to search, defendant's right to an attorney, *Miranda* issues). [Would you prefer a judge who tends to vote] in favor of the prosecutor's position [or] in favor of the defendant's position?"[97]

Finally, we faced a problem when we had data about one candidate in a race but not another. Occasionally an incumbent judge is running for re-election against an attorney who has never been a judge before and thus has not established any kind of voting record. Luckily, we can still gather pedigree information about each candidate, so the voter will have some information about the challenger. We still included

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95. *See infra* Part IV.C for details.

96. *See, e.g.*, *Judicial Preference Quiz*, CHOOSE YOUR JUDGES, http://www.chooseyourjudges.org/ quiz.php?state=CA (last visited Oct. 16, 2011).

97. *Id.*

substantive information about the incumbent so that the voter can determine how well his or her preferences match up to the incumbent's voting record. In these cases, the quiz results will still provide a recommendation to the voter, but it will include a disclaimer that not all the information about the challenger is available.

The entire quiz is reprinted in Appendix B.

C.   Processing the Quiz

After we gather the voter's preferences, we compare each of those preferences to each relevant candidate in our database. Every data comparison has a "raw score" depending on how well the candidate's data matches the voter's responses on the quiz. In addition, for every response, we use the voter's "strength of preference" as a multiplier. Thus, if the user responds that a particular issue has a "strong positive influence," or is "very important," we multiply the raw score for that reply by 2; "minor positive" or "somewhat important" results in a multiplier of 1, and "not at all" is a multiplier of 0 (that is, the response will not affect the total score for that candidate). Likewise, a "minor negative influence" results is a multiplier of -1 (that is, we will subtract the raw score for this response from the candidate's total score), and "strong negative" is a multiplier of -2. Finally, if the user fails to answer a specific question, the strength of preference is presumed to be zero, and the score of the candidate remains unchanged.

In determining the raw score for each response, we had two primary considerations. First, we wanted to ensure that no one response was worth a disproportionate amount of points on the raw score—that is, each response should be equally weighted at first and only become more (or less) important if the voter indicates a strong (or negligible) strength of preference. Thus, in most cases the raw score for a response will be equal to the number of standard deviations away from the average for judicial candidates. In practice, this meant that almost all raw scores fell between the range of negative two and positive two. For example, when calculating a candidate's prior practice experience, some candidates may have had only five years of prior experience, while others may have had twenty or more. Giving the more experienced attorney twenty extra points would skew the results by placing undue emphasis on this particular factor. In order to keep the raw scores within an acceptable range, therefore, we calculated the standard deviation for the amount of practice experience of all judicial candidates (in this case, 6.7), and divided each candidate's years of experience by that number.

The second consideration involved the problem of "one-sided" data. In certain situations, data is available for only one candidate in a race. This could either be because the opponent had never been a judge, and so therefore had no prior decisions to record, or (more frequently) because the election is a retention election, with only one candidate on the ballot. In these cases the voter's preferences should still be matched up with the one candidate whose qualifications and preferences are known, but the candidate may deserve a negative raw score if his or her data is contrary to what the voter prefers. In other words, we cannot use zero as the lowest possible raw score for each response, because then a candidate would end up with a positive score even if his or her qualifications and preferences had twenty negative correlations and only one positive correlation with the voter's preferences. In such a situation, the voter should clearly choose not to retain the candidate (or, if it is a contested election, the voter would most likely want to choose the unscored opponent). Therefore, we needed to create a system that would return a negative score (and thus a negative recommendation to the voter) if the majority of the correlations between the voter preference and the candidate's record were negative.

To solve this problem, we set a candidate's raw score at zero if a candidate had an "average" level of correlation with the voter's preference. For example, the average candidate had fourteen years of practice experience before running for judge. Thus, a candidate with only five years of experience deserved a negative raw score for practice experience because his or her five years is well below the average for judicial candidates. So in this example, we must first subtract fourteen from the candidate's years of practice experience, to ensure that candidates only get positive points for this factor if they are in fact above average in the amount of practice experience that they have. We then divide by the standard deviation as described above in order to reach a raw score within the appropriate range. Thus, the formula we used to calculate raw score in most cases was: ((# of years)-(average # of years))/(standard deviation for # of years).

Some of the responses, however, did not fit into this formula—for example, party affiliation or prior political experience. For these variables, we assigned a number between the range of 2 and -2 in order to keep the numbers comparable. By keeping the raw scores for any one response within an acceptable range, and by allowing a voter to increase or decrease the raw score for any given response based on the strength of preference, we hoped to minimize the arbitrariness of these choices.

The algorithm for translating a candidate's data into a score for the user, sample entries for two candidates, and a sample score calculation for a candidate are included in Appendix C.

For contested elections, the website calculates the total score for each candidate and recommends that the voter select the candidate with the higher score. If one of the candidates had less data than the other (for example, an incumbent judge is running against a challenger with no judicial experience and thus no record of judicial votes), the website adds a disclaimer to this effect.

For retention elections, the website calculates the total score for the candidate and notes whether the total score is positive or negative. If the score is negative (thus indicating that the candidate in question is worse than the average candidate in matching up with the voter's preferences), the website recommends a vote against retention. If positive, the website recommends a vote in favor of retention.

D.   Other Information on the Website

In designing the website, my primary goal was to provide specific recommendations to voters in specific races, and the quiz attempted to do that for each race that we covered. But a secondary goal was to increase voter awareness of judicial elections generally, and so I added a number of other features to the website in order to educate voters about the process of judicial elections. I wrote a series of short commentaries on topics ranging from the debate about electing judges to the effect of money on judicial elections. I gathered and posted facts and data about retention rates, the effect of party affiliation on a judge's voting patterns, and various related issues. And I maintained a blog in which I discussed new developments in the current election cycle.[98] I also prepared a glossary of terms used to describe judicial philosophies (such as "activist" or "strict constructionist") and a frequently asked questions page to address questions that voters might have about the site. Finally, I invited visitors to e-mail me with questions or suggestions about improving the website. Approximately two hundred users took me up on the offer.[99]

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98. Blog entries detailed issues such as the recall efforts against Supreme Court justices in Iowa and Illinois, the open partisan bickering on the Michigan Supreme Court, and the latest attack advertisements in various states.

99. By far the most common suggestion from the e-mails was that the website should cover more judicial races. I only had the resources to gather information on Supreme Court justices (though I also included intermediate appellate court judges in Ohio), and most e-mails requested that I include appellate court and trial court judges for their jurisdiction. Other e-mails offered

V. THE RESULTS

Although the primary purpose of the website and the quiz was to assist voters in judicial elections, a fringe benefit of using the quiz method was that it enabled us to collect data on the voting preferences of thousands of voters across five different states. Overall, we had 6,059 voters taking our quiz: 3,211 (53%) were Republicans, 2,353 (49%) were Democrats, and 493 (8%) did not register a party affiliation.

Obviously, these results do not represent a scientifically valid sample of voters; this only reflects voters who came to the website and took the quiz to assist them in their voting process. Presumably, most voters do not take the time or trouble to learn this much about their judicial candidates, so this sample represents voters who care enough about judicial elections to look for information online and spend five minutes on a quiz about their judicial preferences.

A.   What Factors are Important to Voters?

First, we can examine what issues voters believe are important in electing their judges. In order to properly weight each response from the quiz, the website asked each voter to rate the importance of each of their responses. The following table shows the average weighting of for each response, on a scale from 0 ("Not at all important") to 2 ("Very important").

Table 1: Most important factors in a judicial candidate (2 = "Very important"; 1 = "Somewhat important"; 0 = "Not at all important")

Issue	Overall	Republican	Democrat
Practice experience	1.41	1.43	1.37
Rulings in tax cases	1.33	1.52	1.10
Tendency to overturn statutes	1.31	1.40	1.15
Rulings in criminal procedure cases	1.28	1.31	1.27
Rulings in discrimination cases	1.25	1.22	1.31
Rulings in insurance cases	1.25	1.14	1.40

suggestions about other questions to put on the quiz, while a few complained that the quiz was "unfair" or "biased"—usually without any explanation as to how it was biased and without any suggestion about how to improve it.

Party affiliation	1.24	1.37	1.32
Rulings in medical malpractice cases	1.19	1.27	1.08
Rulings on substantive criminal issues	1.18	1.28	1.06
Tendency to overturn precedent	1.10	1.10	1.05
Rulings in election cases	1.08	1.20	.98
Judicial experience	.92	.94	.89
Bar recommendation	.81	.65	.97
Prosecutorial experience	.69	.78	.54
Newspaper recommendation	.65	.45	.65
Defense attorney experience	.63	.58	.61
Political experience	.61	.52	.57
Quality of law school attended	.60	.52	.73

When evaluating a candidate's background and experience, voters believe that prior practice experience and party affiliation are the most critical factors. As it turns out, most candidates have similar amounts of practice experience, so this factor does little to distinguish candidates in any specific election. Party affiliation, on the other hand, is an easy way to distinguish between candidates, and the information is almost always available to the voter, usually at the ballot box itself. Other studies have confirmed that party affiliation is one of the most important factors in determining who a voter will choose.[100]

On the other hand, voters do not seem to care very much about the quality of the law school the judge attended—in fact, it is the least important factor of all the ones on the quiz. This seems a little odd—if competency and legal ability were significant factors to voters, it would seem that the quality of the law school attended by the candidate would be a useful proxy for voters who are otherwise unable to evaluate these skills. And in other segments of the legal profession, a candidate's alma mater is very significant in an employer's hiring decision—but it does not appear to matter to voters. Indeed, it is rare to find a judicial candidate that went to one of the so-called "elite" law schools. For example, of the forty-four candidates for appellate judges in Ohio in

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100. *See* Rice & Macht, *supra* note 11 and accompanying text.

2010, only twelve graduated from a law school ranked in the top fifty in the U.S. News and World Report survey.[101]

Ironically, although the entire website was built on the premise that judges should be treated like politicians and the voters who took the quiz were evaluating candidates based in part on their political views, prior political experience was one of the least important factors (and as is shown in the next section, most voters who did say it was important preferred candidates to *not* have prior political experience).

Overall, there does not appear to be a great deal of partisan difference in these rankings; that is, voters of both parties seem to agree on the significant factors in judicial races. Republicans care more about tax issues, and they care somewhat less about bar recommendations and newspaper endorsements, but for the most part there seems to be consensus as to what issues voters care about. Unsurprisingly, that consensus disappears when we examine the side that voters take on each issue.

Finally, these results provide some confirmation to the premise of the website (and of this Article), that voters care about the political views of their judicial candidates. Ten of the top eleven factors on the table have to do with a candidate's political views, while the bottom seven factors involve more basic background information. Furthermore, a candidate's position on five different issues ranks *higher* than their party affiliation, even though previous surveys have shown that party affiliation is the most important factor to voters in judicial elections.[102] This indicates that voters would like to have a more detailed view of their candidate's positions on specific issues—like a President who is selecting a judicial nominee (or a Senator who is voting on the nominee's confirmation). Voters appear to want to know more about their prospective judges' politics than simply their party affiliation.

B.   *What do Voters Like?*

The following table ranks the issues based on the overall percentage of voters who indicated it would have a positive impact on their vote. The number in parentheses indicates the number of voters who indicated that the issue would have a *negative* impact on their vote

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101. Based on research conducted by author. Although the *quality* of the law school does not seem to matter, the *location* of the law school does; voters appear to want their state judges to be "home grown." Out of those same forty-four candidates for appellate and Supreme Court in Ohio, all but seven graduated from a law school in the State of Ohio.

102. *See* Rice & Macht, *supra* note 11.

(these percentages do not always add up to 100, because some voters indicated that the issue would not affect their vote at all). For example, approximately 76% of overall users indicated they would prefer a judge who rules in favor of taxpayers in tax cases, while 13% of overall users indicated that they would prefer a judge who rules in favor of the government and approximately 10% of voters had no preference on this issue.

Table 2: Most desired factors in a judicial candidate

Issue	Percent of voters who approve (percent of voters who disapprove in parentheses)	Republican	Democrat
Practice experience[103]	89.2% (N/A)	90.9% (N/A)	88.1% (N/A)
Ruling in favor of taxpayers in tax cases	76.4% (13.5%)	86.0% (5.2%)	64.7% (25.3%)
Ruling in favor of the insured in disputes against insurance companies	75.2% (14.7%)	66.3% (23.9%)	88.5% (2.8%)
Judicial experience	65.9% (5.1%)	68.0% (5.2%)	65.2% (5.0%)
Ruling in favor of defendant in questions of substantive criminal law	58.1% (33.7%)	65.5% (24.4%)	48.8% (42.9%)
Judicial restraint in reviewing statutes or regulations (i.e., Not overturning statutes or regulations)	51.7% (37.2%)	64.4% (25.6%)	35.2% (53.7%)
Bar recommendations	57.4% (5.1%)	47.5% (7.9%)	70.8% (1.7%)

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103.   The quiz had no way for voters to indicate that practice experience would have a negative effect on their vote.

Quality of law school attended by candidate[104]	50.6% (N/A)	45.4% (N/A)	59.9% (N/A)
Ruling in favor of plaintiff in personal injury cases	50.4% (39.8%)	28.2% (62.0%)	80.7% (11.3%)
Ruling in favor of doctors in medical malpractice cases	50.0% (40.4%)	65.7% (25.7%)	30.8% (60.1%)
Judicial activism in overturning previous precedent (i.e., Not being bound by stare decisis in close cases)	49.0% (39.8%)	41.6% (47.0%)	57.8% (30.9%)
Ruling in favor of plaintiff in discrimination cases	47.5% (42.7%)	23.4% (67.3%)	80.1% (11.4%)
Ruling in favor of government in criminal procedure cases	47.2% (45.6%)	68.7% (24.9%)	19.9% (73.4%)
Prior experience as a prosecutor	48.5% (7.1%)	59.4% (4.8%)	34.4% (10.2%)
Prior experience as a defense attorney	42.7% (9.8%)	40.4% (13.8%)	46.1% (5.1%)
Endorsement by newspaper	27.4% (19.4%)	13.0% (32.0%)	47.0% (4.5%)
Not having prior political experience	28.2% (18.1%)	30.6% (17.6%)	24.1% (20.5%)

Most of these results are unsurprising: voters prefer judicial candidates to have experience practicing law, prior experience as a judge, and high marks from bar association evaluations. Regarding substantive issues, voters prefer judges who (in close cases, when the law could be interpreted either way) vote on the side of taxpayers in tax cases, on the side of insured individuals in insurance cases, and in favor of the narrowly interpreting criminal statutes. Once again, there are a few surprises on the low side of the list: most voters prefer a candidate who has no political experience, and endorsements by the local

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104. The quiz had no way for voters to indicate that attendance at a high quality law school would have a negative effect on their vote.

newspaper do not help very much (in fact, they appear to be harmful for Republican voters).

In this data, however, we can see significant partisan differences on almost every issue. Although Republicans strongly prefer rulings in favor of the government in criminal procedure cases, they feel almost as strongly about rulings *against* the government in substantive criminal cases; that is, they appear to want judges who limit constitutional protections for defendants but also judges who will narrowly interpret criminal statutes. These preferences are not inconsistent. Rather, they indicate that voters are sophisticated enough to understand the difference between these two issues. Democrats show the same sophistication, though they have different preferences: they are fairly split on the question of substantive criminal law, but they strongly prefer judges who will vote to expand constitutional rights in criminal procedure cases.

The two different ratings for judicial activism resulted in some unexpected findings. Because the term "judicial activism" is a rather broad one, I split up the issue into two different questions: one regarding how often a judge overturned a statute or regulation (that is, exercised the power of judicial review), and one regarding how often a judge overruled prior precedent (that is, did not follow the principle of stare decisis). As might be expected, Republican voters were strongly against the use of the judicial review power, preferring by more than a two-to-one margin judges who exercised restraint when faced with a close question on that issue.[105]

But when asked about another dimension of judicial activism involving stare decisis, Republican voters were much more ambivalent, essentially splitting evenly among those who wanted judges to avoid overturning precedent if possible and those who preferred judges who did not feel the need to stand by precedent.[106] Once again, this appears to show a surprising level of sophistication on the part of these voters, who were able to distinguish between one form of judicial activism and another.

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105. Democrats, by a slightly smaller margin, preferred more "activist" judges in this sense— that is, judges who would be more willing to strike down a regulation or a statute if there was a legitimate argument that the provision was invalid.

106. Democrats showed a slight preference for this kind of "activist" judge—essentially the same level of preference they showed for the other type of "activism."

VI. CONCLUSION

The goals of this article are threefold. First, I wanted to share the quiz results and reveal the type of information voters believe they need to have in order to make informed decisions in judicial elections. Although these results represent a skewed segment of the voting population, they do show that voters would like to know more information about the specific political views of their judicial candidates, and that these voters are capable of making sophisticated distinctions between different types of legal issues.

Second, I wanted to argue in favor of the controversial proposition that elected judges should be treated like politicians, and that voters who select them should be given the same information about the candidates' views that these voters have in other types of elections. Many would worry that evaluating elected judges based on their political views runs the danger of politicizing the bench—that judges will worry about poll numbers when deciding cases instead of neutrally applying the law.[107] There are two responses to this critique. The first response is to point out that judges in most cases are bound by the law to reach a certain result, and therefore the majority of judicial decisions are unaffected by his or her ideology or policy preferences. If a particularly partisan judge ignores the law in order to reach a specific result, he or she will almost certainly be outvoted by the other judges on the panel, and if not, the decision will certainly be overturned on appeal. So the judicial system provides an effective check on judges who may be tempted to reach decisions for political rather than legal reasons. But more fundamentally, it seems a little late to worry about the risk that judges will turn into politicians. As noted above, forty-one states require at least some of their judges to stand for popular election.[108] This means that judges in these states are already politicians—politicians with a different role to play than legislators or executives, but politicians nonetheless. And if we expect the voters in these states to make

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107. There are a number of studies to support this assertion. *See, e.g.*, Paul Brace & Brent D. Boyea, *Judicial Selection Methods and Capital Punishment in the American States*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS, *supra* note 4, at 191-95 (showing a significant change in the rate at which judges reverse capital punishment cases based on whether they are up for re-election later that year); Richard R. W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 610 (2002) (showing that judges were more likely to sentence defendants to death if the sentencing occurred during that judge's election year).

108. *See Methods of Judicial Selection*, *supra* note 18.

informed decisions about the type of judge they would like to have on the bench, voters should know how the judges are likely to vote in those close cases where the law gives them the leeway to show their policy preferences.

The primary purpose of the article is to begin a dialogue—one that so far has been underdeveloped in the literature—about the kind of information voters should have when they make decisions in judicial elections. Whether or not a person approves or disapproves of using elections to select judges, it is clear that the amount of useful information available to voters is inadequate. This information gap is rapidly being filled by sensationalist attack ads that distort the record of an opponent and focus the voters' attention on hot-button political issues which make up only a tiny percentage of the cases that a judge will deal with on the bench. But the real problem is not the lack of information that is available, it is the lack of a reasonable consensus as to what *type* of information voters should have. Existing guidelines for appraising judges focus on factors that are beyond the ability of most voters to independently evaluate. I propose that the only reasonable solution is to provide voters not just with the background information about each candidate, but also the candidate's political views as expressed by his or her prior rulings on the bench.

There is also, admittedly, a normative aspect to my project. In creating this website, I was not merely attempting to provide voters with the type of information that they want to know, but also providing them with the type of information they *should* know when making their decisions. The distinction is an important one, particularly in the context of judicial elections. Judicial campaigns already provide information that the candidates *believe* the voters want to know about them (and their opponents), and the results are either bland descriptions of a candidate's background or misleading attack advertisements that focus on one or two controversial decisions by the opponent. Perhaps this actually is the information voters want to know. Otherwise, presumably, the candidates would not be spending their campaign money providing it.

But it is long past time to broaden the type of information that voters receive about their judicial candidates. Even supporters of judicial elections must admit that these elections serve little purpose when voters know nothing about the candidates they are voting for, when they cannot distinguish between the candidates in an election, or when they base their votes on incomplete or misleading information. Voters need to be able to distinguish between judicial candidates in meaningful ways—something that background information alone cannot

do. They also need to know more detailed information about all aspects of a candidate's political views, not just the party affiliation or a candidate's decisions in one or two high-profile cases. And in examining the judge's prior decisions, voters should focus on non-unanimous cases, because only those cases can provide a clue as to the judge's political predisposition. In short, it is time to give voters in judicial elections the same information that they have about candidates in other types of elections.

Appendix A: Sample Entry for Candidate

first_name	Maureen
last_name	O'Connor
State	OH
Supreme	Y
Seat	1
Incumbent	Y
party*	2
Retention	N
years of practice experience	8
practice experience*	-.9
years of judicial experience	17
judicial experience*	0.5
political experience*	2
years as prosecutor	4
former prosecutor*	0.2
years as defense attorney	0
former defense*	-0.3
law school rank raw	4
law school*	-0.6
us News tier	3
law school state	OH
endorse state bar*	2
state Newspaper Name	Plain Dealer
endorse state newspaper*	2
crim_pro*	1.5
crim sub*	2
tort*	2
med_mal*	2
ins*	1.5
tax*	0.5
elections*	0
misc_priv*	1
misc_pub*	1.5
jud_rev*	2

stare_dec*	2
website*	http://www.oconnorforchiefjustice.com/

*For details of how we determined these scores, see Appendix C.

Appendix B: The Quiz Questions
Judicial Preference Quiz

Please answer the following questions and click to see your results when you are done.

You vote in the great state of _____.

How much does a judicial candidate's party affiliation matter to your vote?

Very important
Somewhat important
Not at all important

If party affiliation does matter, which party affiliation would you prefer the judge to have?

Democrat
Republican

How important is it to you that a judge has prior experience as a practicing attorney?

Very important
Somewhat Important
Not at all important

Do you want a judge to have prior experience as a judge?

Yes, this is very important to me.
Yes, this is somewhat important to me.
This is not at all important to me.
No, it is somewhat important to me that a judge not have prior experience as a judge.
No, it is very important to me that a judge not have prior experience as a judge.

Do you want a judge to have significant political experience?

Yes, this is very important to me.

Yes, this is somewhat important to me.
This is not at all important to me.
No, it is somewhat important to me that a judge not have prior political experience.
No, it is very important to me that a judge not have prior political experience.

Do you want a judge to have prior experience as a prosecutor?
Yes, this is very important to me.
Yes, this is somewhat important to me.
This is not at all important to me.
No, it is somewhat important to me that a judge not have prior experience as a prosecutor.
No, it is very important to me that a judge not have prior experience as a prosecutor.

Do you want a judge to have prior experience as a defense attorney?
Yes, this is very important to me.
Yes, this is somewhat important to me.
This is not at all important to me.
No, it is somewhat important to me that a judge not have prior experience as a defense attorney.
No, it is very important to me that a judge not have prior experience as a defense attorney.

How important is it to you that a judge has gone to a highly-ranked law school?
Very important
Somewhat important
Not at all important

The state bar association issues endorsements for candidates. How important would the association's endorsement be?
Strong positive influence on vote
Minor positive influence on vote
Not at all important
Minor negative influence on vote
Strong negative influence on vote

The Plain Dealer also issues endorsements for candidates. How important would their endorsement be?

Strong positive influence on vote
Minor positive influence on vote
Not at all important
Minor negative influence on vote
Strong negative influence on vote

When an appellate judge reviews a lower court decision, he or she is usually bound by established legal principles which control the outcome of the case. However, if the legal question is a close one, or the law is ambiguous, a judge has the authority to interpret the law. Over the years certain patterns can be discerned in a judge's voting record in these close cases. In the following types of cases, what side would you like your judge to vote on?

Cases involving questions of criminal procedure (for example, police authority to search, defendant's right to an attorney, Miranda issues).
        In favor of the prosecutor's position.
        In favor of the defendant's position.

How important is this issue to you?
        Very important
        Somewhat Important
        Not at all important

Cases involving the interpretation of a criminal statute (for example, whether to interpret a statute to broadly cover a larger range of activity or whether to interpret it narrowly to cover a more limited range of activity).
        In favor of a broader reading of the statute.
        In favor of a narrower reading of the statute.

How important is this issue to you?
        Very important
        Somewhat Important
        Not at all important

Cases involving personal injury allegedly caused by a corporation or public entity, in which an individual seeks compensation from the corporation or public entity (for example, issuing rulings which make it easier or harder to hold a corporation or public entity responsible, or deciding whether to limit the damages that can be awarded).

In favor of the corporation or public entity.
In favor of the individual suing the corporation or public entity.

How important is this issue to you?
Very important
Somewhat Important
Not at all important

Cases involving alleged medical malpractice by a physician, in which an individual seeks compensation from a physician (for example, issuing rulings which make it easier or harder to hold for the physician responsible, or deciding whether to limit the damages that are awarded.)
In favor of the physician.
In favor of the individual suing the physician.

How important is this issue to you?
Very important
Somewhat Important
Not at all important

Cases in which an insured is suing his or her insurance company.
In favor of the insurance company.
In favor of the insured individual.

How important is this issue to you?
Very important
Somewhat Important
Not at all important

Cases involving disputes between a taxpayer and the taxing government entity involving the individual's tax liability (for example, issuing rulings which limit or expand the availability of a certain tax deduction, or challenging the tax assessment of an asset).
In favor of the government.
In favor of the taxpayer.

How important is this issue to you?
Very important
Somewhat Important
Not at all important

Cases involving election law disputes (for example, an individual or group is suing the Secretary of State challenging the Secretary's decision not to include a candidate or issue on the ballot).

 In favor of the government body that make the election ruling.
 In favor of the individual or group challenging the ruling.

How important is this issue to you?
 Very important
 Somewhat Important
 Not at all important

Courts have the authority to strike down statutes or regulations which violate the state or federal constitution. In close cases judges may disagree as to whether or not a statute or regulation should be struck down. In these close cases would you prefer a judge who usually votes to uphold the statute or regulation or votes to strike down the statute or regulation?

 Votes to uphold the statute or regulation.
 Votes to strike down the statute or regulation.

How important is this issue to you?
 Very important
 Somewhat Important
 Not at all important

Courts generally reach the same decisions that previous courts have set out in prior court decisions, assuming the facts and the law of the new case are the same as the previous case. However, occasionally the original decision is found to be flawed or incorrect, and courts decide to overrule their own previous decisions. In close cases, judges may disagree as to whether to follow a previous decision or overrule it. In these close cases would you prefer a judge who usually votes to follow the previous decision, or votes to overturn the previous decision?

 Votes to follow the previous decision.
 Votes to overturn the previous decision.

How important is this issue to you?
 Very important
 Somewhat Important
 Not at all important

Appendix C: The Quiz Algorithm

Pedigree information

In order to process the data, we needed to turn the raw quantitative data from the judicial database into scores that could be used in the algorithm to be compared against other categories. We did this by calculating the average score for each category and then dividing the result by the standard deviation.   (In statistics, this is known as calculating a "Z score").

We first determined an average score for each variable so that we could provide a score for a candidate who was running in a retention election or running against a candidate with no information. We would give a candidate a "negative" score if he or she was below average for that category, and a "positive" score only if he or she was above average for that category. Thus, the first step was to subtract the average score for judicial candidates (as calculated from the hundreds of judicial candidates that we evaluated) from the candidate's actual number. For example, the average amount of practice experience for all judicial candidates was fourteen years, so a candidate who had practiced for twenty-five years would get a +11 at this stage of the algorithm, while a candidate who had practiced for six years would get a -8 at this stage.

The second task was to normalize the various different categories so that we could compare them against each other. We accomplished this by calculating a standard deviation for each category and then dividing each candidate's difference from the average by the standard deviation. To use our previous example, the standard deviation for prior practice experience was 6.7. Thus, the candidate who had twenty-five years of experience would end up with a processed score of 1.6, while the candidate who had six years of practice experience (-8 below the average) would end up with a processed score of -1.2.

This resulted in a range roughly between -2 and 2 for each category of pedigree data, because almost no candidate was more than two standard deviations away from the average.   For non-quantitative pedigree information (such as party affiliation or endorsements), we stuck within that range, awarding a +2 if the candidate had a certain affiliation or endorsement and a -2 if the candidate had the opposite affiliation or endorsement.

Note that the numbers at this stage of the algorithm do *not* directly correspond to the candidate's final score when compared to a voter's preference.   "Positive" and "negative" numbers were only chosen as

markers for the range of data. For simplicity's sake, positive numbers generally corresponded to "conservative" pedigree information and negative numbers generally corresponded to "liberal" pedigree information. This was in no way meant to be a value judgment on the candidates' affiliations or endorsements.

As noted below, the final score of each candidate was determined by comparing the data in the candidate's database to the voter preference. If the voter preference was identical to the candidate's data, then the value would be added to the candidate's score; if the voter preference was opposite from the candidate's data, the value would be subtracted from the candidate's score. For example, if the voter indicated that he or she preferred a Democratic judge, and the candidate as a Republican, the candidate would have two points subtracted from his or her score. Likewise, if the voter indicated that he or she approved of an endorsement by the AFL-CIO, and the candidate had such an endorsement, the candidate would have two points added to his or her score. This also held true for the quantitative measures: if the voter indicated that he or she did *not* want a candidate with prior experience as a prosecutor, and the candidate had a +1.7 experience as a prosecutor, then the algorithm would *subtract* 1.7 from the candidate's score, because this candidate had a great deal more experience as a prosecutor than an average judicial candidate, and therefore would be less desirable to the voter than the average candidate.

The following are the specific numbers for each of our "pedigree" categories:

(1) Party affiliation

The raw score is +2 point if the candidate is a Republican and -2 if the candidate is a Democrat.

(2) Prior practice experience

The average amount of practice experience for a judicial candidate is fourteen years. Therefore, any amount of practice experience above fourteen deserves a positive score, and any amount below fourteen deserves a negative score. The standard deviation for this variable is 6.7. Thus, the raw score for this raw score is the total years of practice experience, minus fourteen, divided by 6.7.

(3) Prior judicial experience

The average amount of judicial experience for a judicial candidate is approximately twelve years. Therefore, any amount of judicial experience above twelve deserves a positive score, and any amount below twelve deserves a negative score. The standard deviation for this variable is 9.6. Thus, the score for this is the total years of judicial experience, minus twelve, divided by 9.6.

(4) Prior political experience

The vast majority of candidates have had no prior political experience, so there is no need to make provisions for a negative score, and there is no real way to calculate an average or a standard deviation. The raw score here is two if a candidate has held a statewide office (such as lieutenant governor or secretary of state), 1.5 for extensive time spent in a local office (defined as ten or more years as a mayor or city council member), 1 for moderate time in a local office (defined as 5-10 years), and .5 for 1-5 years in a local office.

(5) Prior experience as a prosecutor

The average amount of experience as a prosecutor for a judicial candidate is approximately 2.8. The standard deviation for this variable is 5.0. Thus, the raw score for this variable is the total years of judicial experience, minus 2.8, divided by 5.0.

(6) Prior experience as a defense attorney

The average amount of experience as a defense attorney for a judicial candidate is approximately .9. The standard deviation for this variable is 2.8. Thus, the raw score for this variable is the total years of judicial experience, minus .9, divided by 2.8.

(7) Ranking of law school

We used the current rankings from U.S. News and World Report to determine the strength of the law school that the candidate attended: candidates got a "1" for third or fourth tier; a "2" for second tier; a "3" for first tier ranked 11-50; and a "4" for a top ten law school. We then calculated an average and a standard deviation for these scores as we did

for most other variables. Most judicial candidates (perhaps surprisingly) attended a law school in the third or fourth tier; thus the average ranking was 1.6, and the standard deviation was one.

(8) State bar association endorsements

State bars traditionally give a candidate a ranking along a certain spectrum: for example, not recommended, adequate, qualified, or highly qualified. The majority of judicial candidates receive a "qualified" ranking, so this was set at zero for a raw score. A candidate received a score of -2 if he or she is "not recommended", a score of -1 if he or she is merely "adequate", and a score of 1 if he or she is "highly qualified."

(9) Newspaper endorsements

A candidate received a score of 2 if he or she is endorsed by the newspaper and a score of -2 if he or she is not endorsed.

Substantive legal questions

In our research, we recorded decisions in over twenty different categories; some decisions could be recorded in more than one category. Only non-unanimous cases were used because those cases are most likely to show a political or ideological preference. In the end, some categories did not result in a sufficient number of cases to warrant inclusion in the database and so the final category list included only ten categories:

(1) Criminal procedure (whether the procedural rights of a criminal defendant were violated)

(2) Substantive criminal law (whether the defendant's actions were covered by the criminal statute in question or whether an imposed sentence was too severe)

(3) Personal injury/tort case against a corporation/company or public entity (not including medical malpractice cases)

(4) Medical malpractice (patient suing a doctor or hospital)

(5) Insurance case (insurance company is suing or being sued)

(6) Employment/housing discrimination (employer or landlord being sued for discrimination)

(7) Tax case (government body or taxing agency is suing or being sued over amount of taxes or assessment or other tax issue)

(8) Election/ballot access case (individual or group is suing the secretary of state challenging the secretary's decision not to include a candidate or issue on the ballot)

(9) Activist—Judicial Review (did the candidate strike down a state law or agency regulation or did he or she refuse to do so when other members of the court did)

(10) Activist—Stare Decisis (did the candidate overturn or ignore a prior precedent issued by his or her court or did he or she refuse to do so when other members of the court did)

In each case, our researchers recorded which side the judicial candidate in question voted, and awarded the candidate one point if he or she ruled on one side (generally the "conservative" side), and took away a point if the judge ruled on the other side (generally the "liberal" side). In the end, we added up the total number of cases for each category and added up the total "points" for his or her rulings in those cases. A completely balanced voting record would result in a point total of zero. For example, if a candidate ruled in twenty non-unanimous cases regarding medical malpractice, and voted for the patient/plaintiff half in twenty cases and the doctor/defendant in the other half, the candidate would have a point total of zero for that category. On the other hand, if the candidate voted for the doctor/defendant in eighteen of the cases and the patient/plaintiff in only two, the judge would have a point total of sixteen (eighteen positive and two negative).

Thus, for every candidate and each category, we ended up with two numbers: total number of cases (the "count"), and point total of the decisions (the "sum"). We then divided the sum by the count to measure the candidate's political or ideological preferences for that category. A large number (approaching 1 or negative 1) would mean a very strong ideological preference. In essence, for almost every case in which the candidate's court was divided on a given issue, this candidate routinely voted for the same side. In our medical malpractice example above, for

example, a judicial candidate who voted for the defendant/doctor in eighteen of the twenty non-unanimous medical malpractice cases would end up with a sum/count ratio of .8 ((18-2)/20).

The final step was to convert the judge's number to a score for the purposes of our quiz results algorithm. There was not enough data to compute an average score or a standard deviation, so we tried to ensure that we would end up with a range between two and negative two. Thus, we set a score of 2 if the sum/count ratio was over .5 (this would mean that the candidate ruled a certain way in over 75% of the non-unanimous cases on this issue). We set a score of 1.5 if the sum/count ratio was between .33 and .5; a score of 1 if the sum/count was between .2 and .33; and a score of .5 if the sum/count was less than .2 but greater than zero. If the sum/count was a negative number, indicating a strong ideological preference for the "liberal" side of the case, the score would be somewhere between -.5 and -2. Once again, the choice of "positive" or "negative" was purely arbitrary and did not reflect any value judgment, nor did it translate into "positive" or "negative" final scores for the candidate; it was only needed to provide markers for the range of data. If the voter indicated a preference for the more "liberal" type of judge for a certain category, then the judge's actual score would *increase* if he or she had a negative (liberal) number in that category, and it would *decrease* if he or she had a positive (conservative) number in that category.

Calculating a final score for each candidate

The score for each category would then be compared to the voter's preference, and the strength of the voter's preference would act as a multiplier for that score. Thus, the score would be multiplied by two if the voter's preference was consistent with the candidate's data and the voter indicated that this issue was "very important" to him or her. If the voter's preference was consistent with the candidate's data and the category was only "somewhat important," then the score for that category would be added to the candidate's final score without any multiplier.

The score for the category would be multiplied by zero (that is, have no effect on the total score for the judicial candidate) if the voter indicated that the issue was not at all important. Finally, if the voter's preferences were contrary to the indicated ideological preference of the candidate, the raw score would be multiplied by -1 or -2 (and thus the number would be subtracted from the candidate's total score).

Sample entries

Below are two sample database entries: one for Justice Maureen O'Connor, who ran (successfully) for Chief Justice of the Ohio Supreme Court, and one for Chief Justice Thomas Kilbride, who ran (successfully) to be retained as the Chief Justice of the Illinois Supreme Court. Each candidate was independently evaluated by two separate research assistants, with the results being compared against each other and ultimately combined; these samples are only the results from one research assistant.

Justice Maureen O'Connor (R-Ohio)				
	Total cases	Total score		Processed score
	"Count"	"Sum"	Sum/Count	
Total	310			
Criminal Procedure	75	29	0.39	1.5
Substantive Criminal Law	33	23	0.70	2
Personal Injury	36	20	0.56	2
Medical Malpractice	12	8	0.67	2
Labor	5	3	0.60	2
Insurance	19	9	0.47	1.5
Misc. Private Cases	20	6	0.30	1
Misc. Public Cases	57	21	0.37	1.5
Activism (Jud. Review)	2	2	1.00	1
Activism (Stare Decisis)	19	19	1.00	1
Tax	34	6	0.18	0.5
Election law	13	-1	-0.08	-0.5

Justice Thomas Kilbride (D-Michigan)				
	"Count"	"Sum"	Sum/Count	Processed score
Total	247			
Criminal Procedure	94	-58	-0.62	-2
Substantive Criminal Law	53	-23	-0.43	-1.5
Personal Injury	24	-6	-0.25	-1
Medical Malpractice	11	-3	-0.27	-1
Labor	12	-8	-0.67	-2
Insurance	3	-1	-0.33	-1
Misc. Private Cases	8	-2	-0.25	-1
Misc. Public Cases	24	2	0.08	0.5
Activism (Judicial Review)	29	-19	-0.66	-2
Activism (Stare Decisis)	16	-2	-0.13	-0.5
Tax	4	-2	-0.50	N/A *
Election Law	1	1	1.00	N/A*

*Sample size too small for processed score

Sample calculations

Assume we had a voter who answered the quiz as follows:

Party affiliation: Democrat, Somewhat important

Prior practice experience: Somewhat important

Prior judicial experience: Somewhat important

Significant political experience: Very important

Prior experience as a prosecutor: Somewhat important to not have experience

Prior experience as a defense attorney: Very important

Important that a judge has gone to a highly-ranked law school: Very important

State bar association issues endorsements for candidates: Strong positive influence

The Plain Dealer endorsement: Minor positive influence on vote

Criminal procedure: In favor of defendant, Very important

Substantive criminal law: In favor of a broader reading of the statute, Very important

Personal injury: In favor of the individual, Somewhat important

Medical malpractice: In favor of the physician, Very important

Insurance: Not at all important

Tax cases: In favor of the taxpayer, Somewhat important

Election cases: In favor of voter, Somewhat important

Activism/Judicial Review: Votes to uphold the statute or regulation, Very important

Activism/Stare Decisis: Votes to overturn the previous decision, Somewhat important

Assuming this voter was voting in Ohio, we would apply her preferences to Justice Maureen O'Connor. (We would also apply her preferences to every other candidate she would vote for in Ohio, including O'Connor's opponent, then-Chief Justice Eric Brown, but for the purposes of this example we will only review the algorithm for one candidate). Using the table from Appendix A, we end up with the following results:

Party affiliation: Democrat, Somewhat important
    Candidate = 2 (Republican)
    Result = -2
Prior practice experience: Somewhat important
    Candidate = -1.5 (Eight years practicing attorney)
    Result = -.9
Prior judicial experience: Somewhat important
    Candidate = .5 (Seventeen years as a judge or magistrate)
    Result = +.5
Significant political experience: Very important
    Candidate = 2 (Four years as Lieutenant Governor)
    Result = +4
Prior experience as a prosecutor: Somewhat important to not have experience
    Candidate = .2 (Four years as prosecutor)
    Result = -.2
Prior experience as a defense attorney: Very important
    Candidate = -.3 (No experience)
    Result = -.6
Important that a judge has gone to a highly-ranked law school: Very important
    Candidate = -.6 (Third tier law school)
    Result = -1.2
State bar association issues endorsements for candidates: Strong positive influence
    Candidate = 2 (Ranked as "highly recommended")
    Result = +4
The Plain Dealer endorsement: Minor positive influence on vote

Candidate = 2 (Endorsed by newspaper)
Result = +2
Criminal procedure: In favor of defendant, Very important
Candidate= 1.5 (Strongly in favor of prosecutor)
Result = -3
Substantive criminal law: In favor of a broader reading of the statute, Very important
Candidate = 2 (Very strongly in favor of broad reading)
Result = +4
Personal injury: In favor of the individual, Somewhat important
Candidate = 2 (Very strongly in favor of corporations)
Result = -2
Medical malpractice: In favor of the physician, Very important
Candidate = 2 (Very strongly in favor of physician)
Result = +4
Insurance: Not at all important
Candidate = 1.5 (Strongly in favor in insurance company)
Result = 0
Tax cases: In favor of the taxpayer, Somewhat important
Candidate = .5 (Mildly in favor of taxing agency)
Result = -.5
Election cases: In favor of voter, Somewhat important
Candidate = 0 (No preference shown)
Result = 0
Activism/Judicial Review: Votes to uphold the statute or regulation, Very important
Candidate = 2 (Strong tendency to uphold statute)
Result = 4
Activism/Stare Decisis: Votes to overturn the previous decision, Somewhat important
Candidate = 2 (Strong tendency to adhere to precedent)
Result = -4

In adding up all of the categories, Justice O'Connor receives a final score of 8.1 for this voter. If O'Connor were running in a retention election, this would be sufficient to result in a recommendation in favor of retention because the number is greater than zero. Because O'Connor is running in a contested election, the algorithm would calculate a score for her opponent (in this case, Chief Justice Eric Brown) and then compare O'Connor's score to Brown's score and recommend that the voter choose the candidate with the higher score.