

Summer 2009

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### Recommended Citation

Duane Benton, *Comments on the White, Caufield, and Tarr Articles*, 74 Mo. L. REV. (2009)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol74/iss3/12>

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# Comments on the White, Caufield, and Tarr Articles

Duane Benton<sup>1</sup>

These three articles are valuable additions to the literature on retention elections. I am honored to comment, understanding I was chosen because I have survived merit selection (both as an applicant and as chair of the commission), a retention election, federal appointment, various roles in partisan elections, and an undergraduate political-science, voter-behavior education.

## I. JUDICIAL PERFORMANCE EVALUATIONS

In her article, Justice White makes an eloquent plea for judicial performance evaluations.<sup>2</sup> More information is better, so the goal is laudable. She acknowledges that evaluations are meaningful only if they meet three criteria: “critically designed, appropriately administered, and widely disseminated.”<sup>3</sup> Each step is a challenge.

First, as to design, recent scholarship indicates that empirical evaluation of judges is difficult.<sup>4</sup> What Justice White advocates is qualitative evaluation. Most qualitative evaluation uses the ABA criteria, which are bland and generic. Proponents need to be more creative. To rate professionalism and temperament, they should consider asking, “Is the judge more dignified/courteous/patient/controlled/fair-with-unrepresented-people than Judge Judy?” While 57% of Americans cannot name a Supreme Court Justice,<sup>5</sup> *Judge Judy* – watched by millions daily – is currently the top show in daytime

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1. Judge, United States Court of Appeals for the Eighth Circuit.

2. Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635 (2009).

3. *Id.* at 652.

4. See generally Jeffrey M. Chemerinsky & Jonathan L. Williams, Foreword, *Measuring Judges and Justice*, 58 DUKE L.J. 1173, 1178-79 (2009) (introducing nine articles and twelve responses presented at the symposium); Steven G. Gey & Jim Rossi, *Empirical Measures of Judicial Performance: An Introduction to the Symposium*, 32 FLA. ST. U. L. REV. 1001, 1004, 1007-08 (2005) (summarizing sixteen articles presented at the symposium).

5. FindLaw.com, FindLaw’s US Supreme Court Awareness Survey, <http://public.findlaw.com/ussc/122005survey.html> (last visited July 23, 2009). Press Release, Ipsos News Center, Most Americans Can’t Name Any Supreme Court Justices, Says FindLaw.com Survey (Jan. 10, 2006), <http://www.ipsosna.com/news/pressrelease.cfm?id=2933#>.

television, ahead of Oprah Winfrey and *Wheel of Fortune*.<sup>6</sup> Comparisons to Judge Judy are not trivial, because one of the most important determinants of public perception of courts is (in poll-speak): “What happens during TV judge programs.”<sup>7</sup>

As to a judge’s legal ability, proponents should consider asking, “Does the judge have the legal ability of the best lawyers?” Half the public believes that the best lawyers are *not* selected as judges, one-fourth has no opinion, and only one-fourth agrees that the best lawyers are selected as judges.<sup>8</sup>

I suspect that “Judge Judy” and “best lawyers” questions would make demeanor and legal knowledge more relevant to the average voter. Proponents can probably think of snappy ways to operationalize the other ABA criteria also.

Second, information gathering for evaluations must be appropriate. Here the concern is the cost of the information, particularly the effect on the process of judging. The best information, according to Justice White and others, comes from anonymous reports, including those from other judges and court personnel. These inquiries can harm the frank and collegial communication required in (at least) appellate courts and, as Professor Caufield notes, may change the behavior of any judge.<sup>9</sup>

Third, evaluations must reach and be useful to voters. The few states that mail evaluations to each voter – or maintain them on a website – should be applauded. Although Professor Caufield cites optimistic assessments, I find more believable the studies concluding that, even in these few states, voters do not take time to read the evaluations.<sup>10</sup> Again, more pizzazz in design and presentation would increase the public’s use of evaluations.

6. David Tanklefsky, *Syndication Ratings: ‘Judge Judy’ Passes ‘Oprah’ as Week’s Leader*, BROADCASTING & CABLE, June 9, 2009, available at [http://www.broadcastingcable.com/article/print/278920-Syndication\\_Ratings\\_Judge\\_Judy\\_Passes\\_Oprah\\_As\\_Week\\_s\\_Leader.php](http://www.broadcastingcable.com/article/print/278920-Syndication_Ratings_Judge_Judy_Passes_Oprah_As_Week_s_Leader.php).

7. DAVID B. ROTTMAN, RANDALL HANSEN, NICOLE MOTT & LYNN GRIMES, NAT’L CTR. FOR STATE COURTS, PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY 80 tbl.4.14 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/201302.pdf> and [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PerceptionsPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PerceptionsPub.pdf). See also M/A/R/C RESEARCH, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 11, 95, 97 (1999) [hereinafter M/A/R/C Research] (survey and report prepared for the American Bar Association), available at <http://www.abanet.org/media/perception/perceptions.pdf>.

8. M/A/R/C RESEARCH, *supra* note 7, at 71, 117.

9. Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 MO. L. REV. 573, 592 (2009).

10. See, e.g., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., THE BENCH SPEAKS ON JUDICIAL PERFORMANCE EVALUATION: A SURVEY OF COLORADO JUDGES 26 (2009), <http://ssrn.com/abstract=1365256>; Mark I. Harrison, Sara S. Greene, Keith Swisher & Meghan H. Grabel, *On the Validity and Vitality of Arizona’s Judicial Merit Selection System: Past, Present, and Future*, 34 FORDHAM URB. L.J. 239, 254

## II. RETENTION ELECTIONS

In her article, Professor Caufield defends retention elections as a “workable compromise” that is superior to contestable elections.<sup>11</sup> Professor Tarr counters that they have not accomplished the purposes of depoliticizing judicial selection, reducing fundraising and negative campaigning, and improving voter choice.<sup>12</sup> These two articles generally differ in perspective on the same facts and studies: Professor Caufield says that retention elections do significantly reduce overt partisanship and fundraising or negativity, while Professor Tarr says that retention elections do not significantly affect political influence and fundraising or negativity.

Although Professors Caufield and Tarr differ most on voter choice, they do not represent the extremes. The strongest advocates of retention elections intended that they would be nearly meaningless:

The historical examination has revealed that retention elections were never designed to promote those democratic principles. Rather, they were designed to allow qualified judges to serve long terms with only a modest amount of direct accountability. Indeed, those who developed the concept preferred life tenure, but they acquiesced to political realities and allowed the public an opportunity to remove judges in extreme circumstances. Clearly removal was perceived as the exception, not the rule. Thus, the facts that voters do not turn out in large numbers, and that few judges are removed, are entirely consistent with the tenets of retention elections.

This study has shown that the two principal objectives of retention elections have been met: they provide judges with lengthy terms of

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(2007); B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1439 (2001). Dann and Hansen’s summary follows:

Despite state efforts to disseminate information, many voters are not receiving or making use of the evaluation reports. A study of retention elections in 1996 found that, in Alaska and Colorado, just 58% and approximately 55% of voters, respectively, reported awareness of judicial performance evaluation reports. Exit polls in Arizona and Utah indicated even less awareness of such reports among voters. Further, the study showed that even fewer voters took advantage of information in these reports. While these statistics are from relatively small samples, the implications are discouraging, considering state efforts to disseminate evaluation reports.

*Id.* (citations omitted).

11. Caufield, *supra* note 9, at 575.

12. G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 633 (2009).

tenure, and they provide the electorate with some measure of control over the judiciary.<sup>13</sup>

These strong-advocate objectives rest on the premise that the public does not understand what judges do and cannot rationally choose them. Justice White and Professor Caufield invoke this premise often, but most symbolically when they repeat the assertion that most citizens do not grasp that judges simply “interpret laws.” More accurately, citizens are confused because the judiciary’s role is confusing. Judges “enforce laws” when they sentence criminals and help decide who pays for wrongs and breaches; for years judges have justified appropriations by claiming to be the ultimate law enforcers. It is logical and rational that nearly as many citizens say the judiciary’s role is to “enforce laws” as say it is to “interpret laws.”<sup>14</sup> The tough issue is how judges (and knowledgeable observers) can tell the confusing nuanced story to a public with more pressing needs than to be lectured by conflicting voices. Telling the facts in primary and secondary education is the best hope (as Justice White suggests).

At the other extreme, some professors – mostly of political science – assert that “several propositions traditionally used to criticize partisan elections and to promote nonpartisan systems and the Missouri Plan do not survive scientific scrutiny.”<sup>15</sup> The critics’ theme is that retention elections inhibit voting by suppressing challengers and party label.<sup>16</sup> They rely on the findings that a judge’s (former) political party – or the appointer’s party – correlates highly with a judge’s views on many issues<sup>17</sup> and is the information voters want and are satisfied with.<sup>18</sup>

These critics of retention elections focus on the voter’s immediate choice, ignoring voters’ collective long-range choice. In many states, the judiciary’s form is set by a popular vote, usually on a constitutional amend-

13. Susan B. Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 210, 233 (1980).

14. M/A/R/C RESEARCH, *supra* note 7, at 20 (asked to choose the judiciary’s function, 49% say “interpret laws”; 42% say “enforce laws”).

15. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 326 (2001).

16. Melinda Gann Hall, *Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives*, 69 J. POL. 1147, 1148, 1157 (2007).

17. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219, 243 (1999) (based on meta-analysis of eighty-four legal and political-science studies, “party is a dependable measure of ideology in modern American courts”). Paul Brace, Laura Langer & Melinda Gann Hall, *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387, 388 (2000) (proposing a model based on extensive review of other studies that concludes that “justices’ preferences reflect, to a large extent, a combination of their partisan affiliations and the ideology of their states at the time of their initial accession to office.”).

18. David Klein & Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POL. RES. Q. 709, 725 (2001).

ment. Where voter-approved constitutions ban party identification (but highlight incumbency) of judges, the “anti-voter” election results from an earlier election. Students of government should focus on the whole equation: how voters trade off the desire for immediate information (party) with the desire for a fair and impartial judiciary.

### III. SUGGESTIONS FOR RESEARCH

A baseline need exists for research on the effects of different types of judicial election. Studies are mixed. According to public-opinion data, the method of election does not significantly affect the public’s perception of political neutrality. As for “the perception that politics gets mixed up in state court decisions more than it should,”

Differences are found, however, by whether or not the voters elect their state supreme court judges. Ironically, when judges have to run for elective office, people are more likely to think their decisions are above politics. Fifty-seven percent of those living in states that elect judges see court decisions too mixed up in politics versus 69% of those in states where judges never have to face the voters. And opinions of those in elective states are relatively uniform – similar numbers of those living in partisan, non-partisan and retention states report that court decisions are too mixed up [in] politics. A likely explanation for this pattern is that concern with politics and appointed judges stems from the direct influence politicians have in those states on deciding who should be a judge and who should retain their judgeship.<sup>19</sup>

On the other hand, the most detailed study of “diffuse support” of state courts finds that partisan elections reduce general good will toward the courts, while nonpartisan and retention elections do not significantly differ from appointed systems in their effect on good will.<sup>20</sup>

The issue may be restated as measuring how much society – the *White* decision, outreach by judges and courts, special-interest participation (including the bar’s), campaign fundraising and spending, general quality of

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19. PRINCETON SURVEY RESEARCH ASSOC. INTL., SEPARATE BRANCHES, SHARED RESPONSIBILITIES: A NATIONAL SURVEY OF PUBLIC EXPECTATIONS ON SOLVING JUSTICE ISSUES 20 (2009), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctcomm&CISOPTR=118> (report prepared for Nat’l Ctr. for State Courts).

20. Damon M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for State Courts*, 36 AM. POL. RES. 297, 312-13 & tbl.3, 326 n.13 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=870592](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870592).

judges,<sup>21</sup> academic and media attitudinalism/legal realism – is forcing a convergence of the systems to elect judges. The public everywhere is taking more interest in, and voting more on, judges – regardless of the system of election.<sup>22</sup>

After all, big-dollar, high stakes judicial politics is no respecter of systems; it has affected states choosing judges in straight partisan elections (for example, Alabama and Texas), initial partisan elections with retention re-elections (Illinois and Pennsylvania), pure non-partisan elections (for example, Washington and Wisconsin), non-partisan elections with candidates selected by political parties (Michigan and Ohio), gubernatorial appointment with retention election systems (California appellate courts), pure merit selection systems (Tennessee Supreme Court), and even legislative elections (South Carolina).<sup>23</sup>

Such broad-brush statements (like many of mine) need the refinement of research on the probability of big-dollar, high-stakes campaigns in each type of system.

I also find no research on the beliefs of many judges facing retention.<sup>24</sup> Judicial ballots are generally very long.<sup>25</sup> Judges instinctively think that the greater the number of candidates on a retention ballot, the less chance that any one judge will face organized opposition. According to a study of all retention elections over their forty-two-year history, voters almost never differentiate among the judges listed on the ballot,<sup>26</sup> but the study does not corre-

21. M/A/R/C RESEARCH, *supra* note 7, at 69, 88 (“People’s strongest opinion about judges is that they are qualified for their jobs. Encouragingly, more than half [54%] the people believe this statement,” while only 25% disagree or strongly disagree, with 20% neither agreeing nor disagreeing.).

22. Melinda Gann Hall & Chris W. Bonneau, *Does Money Buy Voters? Campaign Spending and Citizen Participation in State Supreme Court Elections*, Feb. 1, 2007, available at <http://ssrn.com/abstract=1009671>.

23. Thomas R. Phillips, *The Merits of Merit Selection*, 32 HARV. J.L. & PUB. POL’Y 67, 67 n.1, 88 (2009) (Remarks by former Chief Justice of Texas (1988-2004) at *The People and The Court: The Twenty-Seventh Annual National Federalist Society Student Symposium on Law and Public Policy – 2008*).

24. For empirical research on some judges’ beliefs about retention elections, see Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643 (2002).

25. See Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849, 855-56.

26. Larry Aspin, *Judicial Retention Election Trends 1964-2006*, 90 JUDICATURE 208, 211 (2007), available at [www.ajs.org/ajs/publications/Judicature\\_PDFs/905/aspin\\_905.pdf](http://www.ajs.org/ajs/publications/Judicature_PDFs/905/aspin_905.pdf). “By definition, these [retention] ballots indicate that each candidate is an incumbent and structure the voter’s choice in terms of a response to the candidate’s incumbency. This structuring creates a tendency for voters to cast the same votes for

late this with the number of judges on each slate. Within the same state, an urban ballot usually has more candidates than a rural ballot; across states, ballot lengths vary greatly. So research is feasible.

Judges often assume that defeat is less likely if there were diverse appointers – typically governors of different parties – of the judges on a retention ballot. In one survey, voters – once told the appointing governor’s name – become less undecided *and* much more likely to vote “no” than “yes.”<sup>27</sup> This survey does not refute the “diverse appointers” hypothesis because, as the authors concede,<sup>28</sup> most voters actually do not know the appointer’s name. I would add that diverse appointers may be more effective in deterring organized opposition to a slate than in affecting balloting on the slate. Because governors (and their parties) change in most retention states, analysis is possible.

I find no research on whether courts delay controversial decisions until after the retention election, or use the anonymous “per curiam” designation more frequently as elections approach. One article finds an association between a judge’s vote for the death penalty and the proximity of an election.<sup>29</sup> As for judges themselves, 15.4 % of those responding to a ten-state survey of 991 judges who had faced retention votes said that “judges avoid controversial cases or rulings before elections.”<sup>30</sup> The most frequent response (27.6%) was that “retention elections make judges more sensitive to public opinion.”<sup>31</sup> But no article directly analyzes the “delay” or “per curiam” theses. Analysis is feasible by comparing public releases of court decisions, before and after elections, weighted by media coverage and political impact.

In conclusion, the real-world bases for retention elections are clear. The public strongly wants to elect judges and dislikes an appointment-only system but will tolerate a system of initial appointment only if the voters can decide whether a judge remains in office.<sup>32</sup> Most judges and the leading bar groups

or against all the judges on the same retention ballot.” Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter’s Perspective*, 64 OHIO ST. L.J. 13, 24 (2003).

27. Peverill Squire & Eric R.A.N. Smith, *The Effect of Partisan Information on Voters in Nonpartisan Elections*, 50 J. POL. 169, 172 (1988).

28. *Id.* at 177.

29. Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 438-39 (1992).

30. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 313 (1994). The initial question was “Does the existence of judicial retention elections in any way alter the behavior of judges on the bench?” *Id.* at 312. The quotations in the text above responded to the follow-up request for specifics. *Id.*

31. *Id.* at 312.

32. GREENBERG, QUINLAN, ROSNER RESEARCH INC., JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE: OCTOBER 30-NOVEMBER 7, 2001, at 7-8 (questions 52-53) (2001), <http://www.gavelgrab.org/wp-content/resources/polls/JASNationalSurveyResults.pdf>.

oppose normal partisan election of judges but will settle for a nonpartisan, noncompetitive retention election.<sup>33</sup> The “second choice” nature of retention elections ensures comparisons to first choices for years to come.

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33. GREENBERG, QUINLAN, ROSNER RESEARCH INC., JUSTICE AT STAKE – STATE JUDGES FREQUENCY QUESTIONNAIRE: NOVEMBER 5, 2001-JANUARY 2, 2002 1-2, 13 (2002) at 1-2, 13 (questions 2-3, 36), *available at* <http://www.gavelgrab.org/wp-content/resources/polls/JASJudgesSurveyResults.pdf>. For the American Bar Association’s position, see ALFRED P. CARLTON, JR., JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY, app. A at 4-5, 13-14 (2003), *available at* <http://www.abanet.org/judind/jeopardy/pdf/report.pdf>.