

CHECK ONE AND THE ACCOUNTABILITY IS DONE: THE
HARMFUL IMPACT OF STRAIGHT-TICKET VOTING ON
JUDICIAL ELECTIONS

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INTRODUCTION

States that elect judges are heir to a populist tradition dating back to the Jacksonian era. In the spectrum between independence and accountability, these states emphasize accountability. Systems vary from state to state, and even within states there may be geographic diversity or different selection systems for different levels of courts. Elections can be partisan or non-partisan, contested, or, as in merit-selection states, retention. Some states have dabbled in public financing of judicial elections. Reformers are most critical of contested partisan elections. Those are the elections where the most money is spent, the nastiest ads aired, and the dignity of the judicial office most often impugned. One factor that often goes unnoticed, perhaps because of its unquestioned status in a partisan election, is the ballot itself.

Critics of partisan judicial elections decry the very concept of attaching a party label to a judicial candidate.¹ The argument certainly has its merits. However, even if a voter blindly checks the box for every Democrat (for example) on the ballot, at least he has to confront the name and notice that the candidate is running for a judgeship. Some sort of internal evaluation—perhaps memory recall of campaign literature or radio advertisements—remotely

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¹ See, e.g., Editorial, *Firing Judges*, WASH. POST, Nov. 5, 2010, at A20, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/04/AR2010110407646.html>.

informs the choice. Nevertheless, in a few states, the voter need not even do that; he literally need only check a single box and be out of the voting booth in thirty seconds or less. Straight-ticket voting² virtually nullifies the legitimacy of judicial selection in partisan election states. The low informational nature of these races makes straight-ticket voting attractive to the uninformed voter. Parties in states that allow the practice seize the opportunity to take advantage of the uninformed voter and urge the single checkmark.

If the logic of an elected judiciary is that it is more accountable to the public it serves, then straight-ticket voting directly contravenes that goal by placing all the power in the selection process in the hands of party leaders. Not only are minority party candidates handicapped in such a system, so are majority party candidates who fail to win the favor of party leadership. Judicial candidates and judges are indebted to leadership for their patronage and nomination, despite the fact that the judiciary does not align with conventional party platforms. Ultimately, uninformed voting translates to facile voting, and influence translates to control. The judges who win in straight ticket races are likely neither accountable to the people nor independent of the party that elevated them.

At present, sixteen states' ballots have a straight ticket option.³ Of those, three select their judges through partisan elections and require that their judges participate in regular general elections, not retention elections: Alabama, Texas, and West Virginia.⁴ As such, these three are the states in which voters are most likely to rely on straight-party voting in casting their votes in judicial elections.

Texas stands as a prime example of a state where politics, and particularly straight-ticket voting, has long had a visible influence in the election of judges. As the current Chief Justice, Wallace Jefferson, observed in connection with his own election:

My success depended primarily on a straight-ticket partisan vote. . . . Even if I had never appeared in court, lost every endorsement and fared poorly in polls that assess

² Straight-ticket voting is understood here as literally the single party box check rather than checking every member of a given party on the ballot, which is downright deliberative in comparison.

³ *Straight-Ticket Voting*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16597> (last updated June 2, 2011).

⁴ *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited June 9, 2012).

qualifications, I would still have won in Texas. The state voted for McCain, and I was the down-ballot beneficiary. Currently, merit matters little in judicial elections. We close our eyes and vote for judges based on party affiliation even though a party label does not ensure a judiciary committed to the rule of law.⁵

Former Chief Justice, Tom Phillips, echoed the point:

Most of us [judges] feel like judges should not run as Republicans or Democrats, which . . . in my opinion has been a terrible blow for the stability of our judiciary. As the state has changed from one party to the other over the last decade, over 200 of our state trial and appellate judges have been defeated in general elections. In almost every case for no other reason that I can identify other than they were running on the party that was not popular.⁶

While no case has reached the U.S. Supreme Court questioning Texas' straight-ticket voting system for its judges, it may not be an accident that the high court's two most recent relevant cases involved West Virginia, which has a straight-ticket option on its ballot, and New York, where although there is no straight-ticket option, voter behavior is typically lock-step in voting straight party line (downstate, Democratic, and upstate, Republican).

In the pages that follow, we examine straight-ticket voting, the particularly pernicious role it plays with respect to voter choice, and its impact on both judicial independence and accountability. We then consider the probable outcome of a constitutional challenge to Texas straight-ticket voting—we think it would likely fail—and suggest two partial ways out of the thicket, one legislative and one administrative.

I. THE EFFECT OF STRAIGHT-TICKET VOTING ON INDEPENDENCE AND ACCOUNTABILITY

Independence and accountability are the central competing ideals in judicial selection; both qualities are fundamental to a judiciary's legitimacy. A state's decision to elect its judiciary necessarily

⁵ Wallace B. Jefferson, Op-Ed., *Making Merit Matter By Adopting New System of Selecting Judges* (Mar. 21, 2009), HOUS. CHRONICLE, <http://www.chron.com/opinion/outlook/article/Wallace-B-Jefferson-Make-merit-matter-by-1544078.php>.

⁶ *Interview with Tom Phillips*, WMHT: JUSTICE FOR SALE (2009), <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/philips.html> (last visited Apr. 23, 2012).

prioritizes accountability above independence, but some semblance of the latter must remain for the sake of judicial integrity. The electoral context, particularly the partisan variety, automatically ushers in politics. The influence and financial strength of the major parties and complementary interest groups have irrevocably shaped the tone and substance of judicial elections around the country. The dominance of parties is exaggerated in states where straight ticket voting is an option, and judicial independence suffers. Additionally, and contrary to the intent of judicial elections, straight-ticket voting renders meaningful judicial accountability highly unlikely.

A. Party Influence and Judicial Independence

Political parties and partisan interests have moved steadily into the judicial election field as judicial independence gradually erodes. There is evidence to suggest that parties are overtly nationalizing state-level judicial elections. Though still in a nascent stage, the Democratic Judicial Campaign Committee, formed in 2007, has an explicitly partisan goal: elect Democratic judges to state courts.⁷ No corresponding Republican effort currently exists, but this may be due to the lack of a need for one, given the funding ability and staunchly Republican allegiances of the various chambers of commerce throughout the country (the U.S. Chamber and its Ohio affiliates spent \$4.4 million in 2000, while the U.S. Chamber and the Illinois Republican Party teamed up to spend \$1.9 million in 2004).⁸

To be sure, political parties are very interested in state judicial elections. The ramifications of the deep pockets of parties are largest in states where partisan elections occur. From 2000 to 2009, the Alabama Democratic Party spent just under \$5.5 million on judicial elections.⁹ The Illinois Democratic and Republican parties were the top spenders in their state over the past decade (\$3.7 and \$1.9 million, respectively).¹⁰ The Texas Democratic Party spent just over \$900,000 on television advertisements for the 2008 state supreme court elections alone (though all three races were lost).¹¹ Money equals power and, more often than not, money equals votes.

⁷ JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE* 44–45 (2010).

⁸ *Id.* at 10.

⁹ *Id.* at 78.

¹⁰ *Id.* at 79.

¹¹ *Id.* at 83.

In judicial elections where a majority of the populace may not even be aware the race exists, an expensive primetime television or other media buy in a major market may make all the difference, and he or she with the wealthier friends, or party bosses, can afford it.

With that power comes a chilling effect; whether or not their actual decision-making is affected in individual cases, the specter lingers in the popular imagination that judges decide cases the way their political patrons want them decided, at the peril of their jobs. This is the antithesis of judicial independence. While polling shows that the threat to the integrity and impartiality of legal opinions strikes a large number of Americans as repugnant and anathema to the rule of law,¹² voters in elected judge states are fairly likely to hold their noses, especially in states where straight-ticket voting is available. Party allegiance and convenience trump concerns over judicial independence.¹³ Partisan dominance of every aspect of the judicial selection process in those states with straight-ticket voting¹⁴—from the hand picking of candidates to the dissemination of propaganda—corrupts the idea of an independent judiciary, one distinct from the chaos of partisan politics. The threat that straight-ticket voting poses to institutional independence is both particularly strong and insidious, as the judiciary becomes just another partisan branch of government.

B. Party Influence and Judicial Accountability

At the opposite end of the spectrum of judicial values, accountability was supposedly the impetus for judicial elections in

¹² For example, seventy-eight percent of Minnesotans “are ‘very’ or ‘somewhat’ concerned that judicial candidates must raise more money, run television advertising, and potentially seek party and political interest group support.” *Poll of Minnesota Citizens*, JUSTICE AT STAKE CAMPAIGN, <http://www.justiceatstake.org/resources/polls.cfm> (last visited Apr. 23, 2012).

¹³ In contrast to Minnesota, polls have shown seventy percent of Texans favoring judicial elections. Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 *FORDHAM URB. L.J.* 907, 935 n. 136 (2002). However, at one point, eighty-three percent believed the elections should be nonpartisan. Janet Elliott, *Ethics Rules Revised for Candidates*, *HOUS. CHRONICLE*, Oct. 23, 2002, at A34, available at <http://www.chron.com/opinion/outlook/article/Wallace-B-Jefferson-Make-merit-matter-by-1544078.php>. This tolerance for judicial elections may be a quirk unique to the United States populace. While a few judicial elections do take place in Swiss cantons and some Japanese judges stand for retention elections, the United States is unique in subjecting a significant percentage of its judiciary to the electoral process.

¹⁴ It should be acknowledged that partisan dominance of judicial selection may not be endemic to partisan election states; in those states where governors appoint judges to terms, certainly party alliance between the judge and the executive could factor into the equation. However, the politics are nowhere near as rampant and threatening to judicial independence as they are in straight-ticket voting states.

the first place.¹⁵ Yet straight-ticket voting wreaks havoc on judicial independence, without concomitant gains in accountability.

Accountability is viable in a judicial selection system. While merit selection states tend to give a nod to incumbents, recent years have seen a number of instances in which state high court judges lost their seats in retention elections and contested elections due to one highly unpopular decision. For a recent and dramatic example of drastic voter enforcement of judicial accountability, look to the 2010 Iowa Supreme Court retention election, where three state supreme court justices lost their seat due to the unpopularity of a single decision on same-sex marriage.¹⁶ While Iowa employs a merit selection/retention system, not a partisan election system, this example demonstrates the power that a coalition of well-funded individuals can wield. In effect, such a coalition can buy an election. The anti-retention forces in this race raised approximately \$650,000 to remove three justices who were part of a unanimous decision finding that the Iowa constitution required the recognition of gay marriage. Previously, no justice had failed a retention election since the adoption of the merit selection system in 1962. In the same year, a move to defeat Kansas Supreme Court justices who had voted for an unpopular decision was narrowly beaten back, and there have been similar episodes in Pennsylvania and Colorado. Practices such as these raise their own set of problems—ones well beyond the scope of this article. More edifying practices to increase accountability include the incorporation of judicial performance evaluations (“JPEs”) to inform voters on whether to vote for or against a sitting judge’s retention.

Colorado’s JPE program considers such criteria as courtroom demeanor, efficiency on the bench, and rigorousness of appellate decisions.¹⁷ As Rebecca Kourlis, a former chief justice of the Colorado Supreme Court notes, the program has proven both popular and effective. A television advertisement recently ran encouraging voters to visit the evaluation committee’s website, where a voter could easily access information on a given judge.¹⁸

¹⁵ Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters For Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1259–60 (2008).

¹⁶ Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REGISTER.COM, (Nov. 3, 2010), <http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices>.

¹⁷ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *TRANSPARENT COURTHOUSE: A BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION* 8, 11, 13–15 (2006).

¹⁸ *Judicial Performance Reviews*, COLO. OFFICE OF JUDICIAL PERFORMANCE EVALUATION, <http://www.coloradojudicialperformance.gov/review.cfm> (last visited Apr. 9, 2012).

Colorado judges are held accountable for their performance on the bench through these informed evaluations; the electorate can remove a judge for failure to abide by standards laid out by the evaluation committee and reported on by those with firsthand experience with the judge (litigants, courtroom staff, etc.).¹⁹ This makes sense for a state that opts to prioritize accountability. Those passing judgment on the judge, the voters, have the ability to inform themselves as to whether a judge is good at his or her job.

Texas, Alabama, and West Virginia do not utilize an evaluation system like Colorado's.²⁰ There is little in the way of monitoring or oversight of judicial performance at all. In Texas, in fact, political party leadership urges the opposite of accountability during election season. The Dallas County Democratic Party chairwoman urged voters in the 2008 election to: "vote D and you're done."²¹ A state senator similarly informed voters: "[o]ne and you're done."²² County party chairpersons routinely rally the electorate around the idea of casting only one vote.²³

Party dominance of judicial elections in Texas remains strong. A 2008 Texas Democratic Party advertisement focused on the solely Republican membership of the state's supreme court and emphasized its perceived propensity to overturn jury rulings in favor of big business and insurance interests.²⁴ The ad concluded

¹⁹ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 17, at 8, 11, 16–18.

²⁰ See *Methods of Judicial Selection Retention: Evaluation Programs*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/judicial_performance_evaluations.cfm?state (last visited Apr. 6, 2012) (explaining that Texas, Alabama, and West Virginia do not evaluate the performance of judges who are up for reelection while Colorado has legislation which calls for midterm and retention year evaluations by the office of judicial performance evaluation that specifies evaluation criteria). Aside from decentralized efforts, such as those of the Dallas Bar Association, see *Judicial Evaluation Poll*, DALL. BAR ASS'N, <http://www.dallasbar.org/general-election-polls> (last visited Apr. 6, 2012) (offering judicial evaluations of judicial evaluations during non-election years), or the League of Women Voters of Alabama, see *Alabama Elections*, LEAGUE OF WOMEN VOTERS OF ALABAMA, <http://www.lwval.org/learn-vote/election2012/> (last visited Apr. 6, 2012) (providing election information for voters of the primary elections), neither the judiciaries nor the state bar associations of these states provide formalized evaluations of judges. Would a voter faced with the Harris County (Houston, Texas) ballot opt to become educated on every one of the seventy or so judges' evaluations? A later discussion of voter fatigue should indicate the unlikelihood of such informed democracy when all one has to do, instead, is pick "R" or "D."

²¹ Gromer Jeffers, Jr., *Parties Beg: Vote Straight Ticket North Texas Candidates' Fates Ride on Support of Base at Polls*, DALL. MORN. NEWS, Oct. 22, 2008, at 2B.

²² *Id.*

²³ Ironically, the mechanics of straight ticket voting have been abused for the sake of vote invalidation: in 2008, there were rumors that Republican interests were subversively encouraging voters to just check the Democratic box, but to be sure to check the box for Barack Obama as well. See *id.* A Texas ballot is invalidated if a voter checks the straight party option and then marks anything further.

²⁴ MSHCINTERACTIVE, *Fair and Balanced Supreme Court*, YOUTUBE (Oct. 24, 2008),

with a voiceover calling for “fair and balanced courts” and then listed the names of the three candidates. The visual text of the ad read, “Vote for Democrats.”²⁵ Though not explicitly condoned in the advertisement, the implication was to vote a straight ticket. This goal was made markedly easier by the ability of Texas voters to do so with a single checkmark.

The straight party option, at least in Texas, has resulted in county-wide sweeps, or flips, of lower court judges, with the flips corresponding to the partisan mood of the general population. The 2010 judicial elections in Harris County (which encompasses Houston) resulted in a “straight ticket bonanza” for the Republican party. The county’s party chairman, citing the likely 70 judge pickup for the party (a complete victory), called it “fabulous.”²⁶

His Democratic counterpart lamented that though “[the Democrats] had a good slate of judges . . . [t]hey got caught up in the fact that there are so many judicial positions on the ballot that it’s virtually impossible for the average voter to know which ones are deserving of support and which ones aren’t.”²⁷ That chairman likely was not saying the same thing in years prior: similar flips happened in Harris County in 2008 and Dallas County in 2006, but both in favor of Democrats.²⁸ As Chief Justice Wallace Jefferson of the Texas Supreme Court acknowledged, in Texas’ electoral climate, as long as the straight ticket option persists, Democratic judicial candidates do not have realistic access to statewide positions and Republicans are at a disadvantage in urban, lower court races (though 2010’s anti-Democratic mood apparently assuaged the latter).²⁹

http://www.youtube.com/watch?v=ZK0ubaqo5RA&feature=player_embedded (citing David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 7–22 (2007)).

²⁵ MSHCINTERACTIVE, *supra* note 24.

²⁶ Brian Rogers, *Straight-Ticket Vote Rules in Judicial Races*, HOUS. CHRONICLE (Nov. 2, 2010), <http://www.chron.com/dispatch/story.mpl/metropolitan/7276263.html>.

²⁷ *Id.*

²⁸ Such judicial flips not only represent the domination of party politics, but also the sweeping out of experienced trial judges to make room for an incoming class made up largely of judicial freshmen. The implications for the efficiency, authority, and integrity of the bench are daunting. See generally Mike Tolson, *Democratic Sweep Revives Debate on Election of Judges*, HOUS. CHRONICLE (Nov. 9, 2008), <http://www.chron.com/default/article/Democratic-sweep-revives-debate-on-election-of-1780514.php> (discussing the Democratic flip in Harris County where twenty-two of twenty-six Republican judicial incumbents lost their seats and the learning curve faced by newly elected judges); Thomas Korosec, *Democrats Turn Dallas County a Shade of Blue*, HOUS. CHRONICLE (Nov. 9, 2006), <http://www.chron.com/default/article/Democrats-turn-Dallas-County-a-shade-of-blue-1887588.php> (reporting that straight ticket voting resulted in the Democratic Party gaining forty-two judgeships, the district attorney’s office, and the county judge’s seat).

²⁹ See Wallace Jefferson, *The State of the Judiciary in Texas*, 72 TEX. BAR J. 287, 289

From a judicial administration perspective, too, sweeps are a disaster. They purge the bench of experienced judges and require the courts to play catch-up in many respects as the new judges acclimate to their roles.

Party ideology and factors generally recognized as making for a “good” judge do not neatly align. Whether a judge or judicial candidate is a Republican or Democrat does not speak to his or her ability to manage a substantial trial docket, to exercise decorum on the bench, or to author intelligent, reasoned opinions. Straight ticket voting substitutes party identification for considered evaluation and thus fails to serve accountability interests.

II. STRAIGHT TICKET VOTING: AN ARTIFICIAL CURE TO ROLL-OFF SYNDROME

Ballot format has been consistently understood to impact voter response and election results. To advocates of straight-ticket voting, the greatest balloting evil is down-ballot “roll-off.” “Down ballot” races, those races lower on the ballot and less salient to the public, are particularly likely to suffer from a voter “roll off” effect: a voter will reach these races on the ballot, determine he or she does not have the information necessary to make an informed decision, and opt not to cast a vote.³⁰ If a voter casts a vote in such races, it is possible he or she may do so based on such arbitrary criteria as gender or perceived ethnicity.³¹ Judicial races are particularly likely to suffer from the two hallmarks of a down ballot race: a spatial and an informational handicap.

A. *Judicial Ballot Layout*

The very spatial organization of a typical ballot ensures that judicial races will receive fewer votes. Ballot position research has determined that races found lower on the ballot are more susceptible to roll off as a function of voter fatigue, as voters grow

(2009) (suggesting a merit system for choosing judges to remedy the problems of both Democrats and Republicans).

³⁰ See David Brockington, *A Low Information Theory of Ballot Position Effect*, 25 POL. BEHAV. 1, 2 (2003); Melinda Gann Hall & Chris W. Bonneau, *Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 AM. J. POL. SCI. 457, 459 (2008). Voter roll-off can top fifty percent depending on the state. Hall & Bonneau, *supra*, at 459. Hall and Bonneau’s paper notes the interaction between voter roll off and the amount of money spent on a particular campaign. *Id.*

³¹ See Brockington, *supra* note 30, at 4.

tired with checking off boxes or pulling levers.³² In those states where judicial elections are conducted concordantly with the other standard November elections, judgeships are relegated to a position further down the ballot than national and other statewide offices, such as governor, as well as offices ranging from comptroller to railroad commissioner.³³

Beyond that, the number of judicial elections on a given ballot may be overwhelming. The 2010 ballot in Birmingham, Alabama (Jefferson County) included twenty-four judicial races.³⁴ The 2010 ballot in Houston, Texas (Harris County) included seventy-two judicial races (ranging from state supreme court justices to county probate judges).³⁵ As Richard Murray, a political scientist at the University of Houston noted, Harris County may have the longest ballot in the entire country.³⁶ Birmingham voters, let alone Houston voters, face a daunting task when entering the voting booth and the likelihood of voter fatigue increases proportionately.

B. Judicial Election Information

The notoriously low informational nature of judicial elections represents the second hallmark of a down ballot race. Roll off is more likely to occur when the ballot does not contain informational cues.³⁷

More often than not, voters know little, if anything, about a slate of judicial candidates. A poll conducted in 2001 showed that seventy-three percent of respondents had only some or a little information about judicial candidates, while fourteen percent had no information at all.³⁸ If a judicial race attracts attention, that attention is often solely a function of the tendency of the news

³² See *id.* at 2–3.

³³ See *Election 2010: Harris County Sample Ballot*, CHRON.COM, http://blogs.chron.com/election/2010/11/harris_county_sample_ballot.html (last visited Apr. 23, 2012) [hereinafter *Harris County Sample Ballot*] (featuring a sample ballot from the General and Special Elections of Harris County on Nov. 2, 2010).

³⁴ ALABAMAVOTES.GOV., http://alabamavotes.gov/downloads/election/2010/general/sample_ballots/Jefferson-2010-Sample.pdf (last visited Apr. 23, 2012) [hereinafter *Jefferson County Sample Ballot*].

³⁵ See *Harris County Sample Ballot*, *supra* note 33.

³⁶ See Alan Bernstein, *Many Harris Voters Cut Long Ballot by Picking Straight Ticket*, HOUS. CHRONICLE (Oct. 23, 2008), <http://www.chron.com/disp/story.mpl/metropolitan/6073645.html>.

³⁷ See Brockington, *supra* note 30, at 3–4.

³⁸ Geyh, *supra* note 15, at 1270 (citing Greenberg, Quinlan, Rosner Research Inc., JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 4 (2001) *available at*, http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf).

media to create a “horse race” narrative in partisan elections.³⁹

Voters are thus left with little substantive information about the judicial context. It is not unusual for a judicial campaign to receive no more than two news stories in a newspaper covering the election.⁴⁰ Beyond the sheer dearth of information, judicial elections are more difficult for the electorate to comprehend on a conceptual level. The special nature of a judicial election offers few opportunities to provide informational shortcuts or galvanizing messages tailored to the judicial context: “Vote for *Stare Decisis!*” does not make for good campaign paraphernalia.⁴¹

Voters attuned to judicial races are not likely to encounter deliberative educational conversations about a race.⁴² The substance of judicial elections, which theoretically should be grounded in abstract legal considerations such as constitutional philosophy and appellate practice, renders them more esoteric, lacking a natural partisan foothold. While there are some readily available partisan sound bites extolling or decrying originalism or judicial activism,⁴³ the number of talking points pales in comparison to that for legislative and executive elections (where the content may range from taxation to abortion, issues highly salient to voters).⁴⁴

C. *The Straight Ticket “Cure”*

Straight ticket voting provides a palliative for roll off, as indicated

³⁹ David B. Rottman, *Conduct and its Oversight in Judicial Elections: Can Friendly Persuasion Outperform the Power to Regulate?*, 21 GEO. J. LEGAL ETHICS 1295, 1314 (2008) (citing BRIAN F. SCHAFFNER & JENNIFER SEGAL DIASCRO, *Judicial Elections in the News, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 115, 121–24 (Mathew J. Streb ed. 2007) (assessing the number of articles covering judicial elections and finding that in the period from 2000–2004, in states with contestable judicial elections, on average, supreme court races attracted less than ten news articles, a fourth of which were editorials and that most stories were not printed in the first section of the newspaper)).

⁴⁰ *Id.* at 1314 n.63.

⁴¹ David Pozen, *Are Judicial Elections Democracy-Enhancing?*, in WHAT’S LAW GOT TO DO WITH IT? WHAT JUDGES DO AND WHY IT MATTERS, 17 (Charles G. Geyh, ed., 2011).

⁴² *Id.*

⁴³ *Id.* at 17–18.

⁴⁴ *But see Gay Marriage, Tax Fights Spark High-Profile Court Races*, Justice at Stake & BRENNAN CENTER FOR JUSTICE, http://www.justiceatstake.org/newsroom/press_releases.cfm/gay_marriage_tax_fights_spark_highprofile_court_races?show=news&newsID=8857.

Colorado, Iowa, and Kansas experienced highly publicized judicial races in 2010, all in mere retention elections (the three states employ the merit selection system), motivated, respectively, by taxation issues, gay marriage, and abortion. The appropriateness of the prominence of these issues in judicial selection is highly questionable.

in much of the political science literature on the topic.⁴⁵ Voters get not only the informational cue of party affiliation, but also the ease of checking a single box and being done. As Murray acknowledged, straight ticket voting is “certainly a time saver, if you’re looking for efficiency.”⁴⁶ Party cues typically provide a strong heuristic for voters.⁴⁷ In informational theory terms, party cues are considered secondary information (information that can be gathered from a cursory glance at the ballot); primary information refers to information garnered from actual campaign or issue research.⁴⁸ Party identification is widely understood to be one of the strongest sources of political association, the method by which voters identify themselves in the electoral context.⁴⁹ Consequently, partisan races in which candidates are identified as a Democrat or Republican (or, hypothetically, Libertarian, Green, or any other party affiliation) are less likely to suffer from diminished voter response.

The availability of straight ticket voting increases the total number of ballots cast for all races in a given election. Down ballot races, in particular, are more likely to receive a vote in states that allow for straight ticket voting.⁵⁰ In fact, two thirds of voters in Harris County utilized the straight ticket function on their ballots in the 2004 election, amounting to approximately seven hundred thousand voters.⁵¹ By definition, those were seven hundred thousand voters who effectively cast a vote in every judicial race in the county.

On some level, this could be considered a boon for judicial elections: participation grows exponentially and elections of judges are seemingly legitimized. But how legitimate is a vote based upon minimal information and reasoning? A general presumption exists that, in states where judges are elected, accountability factors heavily into judicial selection, but independence is not to be entirely

⁴⁵ Brockington, *supra* note 30, at 2–3; Philip Dubois, *Voter Turnout in State Judicial Elections: An Analysis of the Tail on the Electoral Kite*, 41 J. OF POLITICS 865, 876–83 (1979). Dubois emphasizes the impact of the Indiana or “party column” ballot, used by the states that allow for straight ticket voting, and its tendency to drastically decrease voter roll off as compared to states with other forms of partisan ballots and states with nonpartisan or retention elections.

⁴⁶ Bernstein, *supra* note 36.

⁴⁷ Brockington, *supra* note 30, at 4.

⁴⁸ *Id.*

⁴⁹ See generally JAMES STIMSON, *TIDES OF CONSENT: HOW PUBLIC OPINION SHAPES AMERICAN POLITICS* (2004); BENJAMIN PAGE & ROBERT SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS’ PUBLIC POLICY PREFERENCES* (1992).

⁵⁰ Brockington, *supra* note 30, at 5 n.10.

⁵¹ Bernstein, *supra* note 36.

eschewed. Can independence exist if judges in straight party ticket states are essentially indebted to the political parties for their ascension to and persistence on the bench? Is there true accountability when a voter does not even recognize the judge for whom he or she votes?

Coordinated county campaigns, whatever salutary effect they may have on the political branches, provide no information on the judges selected by virtue of a single checkmark. To the winning party, the results are “fabulous,” regardless of how uninformed the votes cast. The most charitable view is that party leaders believe it is better to express some view on a candidate rather than none. A less charitable explanation is that straight ticket voting consolidates party control in the most durable branch of government.

III. A SUPREME COURT CHALLENGE TO STRAIGHT TICKET VOTING

Given these two very different views of straight ticket voting, would a constitutional challenge to Texas’ straight ticket voting have any chance of prevailing were it to reach the U.S. Supreme Court?

The starting point for any analysis is the oft-cited leading case on state judicial elections, *Republican Party of Minnesota v. White*.⁵² The facts of *White* have often been recited. The Minnesota judicial canons of ethics forbade a judicial candidate from discussing his or her “views on disputed legal and political issues” that might come before the court to which he or she aspired.⁵³ Finding the canon violative of the Free Speech clause of the First Amendment, Justice Scalia writing for the Court concluded that particularly in the context of an election, state judicial campaign conduct committees do not have the power to limit what a judicial candidate may “announce” with regard to his or her views on matters that may come before the court.⁵⁴ Despite overtures to the importance of impartiality, the majority concluded that, pragmatically speaking, it would be ludicrous to think that judges do not have pre-formed views on the topics that may come before them on the bench.⁵⁵

⁵² *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

⁵³ *Id.* at 768.

⁵⁴ *Id.* at 787–88.

⁵⁵ *Id.* at 776–78. While it did hold that “announce clauses” violated the First Amendment rights of judicial candidates, the Court declined to consider the constitutionality of “promise clauses,” which forbid a judge from promising to bind himself or herself to a particular outcome (effectively pre-judging a case). *Id.* at 770.

In a concurring opinion, Justice O'Connor questioned the wisdom of contested judicial elections, although she did not go so far as to question their constitutionality. Given the system Minnesota employed, speech in these elections was critical, and so she voted with the majority.⁵⁶

Judicial candidates are therefore free to express their views on most any matter, provided they do not pledge to decide one way or another once on the bench.⁵⁷ In practical effect, *White* has been less a boon to the free speech of judicial challengers than a sword wielded by interest groups. Judicial reticence to respond to questionnaires from these groups, which often veer perilously close to pledges as to how specific cases would be decided, was at one time protected by canons like those in Minnesota. Post-*White*, the canons cannot be used as a shield, and judges are often compelled to answer questions they would prefer not to, on peril of losing key endorsements.

If *White* stands for the proposition that speech by judicial candidates has few limits, then the case of *New York State Board of Elections v. Lopez Torres*⁵⁸ stands for the proposition that insurgent candidates can look only to speech to make their case for election; they have no constitutional protection in securing a position on the ballot in the face of a primary system that enforces political party primacy. This 2008 case was a challenge to the New York Democratic Party's control of primary elections for the state trial court (in New York City victory in the Democratic primary is virtually a guarantee of election).

Under New York's partisan election system, political parties select a candidate through nominating conventions comprised of delegates who have solicited the signatures of 500 party members.⁵⁹ While parties that garnered at least 50,000 votes for their candidate

⁵⁶ O'Connor wrote:

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges. *Id.* at 792 (O'Connor, J., concurring). Subsequent to her retirement, Justice O'Connor has said that her deciding vote in the 5-4 *White* decision may be the one vote she regretted having made while on the Court.

⁵⁷ See *id.* at 819-21 (Ginsburg, J., dissenting).

⁵⁸ *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

⁵⁹ *Id.* at 200.

in the most recent gubernatorial election automatically are entitled to a spot on the ballot, independent candidates may acquire ballot access only if they can solicit 3500–4000 signatures (depending on the district in which they are seeking office).⁶⁰

Lopez Torres, a Democratic Party insurgent judicial candidate, complained that the system made it impossible for her to make the inroads needed to garner a nomination.⁶¹ Writing for a unanimous Court, Justice Scalia affirmed the constitutionality of the New York system,⁶² rejecting the notion that “one-party entrenchment” in a given district could violate First Amendment associational rights; indeed, the opposite result, he concluded, would violate those same rights.⁶³

In Justice Scalia’s view, the availability of the petition process, which provides a path to the ballot for minority candidates, albeit without the blessing of majority party leadership, is enough to ameliorate any constitutional concerns. Concerns about the wisdom of the system, he counseled, were best resolved in the legislative arena. As he said in the opinion’s conclusion: “New York State has thrice . . . displayed a willingness to reconsider its method of selecting Supreme Court Justices (the court’s trial level). If it wishes to return to the primary system that it discarded in 1921, it is free to do so; but the First Amendment does not compel that.”⁶⁴

Though the Court’s unanimous holding was primarily concerned with partisan politics in general, the special implications for the judicial context were reiterated in a separate concurrence by Justice Anthony Kennedy. In remarks reminiscent of Justice O’Connor’s concurrence in *White*,⁶⁵ he expressed misgivings about the very idea of judicial elections.⁶⁶ However, he could not hold the given

⁶⁰ *Id.* at 200–01.

⁶¹ *Id.* at 197.

⁶² *Id.* at 205–06 (“What constitutes a ‘fair shot’ is a reasonable enough question for legislative judgment . . . [b]ut it is hardly a manageable constitutional question for judges—especially for judges in our legal system, where traditional electoral practice gives no hint of even the existence, much less the content, of a constitutional requirement for a ‘fair shot’ at party nomination. Party conventions, with their attendant ‘smoke-filled rooms’ and domination by party leaders, have long been an accepted manner of selecting party candidates.”).

⁶³ *Id.* at 208 (“To our knowledge, outside of the Fourteenth and Fifteenth Amendment contexts . . . no court has ever made ‘one-party entrenchment’ a basis for interfering with the candidate-selection processes of a party.”) (citations omitted). The challenges based on other amendments have primarily involved racial discrimination. For a discussion of such cases, see *California Democratic Party v. Jones*, 530 U.S. 567, 573 (2000).

⁶⁴ *Lopez Torres*, 552 U.S. at 209.

⁶⁵ *White*, 536 U.S. at 788–92 (O’Connor, J., concurring).

⁶⁶ *Lopez Torres*, 552 U.S. at 212 (Kennedy, J., concurring) (“When one considers that

circumstances unconstitutional,⁶⁷ not even in the face of party control and manipulation.⁶⁸ Kennedy did offer his view of how the dangerous territory of judicial elections could be successfully navigated:

In light of this longstanding practice and tradition in the States [of electing judges], the appropriate practical response is not to reject judicial elections outright but to find ways to use elections to select judges with the highest qualifications. A judicial election system presents the opportunity, indeed the civic obligation, for voters and the community as a whole to become engaged in the legal process. Judicial elections, if fair and open, could be an essential forum for society to discuss and define the attributes of judicial excellence and to find ways to discern those qualities in the candidates.⁶⁹

If judicial elections are ingrained in certain states' political traditions, especially partisan elections, then efforts should nevertheless be made to produce "judicial excellence" from a "societal forum." For under the holding of *Lopez Torres*, party entrenchment at varying levels is perfectly constitutional.⁷⁰

Taken together, *Lopez Torres* and *White* suggest a system where minority party candidates, or insurgent candidates of majority parties, must rely on their ability to get their message across to voters without the help of a party line endorsement. They can speak; the question is, will anybody hear them?

The last case we will consider here delineates the outer limit—that is, where the elected judge system goes so far that it does violate constitutional norms. The most recent Supreme Court case involving judicial elections, *Caperton v. Massey*,⁷¹ was a victory against the unbridled politicization of judicial elections. Hugh Caperton won a jury verdict of \$50 million against the Massey Coal Company immediately prior to the 2004 West Virginia judicial elections.⁷² The chairman of Massey subsequently spent

elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence.”).

⁶⁷ *Id.* at 205–11 (Kennedy, J., concurring) (noting that the ability of independent candidates who are not party-sponsored to access the ballot through a separate signature gathering process saves the constitutionality of the electoral system).

⁶⁸ *Id.* at 212–13 (Kennedy, J., concurring).

⁶⁹ *Id.* at 212 (Kennedy, J., concurring).

⁷⁰ *Id.* at 208.

⁷¹ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

⁷² *Id.* at 872–73.

approximately \$3 million on the campaign of Brent Benjamin to unseat one of the sitting justices; Benjamin won.⁷³ Caperton sought Justice Benjamin's recusal from the appeal of his case pursuant to the West Virginia Code of Judicial Conduct, but Benjamin refused and was part of the majority that overturned the jury's findings.⁷⁴ West Virginia state judicial conduct codes, in addition to the conference of state chief justices, require recusal whenever a "judge's impartiality might reasonably be questioned."⁷⁵ Caperton again sought recusal of Benjamin for the rehearing; Benjamin continued to refuse, even in the face of an opinion poll demonstrating that 67% of West Virginians doubted his ability to be impartial.⁷⁶ After the overturning of his jury award was reaffirmed, Caperton appealed to the Supreme Court.

The Court, in a 5–4 decision, concluded that "the probability of actual bias [rose] to an unconstitutional level" in this instance, emphasizing the "extreme" character of the facts and the "extraordinary" nature of the situation.⁷⁷ Justice Kennedy's *Caperton* majority opinion focused on the plain ills of interested parties' domination of judicial elections through monetary means.

Caperton is significant because it demonstrates that there are some excesses in the partisan system of judicial elections that are so extreme that due process norms are violated. Yet *Lopez Torres* counsels that even extreme party domination of the ballot is not one of them. Violations, if any, exist only to the extent that a judge selected by a system where donation disparities are extreme may be incapable of fairness in deciding the case of particular litigants. So long as those extremes are not reached, candidates who have not received the accolade of the majority party line for a judicial seat have only their *White*-endorsed right of free speech to make their case to the voters. In all three cases, members of the Court invited the respective states to reconsider, in the legislative arena, the policy choices they had made in the partisan election of judges.

Given this trilogy of cases, it appears that a challenge to Texas-style straight ticket voting would have little chance to prevail before the Court. As in *Lopez Torres*, minority candidates in Texas can certainly appear on the ballot, and there is no impediment to their speaking (although little chance they will be noticed). Nor is the

⁷³ *Id.*

⁷⁴ *Id.* at 873.

⁷⁵ *Id.* at 888–90.

⁷⁶ *Id.* at 874–75.

⁷⁷ *Id.* at 888–90.

sort of gross impropriety, or appearance of impropriety, created by straight ticket voting alone sufficient to warrant a *Caperton* finding.

If New York's judicial primary system passes constitutional muster, then unfortunately it appears that the ones in Texas, Alabama, and West Virginia would too. But what about that invitation by the Court to look at options for reform? Let's look at the three states with straight ticket voting, and one more, New York, post-*Lopez Torres*. Could the Court accomplish by invitation what it refused to do by decision?

A. Alabama

In both the 1998 and 2006 cycles, campaign oversight committees were established in Alabama, but the state has not shown a commitment to long term reform of its partisan system.

B. New York

In 2006, as *Lopez Torres* was winding its way to the Supreme Court,⁷⁸ Chief Judge of New York Judith Kaye and the four presiding justices of the appellate divisions, acting as the Administrative Board of the Courts, adopted court rules establishing a system of "Independent Judicial Election Qualification Commissions" ("IJEQCs") for New York State. The IJEQCs in each state judicial district represented a nonpartisan statewide screening process to review the experience and qualifications of candidates for the courts of general jurisdiction in New York. The IJEQCs were one of the most important recommendations of the Ferrick Commission, a panel appointed by Chief Judge Kaye to study the New York judicial election system and recommend measures to promote public confidence in the judicial election system.⁷⁹

The IJEQCs have been used in New York since 2007. The Commissions are designed to be independent of political influence and include both lawyers and non-lawyers.⁸⁰ The IJEQC is the most significant reform in the New York judicial selection system since the court moved to a merit selection system for its Court of

⁷⁸ *Lopez Torres v. New York State Bd. of Elections*, 411 F.Supp. 2d 212 (E.D.N.Y. 2006).

⁷⁹ See COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006), <http://www.nycourts.gov/reports/FerrickJudicialElection.pdf>

⁸⁰ See *Judicial Campaign Ethics Center*, NEW YORK STATE UNIFIED COURT SYSTEM, www.courts.state.ny.us/ip/jcec/index.shtml (last visited June. 3, 2012).

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Appeals judges (the state's highest court) in 1977. Preliminary assessments from court administrators in New York have been very positive.⁸¹

C. Texas

The height of the judicial reform movement in Texas was unrelated to straight-ticket voting, but was related to the amount of money going into state appellate and supreme court races. In 1980, Texas became the first state in which the cost of a judicial race exceeded \$1 million. Between 1980 and 1986, campaign contributions to candidates in contested appellate court races increased by two hundred fifty percent. The 1988 supreme court elections were the most expensive in Texas history, with twelve candidates for six seats raising \$12 million. Between 1992 and 1997, the seven winning candidates for the Texas Supreme Court raised nearly \$9.2 million dollars. Of this \$9.2 million, more than forty was contributed by parties or lawyers with cases before the court or by contributors linked to those parties.

To address the perceived impropriety of judges soliciting and accepting large campaign contributions from attorneys and parties who appear before them, the Texas legislature passed the Judicial Campaign Fairness Act in 1995, and it was signed by then-Governor Bush.

Texas has never adopted a judicial performance evaluation system or any form of judicial screening program.

D. West Virginia

In reaction to the U.S. Supreme Court's holding in *Caperton*, then Governor Joe Manchin designated an independent commission on judicial reform, which released recommendations on November 15, 2009. The leading recommendations were for the state to adopt a public financing pilot program for one of the two open supreme court of appeals seats in the 2012 elections, and that has been

⁸¹ In particular, directors of the commissions in the Upstate regions have found participation to be very high, roughly around 80%. And at least in the Albany region, it has become common practice for a potential candidate to go through the qualification process *before* seeking a party's nomination. Telephone Interview with Timothy O'Keefe, Director, Independent Judicial Election Qualification Commissions, Third Department (Dec. 28, 2011). This suggests that the parties, regardless of how influential and powerful, are at least embracing a criterion of legitimacy.

done.⁸² Additional recommendations were codification of an advisory commission procedure for selection of state supreme court judges, for establishing an intermediate appellate court, and for creating a business court. No recommendations were made regarding the partisan election system in West Virginia, and none on ballot format.

IV. GOING FORWARD

It appears that the states invited by the Court to consider reform in the decisions in *Lopez-Torres* and *Caperton*—New York and West Virginia—have approached the task with varying degrees of success. Nor have the straight ticket voting states considered above—Texas, Alabama, and West Virginia—taken a cue from the Court’s decisions to re-examine the pernicious effects of partisan elections on the independence and accountability of their own courts. Is there no balm in Gilead? Chief Justice Jefferson noted, “[s]o long as we cast straight ticket ballots for judges, the fate of all judges is controlled by the whim of the political tide.”⁸³ Though the most partisan individuals may disagree, that relationship cannot be consistent with basic notions of judicial fairness and integrity. Straight ticket voting may be a bad idea for politics generally, but it is especially inadequate and unfit for the election of judges. We will conclude by considering next steps in the battle for reform.

A. *The Potential of Legislative Reform*

The most likely source of reform is the state legislatures themselves. While straight ticket voting was at one time widespread, efforts to scale back the availability of straight ticket voting have been successful in a number of states. Illinois, for instance, which also elects its judges, legislatively removed the straight ticket option from its ballots in 1997.⁸⁴ Chicago was at one point the definition of a party machine city, a city entirely beholden to Democrats who rejected attempts at good government reform; it was also a city that could include up to seventy-two judges on its

⁸² Billy Corriher, *West Virginia Rolls Out Public Financing for Judges*, HARVARD L & POL’Y REV. BLOG (Apr. 19, 2012), <http://hlpronline.com/2012/04/west-virginia-rolls-out-public-financing-for-judges/>.

⁸³ Jefferson, *supra* note 29, at 289.

⁸⁴ Dirk Johnson, *The 1998 Campaign: The Voting Booth; Straight-Ticket Voting Losing Ease in Illinois*, N.Y. TIMES (Oct. 29, 1998), <http://www.nytimes.com/1998/10/29/us/1998-campaign-voting-booth-straight-ticket-voting-losing-ease-illinois.html>.

ballots for retention elections.⁸⁵ While Chicago may remain a largely Democratic stronghold, at the very least, the party has now lost the ease of instructing voters to simply pull a single lever; as a consequence, every name on the ballot must be confronted.

Convincing political parties to relinquish a mechanism that not only guarantees a particularized set of votes but also an easy and powerful method of campaigning is difficult, to say the least. Illinois struck straight ticket voting when the Republicans had control of the state's legislative assembly; the GOP uniformly approved of the move and Democrats uniformly opposed.⁸⁶ In actuality, the Republicans did so as a dying gasp: They had just lost control of the state house and passed the bill during a lame duck session.⁸⁷ The Democratic resistance was fierce; the battle made its way through the Illinois court system, under the title *Orr v. Edgar*.⁸⁸ The *Orr* court refused to accept any of the plaintiff's arguments, which ranged from the limitation of voter choice to the particularized burden on the elderly (who would have to wait longer and navigate more of a ballot).⁸⁹ The measure stood and Illinois no longer has the straight ticket option.⁹⁰

Good government efforts across the country have similarly targeted straight ticket voting in states where judges are not elected.⁹¹ As to the states where elected judges are most impacted by straight ticket voting, some legislative movement is underway in Texas.⁹² A state senator is preparing to file a bill that would eliminate the straight ticket option; he concludes that the option

⁸⁵ *Id.*

⁸⁶ David C. Kimball & Chris T. Owens, Where's the Party? Eliminating One-Punch Voting, Presented at the Annual Meeting of the Midwest Political Science Association 1 (Apr. 29, 2000), available at <http://www.umsl.edu/~kimball/mpsa00.doc>.

⁸⁷ Rick Pearson, *Court Delivers Ko to One-Punch Voting*, CHI. TRIB. (Oct. 7, 1998), http://articles.chicagotribune.com/1998-10-07/news/9810070075_1_women-voters-illinois-supreme-court-straight-ticket-voting.

⁸⁸ *Orr v. Edgar*, 698 N.E.2d 560 (Ill. App. Ct. 1998).

⁸⁹ *See id.* at 564–66.

⁹⁰ *See id.* at 566.

⁹¹ *See, e.g., Jo Mannies, Clay Endorses Prop P, Reminds Dems No More Straight-Ticket Voting*, ST. LOUIS POST-DISPATCH (Oct. 25, 2006), http://www.stltoday.com/news/local/govt-and-politics/political-fix/article_7780f018-ca53-5078-8a44-b2696aa45e51.html. Missouri, which employs merit selection of its judges (also known as the Missouri Plan), ended the availability of straight ticket voting in 2006. *See* Josh Goodman, *Voting the Straight-Ticket Sweep*, GOVERNING: THE STATES AND LOCALITIES (June 2010), <http://www.governing.com/topics/politics/Voting-the-Straight-Ticket-Sweep.html>; *Judicial Selection in the States: Missouri*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/index.cfm?state=MO (last visited June 3, 2012).

⁹² *See* Aman Batheja, *Straight Ticket Votes Reach 10-Year High in Texas' Largest Counties*, FORT WORTH STAR-TELEGRAM, Nov. 9, 2010.

“encourages less thoughtful voting.”⁹³ Unfortunately, the same senator has filed similar bills in the past to no avail.⁹⁴ Both parties have expressed extreme resistance to the idea and consider the proposition a proposed limitation on voter choice.⁹⁵ While perhaps the option to spend minimal to no time in the ballot booth, not a second of which is truly deliberative, would be removed, it would, in fact, be for the betterment of democracy and the judiciary. The parties, unsurprisingly, fear any limitation on their power, and the removal of the straight ticket option would be just such a limitation.

One opponent to the reform views voting as such: “[p]eople are buying a preference of a brand, and Americans have been trained to do that in their consumerism, and there’s no reason to say they can’t do that in their politics.”⁹⁶ On the contrary, the marketing of judges as mere accessories to the whole of a political party is simply bad for justice.

B. Making Party Identification Work for Judicial Integrity

How can states like Alabama, Texas, and West Virginia be successful as Illinois was? In Texas, straight ticket voting ensures Democratic domination in urban centers, and Republican rule on the state level. In New York, upstate elections perpetuate Republican control of judicial seats, and downstate elections perpetuate Democratic control. Both parties have reasons to favor keeping a practice that assures particularized and predictable strongholds, reasons that likely ring stronger in the non-judicial context. Consequently, reform will likely need to be predicated on politics proper: legislative and executive elections. The Republicans in Illinois achieved statewide control with the aid of straight ticket voting (outside of Chicago).⁹⁷ But, they lost that control as well through the same mechanism.⁹⁸ Illinois Republican leadership conceded that the move may hamper them along with the

⁹³ *Id.* (internal quotation marks omitted).

⁹⁴ *Id.*

⁹⁵ See *Texas Bill Would Outlaw Straight-Ticket Voting*, KTRK (HOUS. ABC AFFILIATE), Dec. 13, 2010, available at <http://abclocal.go.com/ktrk/story?section=news/politics&id=7840828>. A Texas Republican Party spokesperson countered that they were “in favor of giving voters an option, not taking options from voters,” while a Democratic Party spokesperson said “[i]t’s critical” that the option be preserved as voters “take pride in voting the Democratic ticket.” *Id.* (internal quotation marks omitted).

⁹⁶ Batheja, *supra* note 92 (internal quotation marks omitted).

⁹⁷ See Kimball & Owens, *supra* note 86, at 3.

⁹⁸ See *id.*

Democrats,⁹⁹ but vowed to rely on the strength of their “stronger message” and “better candidates.”¹⁰⁰ Was this a mere “slap” at the Democrats who had just bested them,¹⁰¹ or were the Republicans serious about a turn to relying on hard work on the campaign trail instead of ease at the ballot box?

In reality, do parties even have an identifiable “brand,” one valuable to voters or consumers, when the campaign message is reduced to “one and you’re done?” Arguments about limiting voter choice demean the ability and political interest of the voters themselves; the argument in favor of so-called “choice” is really that the straight ticket option allows the party machinery to capitalize on voter inattention.

If the straight ticket option were eliminated, Texas Republicans would undoubtedly still wield control at the state level and Texas Democrats would still, barring a nationwide shift in the political mood (as was the case in 2010), generally maintain their success in the cities. Strongholds would remain strongholds, whether in Alabama or West Virginia.

An intriguing observation on this point was made by former United States Supreme Court Justice Sandra Day O’Connor, who since retiring from the high Court has spoken frequently on the methods used to select state judges. As an Arizona state legislator, Justice O’Connor had been involved in the original legislation establishing merit selection in her home state. “We didn’t try to do it in the rural districts,” she has observed, because the legislators in those districts would have voted against the proposal for urban districts.¹⁰² To this day, only counties with populations greater than 250,000 employ the merit selection system in Arizona.¹⁰³ In the smaller (primarily rural) counties, judges are still elected in non-partisan elections.¹⁰⁴

⁹⁹ While Democrats undoubtedly benefitted from straight ticket voting in Cook County (Chicago), Republicans uniformly benefitted from the practice in “the collar” (the counties surrounding Cook County on Lake Michigan), not to mention more rural areas of the state, and had ridden the practice to state legislative victories in the past. See Pearson, *supra* note 85; see also Kimball & Owens, *supra* note 84, at 2.

¹⁰⁰ See Pearson, *supra* note 85.

¹⁰¹ *Id.*

¹⁰² E-mail from Linda H. Neary, Secretary to Justice Sandra Day O’Connor (Ret.), to Meryl Chertoff, Director, The Justice and Society Program, The Aspen Institute, and Adjunct Professor of Law at Georgetown University Law Center (Mar. 5, 2012, 9:55 EST) (on file with author) (confirming Justice O’Connor’s consent to release the quote).

¹⁰³ Mark I. Harrison et al., *On the Validity and Vitality of Arizona’s Judicial Merit Selection System: Past, Present, and Future*, 34 FORDHAM URB. L.J. 239, 245 (2007).

¹⁰⁴ See *Judicial Selection in the States: Arizona*, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/index.cfm?state=AZ (last visited June 3,

O'Connor's point underscores the need for reformers to be flexible and to consider piecemeal reform efforts. If Texas is unwilling to depart from a straight-ticket system in statewide elections, then perhaps the departure can be made in urban districts where the ballots are already longer and more unwieldy.

Success may actually be more likely during Republican-controlled legislative sessions; traditionally Democratic demographics are the ones more likely to suffer a slight increase in roll-off following the elimination of straight ticket voting.¹⁰⁵ While there may be some increase in ticket splitting,¹⁰⁶ a party will acquire greater and lasting strength through the clear articulation of its positions, rather than by unthinking affiliative behavior. Given the threat to judicial independence that party domination may facilitate, removing the straight ticket option is a fairly simple, but highly symbolic step toward making judicial elections more transparent.

Since legislatures have often proved to be the stumbling block for reform efforts, we have one final modest suggestion for Texas and other straight ticket voting states like Alabama and West Virginia. Their judicial leaders might want to take a look at the IJEQC system that has been used in New York State, another partisan election state, since 2007. The elegance of the IJEQC is that it did not, at least in New York, require legislative approval, but was established by the judicial branch itself. The political parties can accept the recommendation of IJEQCs, or they can reject them, but a rejection certainly provides insurgents and minority party candidates with a fine talking point for their campaigns. Given Chief Justice Jefferson's firmly articulated support of reform of the judicial selection process in Texas,¹⁰⁷ and particularly his statements opposing straight-ticket voting, an IJEQC that uses New York's innovations as a template could be a valuable adjunct to efforts to 'reform from within' the Texas bench—at least until something better comes along.

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¹⁰⁵ Kimball & Owens, *supra* note 84, at 13. Their study of Illinois elections post-removal of the option concluded that Republican demographics already are less inclined to roll-off than Democratic ones. *See id.* Additionally, though applied to a midterm year, they determined that elimination of the "one punch" option did not substantially increase roll-off overall. *See id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See generally* Jefferson, *supra* note 5 (explaining that merit matters little in straight-ticket judicial elections).

V. CONCLUSION

Ultimately, the key to finding something better than straight ticket voting in judicial elections in the states that now allow it will be a successful lobbying effort, coupled with public education, to create a true momentum for change. In the meanwhile, piecemeal reform, and judge-created reform, may ameliorate some of the worst effects of straight-ticket voting. The greatest evil, however, would be continued indifference to the straight ticket. At best, the practice is an abuse of intelligent democracy. At worst, straight ticket voting corrupts the integrity of a judicial selection system, impairs judicial independence, and makes the accountability of judges flow not to the voters, but to party bosses.