OHIO JUDICIAL ELECTIONS— NONPARTISAN PREMISES WITH PARTISAN RESULTS

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I. INTRODUCTION

Growing recognition of the policy-making function of the judiciary has led to an explosion of judicial behavior studies aimed at exploring the socio-economic and psychological influences on decision-making in the courts. Although sketchy evidence is available that methods of judicial selection are related to the characteristics of the judges selected,[1] few empirical studies have been made of the politics of judicial selection at the state level. The organized bar is conducting a concerted campaign for adoption of a selection method which institutionalizes bar participation in the selection process. Its goal is to "eliminate politics" from judicial selection, and to provide "better judges." Yet the legal profession has not furnished a definition of the politics it seeks to eliminate, nor the criteria by which better judges can be measured. "Competence" is often discussed by members of the organized bar as a criterion for selection, but no empirical evidence is provided that technical proficiency of appellate judges varies with the means by which they are selected. The criterion of competence would appear to be more relevant to the level of trial courts in state and municipal systems, where extractive politics often appear to control judicial output, but bar plans for reform usually exclude the lower courts. The debate contrasting present with preferred methods of selection is conducted in a factual vacuum; both reformers and defenders of the status quo operate in the realm of speculation.

This investigation of the selection of Ohio appellate judges in the decade from 1960 to 1970 was undertaken first to develop a conceptual framework for evaluation of judicial selection methods, and second to test the conventional wisdom about judicial elections in the cauldron of actual events.

II. THE CONCEPTUAL FRAMEWORK

Building a conceptual framework for evaluating judicial selection methods should start with the simple question, "What do judges do?" The obvious and simple answer is that they decide cases. The consequences of their decisions, however, are neither obvious nor simple.

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[1] Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104, 106 (1964).

The judges are actually "doing" far more than settling individual disputes. Particularly at the appellate level, where difficult and ambiguous cases are decided,[2] judges are shaping and developing the law as it will be applied to individuals and groups in the future; they are allocating societal values such as life, liberty, wealth, and representation in other kinds of decision-making; they are, in other words, *making policy*. The custom of judicial review emphasizes the policy-making function involved. Since democratic theory suggests that policy makers should be in some way accountable to the people they rule, *accountability* becomes a criterion by which to measure selection methods.

Judges are, however, policy makers of a special sort, restricted by the concept of judicial role. Externally, judicial discretion is limited by public expectations that the actions of the courts are "law-oriented," that is, based on objective principles. Internally, judicial discretion is limited by the socialization process of legal training which teaches potential judges that they *ought* to be guided by impartial principles.[3] Becker makes a useful distinction between the impartiality and the independence required of a judge:

> [A]s the judge is dependent upon the law (bound to interpret and apply it), he is impartial; as he would resist those in other positions (or those who support them) who would have him violate this dependency, he is independent.[4]

Since impartiality is a mode of behavior made possible by the independence of judges, *independence* becomes the second criterion by which means of judicial selection should be measured.

It is clear, then, that judicial decision-making as a special kind of policy output creates a systemic problem. Inevitably the conflict between judicial norms and political reality produces a state of tension between independence and responsiveness. In fact, for the judiciary to fulfill its complex function, it may be necessary to maintain this state of tension. Hence, the central question about methods of judicial selection is not, "How do we take the courts out of politics," but *what method of judicial selection best accommodates the delicate balance between accountability and independence?*

Since appellate judges, deciding cases in the same legal-institutional framework, with access to the same body of legal precedent, according to

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[2] Useful discussion of the differential impact on society of trial and appellate courts may be found in K. DOLBEARE, TRIAL COURTS AND URBAN POLITICS 82, 124 (1967); and L. MAYERS, *The Courts as Molders of the Law*, THE AMERICAN LEGAL SYSTEM 338-51 (rev. ed. 1964).

[3] Professional norms also emphasize special restrictions on judicial role. The American Bar Association *Canons of Judicial Ethics* prohibit judges from engaging in political activity, and forbid revealing opinions about a case before the decision is announced. ABA CANONS OF JUDICIAL ETHICS Nos. 28 and 30.

[4] T. BECKER, COMPARATIVE JUDICIAL POLITICS 145 (1970).

the same rules of the collegial game, can and often do arrive at conflicting decisions, the student of judicial selection is compelled to ask if there are ways of predicting judicial propensities. Are there characteristics of personality, social background, or political affiliation of potential judges that would enable those who staff the bench to influence the outputs of the courts?

The search for the wellsprings of judicial behavior has been underway at least since the publication of Cardozo's *Nature of the Judicial Process*.[5] The attempt to identify the influence of personality factors on judges' opinions has yielded unsatisfactory results.[6] Few propositions are testable by means available to students of the problem, since judges are understandably reluctant to submit to psychoanalysis.[7] Interviewing judges as an alternative method of investigating personality factors[8] is limited by the kinds of conclusions that can be drawn from the responses. The judge's personality is filtered through his own perceptions and his willingness to make revelations to curious investigators. If a judge is unaware of a given attitude, or if he is aware of it and it conflicts with judicial norms so that he is unable or unwilling to admit that it is related to his decision-making, interviewing cannot reach important influences on behavior.

Scattered findings about the use of social background factors as predictors of judicial behavior have also yielded somewhat limited results. Investigators in this area recognize the inferential quality of conclusions, and do not assert a cause and effect relationship between background factors and judicial voting behavior.[9] Attempts to identify the decisional propensities of judges by their socio-economic, religious and ethnic identity have led to conflicting assertions in various judicial settings.[10]

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[5] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). *See also* the simple but heuristic model of judicial behavior in Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96, 116 (1922).

[6] Glendon Schubert claims to have demonstrated the influence of a personality factor which he calls "pragmatism-dogmatism" in judicial decision-making. G. SCHUBERT, THE JUDICIAL MIND 259 (1965). For a critical discussion of his conclusions, *see* Shapiro, *Political Jurisprudence*, 52 KY. L. J. 294, 329 (1964).

[7] Jerome Frank discusses this problem in J. FRANK, LAW AND THE MODERN MIND (1930). *See also* J. FRANK, COURTS ON TRIAL (1949) for the recommendation that judges be psychoanalyzed before being permitted to take on judicial duties. David J. Danelski has analyzed chief justices of the United States according to the personality types identified by Karen Horney (compliant, aggressive and detached), but the findings relate more to the process of leadership in a particular small group than to judicial opinion formation. Danelski, *Conflict and Its Resolution in the Supreme Court*, 11 J. CONFLICT RESOLUTION 71 (1967).

[8] Becker, *A Survey Study of Hawaiian Judges: The Effect on Decisions of Judicial Role Variations*, 60 AM. POL. SCI. REV. 677 (1966).

[9] Grossman, *Social Backgrounds and Judicial Decisions: Notes for a Theory*, 29 J. POL. 334 (1967). The first major work in this area was J. SCHMIDHAUSER, THE SUPREME COURT: ITS POLITICS, PERSONALITIES AND PROCEDURES (1960). *See also* Heiberg, *Social Backgrounds of the Minnesota Supreme Court Justices: 1858-1968*, 53 MINN. L. REV. 901 (1969).

[10] Goldman, *Voting Behavior on the United States Court of Appeals, 1961-1964*, 60 AM. POL. SCI. REV. 374, 382 (1966); Nagel, *Ethnic Affiliations and Judicial Propensities*, 24 J. POL.

The one variable which has turned up significant findings in a number of different judicial situations is political party affiliation.[11] A crude but useful measure, the Republican or Democratic party label appears to have an "organizing quality," to be an "effective 'net result' of many judges' hierarchies of values."[12] Party appears to be a significant predictor of behavior on economic issues by federal courts of appeals judges,[13] and on many types of cases decided in the highest state courts. Stuart Nagel analyzed a national sample of decisions in state supreme courts and found that Democratic judges tended to favor 1) the defense in criminal cases, 2) the administrative agency in business regulation cases, 3) the claimant in unemployment compensation cases, 4) a finding of constitutional violation in criminal-constitutional cases, 5) the government in tax cases, 6) the tenant in landlord-tenant cases, 7) the consumer in sales-of-goods cases, 8) the injured party in motor vehicle accident cases, and 9) the employee in employee injury cases. Republican judges tended to favor the opposing party.[14] Nagel does not suggest that the party affiliation *determines* the vote of the judge in a particular case, but that personal values lead a judge both to his party affiliation and to his decisional propensities. However, party affiliation may have an indirect effect as "a feedback reinforcement on his value system" which in turn affects decision-making.[15] In their decisional propensities, judges appear to resemble their fellow-partisans in the public at-large, in Congress, and in the executive.

92 (1962); Nagel, *Testing Relations Between Judicial Characteristics and Judicial Decision-Making*, 15 WEST. POL. Q. 425 (1962).

[11] An exception to this generalization must be made for the United States Supreme Court, for reasons related to its special institutional norms. *See* J. Schmidhauser, *supra* note 9.

[12] S. Goldman, Politics, Judges and the Administration of Justice 267 (1965) (unpublished Ph.D. disseration, Harvard University), quoted in Grossman, *supra* note 9, at 346. A recent cross-national study of elite attitudes found that ". . . background factors with the widest scope . . . were again associated . . . with adult socialization experiences—especially occupation and party affiliation." L. Edinger & D. Searing, *Social Background in Elite Analysis: A Methodological Inquiry*, 61 AM. POL. SCI. REV. 428, 436 (1967).

[13] Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. SCI. REV. 428, 436 (1967).

[14] Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843, 845 (1961); *see also* Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L. C. & P. S. 333 (1962).

Confirmation of these findings may be found in studies of economic decision-making on the Michigan Supreme Court, G. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 129-42 (1959) and Ulmer, *The Political Party Variable in the Michigan Supreme Court*, 11 J. PUB. L. 352, 352-62 (1962); and decision-making on reapportionment questions, Barber, *Partisan Values in the Lower Courts: Reapportionment in Ohio and Michigan*, 20 CASE W. RES. L. REV. 401, 406 (1969). *But see* critical analysis of the work of Nagel, Schubert and Ulman in Goldman, *supra* note 13; Howard, *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968); *and* Adamany, *The Party Variable in Judges' Voting*, 63 AM. POL. SCI. REV. 57, 59 (1969). Adamany replicated the Michigan studies of Schubert and Ulmer in Wisconsin and found that differences in selection procedures, political culture and judicial process accounted for his divergent results. *Id.* at 62-72.

[15] Nagle, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843, 847 (1961).

To put together a winning coalition for elections, both major parties attempt to appeal to the broad middle of American politics; hence the parties often appear to converge in ideology. However, they differ in important ways on issue-clusters, and the differences reflect contrasting value systems. Empirical research has shown that Republican leaders tend to identify with "business, free enterprise, and economic conservatism in general," and to oppose extension of social welfare and equalitarian measures, while Democrats are more responsive "toward labor and toward government regulation of the economy," and are more willing to use legislative means to improve the status of disadvantaged groups.[16]

Party followers tend to share the values of their respective leaders, although their views may be less intense, less informed, and less consistently opposed.[17] That followers still perceive and respond to these differences in partisan values may be seen in survey data from the 1970 congressional election. High-income voters supported Republican candidates by a nearly 2-1 margin, while low-income voters supported Democrats 3-1. Middle-income white collar and blue collar workers gave Democrats majority support but by lesser margins than the low-income voters.[18]

Since judicial nomination in the states is achieved largely through partisan activity, it should not be surprising that judges would tend to share the cognitive orientations of party activists.[19] Nagel summarized the de-

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[16] McClosky, Hoffman & O'Hara, *Issue Conflict and Consensus Amoung Party Leaders and Followers*, 54 AM. POL. SCI. REV. 406, 415-16 (1960). McClosky, *et al.*, found that ". . . the disagreements are remarkably consistent, a function not of chance but of systematic points of view, whereby the responses to any one of the issues could reasonably have been predicted from knowledge of the responses to other issues." *Id.* at 410. McClosky's study, based on a sample of major party convention delegates and a national cross-section of the population, was replicated by Thomas A. Flinn and Frederick M. Wirt with a sample of Ohio Republican and Democratic party county chairmen, and secretaries of county, central and executive committees. Flinn and Wirt found that in Ohio, "[o]n national and state issues the inter-party differences are striking." Flinn & Wirt, *Local Party Leaders: Groups of Like Minded Men*, 9 MIDWEST J. POL. SCI. 77, 80 (1965). Attitude structures of the leaders of the two parties were more similar to each other on civil liberties questions than on economic issues, *id.* at 85, a finding confirmed in an attitude study of federal appeals judges by Sheldon Goldman, *supra* note 13, at 381. *See also* J. TURNER, PARTY AND CONSTITUENCY: PRESSURES ON CONGRESS 60-66 (1951).

[17] McClosky *et al.*, *supra*, note 16 at 426.

[18] CONGRESSIONAL QUARTERLY, CURRENT AMERICAN GOVERNMENT 22 (1971). Partisan preferences of voters in a national cross-section of precincts in November 1970 showed the following cleavages:

	Income over $15,000	Income under $5,000	Middle Income-White Collar	Blue Collar
Rep.	65%	25%	42%	31%
Dem.	35	75	58	69

These data confirm the persistence of voter preferences shown in the classic survey research A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, THE AMERICAN VOTER 122,147 (1960).

[19] For example, for many years after the adoption of the direct primary in Ohio, 103 Ohio Laws 476 (1913), judicial candidates along with other candidates for public office were required to furnish five vouchers for "partisan integrity," and to make the following oath:

cisional propensities of Republican state supreme court judges as exhibiting "the viewpoint associated with the interests of the upper or dominant groups and with resistance to long-range social change;" and those of Democratic judges as reflecting "the viewpoint associated with interests of lower or less privileged economic or social groups in . . . society and (to a less extent) with acceptance of long-range social change."[20]

Recognition of these complex political realities about judicial decision-making requires us to reject the most common analytical dichotomy regarding judicial selection: appointment, the method used in the original states as a continuation of colonial practice, is contrasted with popular election, an alternative which swept the country in the middle of the nineteenth century as a component of Jacksonian democracy. Appointive states are then sorted out by simple appointment, with confirmation by another body such as the state senate, and some variation of the Missouri Plan (also known as the Nonpartisan Court Plan or the Merit Plan); while elective states are sorted out by partisan and nonpartisan ballot.

This dichotomy ignores the central political features of all four types of selection. Partisan election and simple executive appointment are "visible" methods of selection, which enable the relevant public (those who are interested in the work of the courts) to *see*, *know*, or *understand* how judges are selected, and therefore to hold the judges (or those who select them) accountable for their activities if they wish to do so. Nonpartisan election and the Missouri Plan are *invisible* methods of selection, which *confuse* or *keep in ignorance* the relevant public, so that neither direct nor indirect accountability of judges is possible.[21] By this classification, both the present selection method used in Ohio (nonpartisan election) and the method preferred by bar association activists (Missouri Plan) are *invisible*.

III. THE CAULDRON OF ACTUAL EVENTS

Ohio's elective judiciary was established by the constitution of 1851 in response to the popular perception that the courts, staffed by the leg-

"I am a member of the _____ party and intend to vote for a majority of the candidates of such party at the coming election.

. . . I will support and abide by the principles enumerated by the _____ party in its national platform and in its platform in the state adopted during the present year." 106 Ohio Laws 547 (1915).

The present declaration of candidacy required of entrants in the primaries for judicial office as well as for other offices includes swearing to membership in the party, and the following statement:

"I further declare that, if elected to said office or position, I will qualify therefor, and that I will support and abide by the principles enunciated by the _____ Party in its national and state platforms." OHIO REV. CODE ANN. § 3513.07 (Page Supp. 1970).

[20] Nagel, *supra* note 14, at 846.

[21] A fifth method of judicial selection is omitted from this analysis: legislative election, a method used by four states; a special case, partaking of both visible and invisible characteristics.

islature, had become "undemocratic," because party service had become the indispensable qualification to win a judgeship.[22] To restore the courts to the people, the new constitution provided for nomination of judges in party conventions and election by partisan ballot. By the end of the century the state courts were again viewed as captives of the parties, and structural changes were sought to make them more democratic. Equating "more democratic" with elimination of partisan politics from governing processes, Progressive forces in Ohio secured the passage of the Nonpartisan Judiciary Act of 1911,[23] which required nonpartisan ballots for the election of judges, and rotation of judicial candidates' names on the ballot. The following year, the Progressive majority in Ohio's constitutional convention succeeded in proposal and ratification of direct primary nomination of all elected officers, including judges except those nominated by petition.[24] Like the structural changes which preceded them, partisan primary nomination and the nonpartisan election ballot were soon subjected to severe criticism. It was widely noted that "ability to get publicity rather than judicial fitness" had become the pathway to the Ohio bench.[25] The cycle of growing dissatisfaction with the quality of the judiciary, and impetus for reform was repeated, this time culminating in the 1938 electoral defeat of a constitutional amendment to substitute the appointive-elective method of selection which was to earn its name two years later by adoption in Missouri.[26] The 1938 campaign for structural change, like those before and after, was conducted in the absence of empirical data about voter behavior or candidate characteristics.

A. *Judicial Appointees in an Elective System*

One of the most common assumptions about elective judiciaries is that the "normal" means of access to the bench is gubernatorial appointment to fill an unexpired term, followed by election which is virtually automatic due to the appointee's advantage of incumbency.[27] In a cross-state investigation of elective state supreme courts from 1948 to 1957, Herndon found that 56 per cent of all judges on these courts were initially appointed. However, this single statistic obscures important difference. The proportion of appointments in individual states ranged from 12.5 per cent in Alabama to 100 per cent in Maryland, South Dakota and Wyoming.[28]

[22] Aumann, *The Selection, Tenure, Retirement and Compensation of Judges in Ohio*, 5 U. CIN. L. REV. 408, 409 (1931).

[23] OHIO REV. CODE ANN. § 3505.04 (Page 1960).

[24] OHIO CONST. art. v, § 7.

[25] Aumann, *supra* note 22, at 414.

[26] Clark, *Pro-Commentary on Proposal for Selection and Tenure of Judges*, 30 OHIO B. ASS'N REP. 916, 920-21 (1957).

[27] Herndon, *Appointment as a Means of Initial Accession to Elective State Courts of Last Resort*, 38 N. DAK. L. REV. 60, 67 (1962).

[28] *Id.* at 63.

When the elective states were classified as partisan, semi-partisan and nonpartisan, Herndon found that appointment increased as a means of initial access as the method decreased in degree of partisanship.[29] The less partisan the means of selection, the more likely was initial access to the bench obtained by gubernatorial appointment, according to Herndon.

In Ohio, both historical and recent data show that the so-called "normal" pattern has not prevailed, and Ohio's "semi-partisan" method of selection does not bear out the hypothesis. To fit the hypothetical pattern, about half of Ohio's appellate judges should reach the bench by appointment. Actually, only 19.9 per cent of the accessions to the Ohio supreme court from 1852 through 1970 were by appointment.[30] The proportion of supreme court appointments in the past decade has been somewhat higher (29.6 per cent), but in the state's appellate judiciary as a whole, only 18.2 per cent of the accessions from 1960 through 1970 were by appointment.[31]

The further assumption that judicial appointees, running as incumbents, are subsequently elected more or less automatically by the voters is also invalid in Ohio. In the entire history of the elective supreme court (1852-1970), a majority of the appointees who stood for election for the remainder of the term were defeated by the voters. In the past decade (1960-1970), a slight tendency toward electoral endorsement of such appointees has developed, but a significantly partisan pattern of voter response is clear in both the historical and the contemporary data. Appointees of Democratic governors have tended to be defeated by the electorate, while those named by Republican governors are most likely to have been subsequently elected.[32] Since no appellate judicial appoint-

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[29] "Semi-partisan" refers to a judicial system which combines partisan nomination of judges with nonpartisan election, as in Ohio. The other three states with semi-partisan judiciaries are Arizona, Maryland and Michgan. *Id.* at 67.

[30] This percentage measures 38 of the total 191 accessions. Tabulated from Ohio Secretary of State, Official Roster of Federal, State, County Officers 106-12 (1970); T. Brown, Secretary of State, Ohio Election Statistics 1969-70, 133 (1971).

[31] OHIO APPELLATE JUDGES, BY MEANS OF ACCESSION, 1960-70.

TABLE 1

	ELECTED	APPOINTED	TOTAL
Supreme Court	19	8	27
Courts of Appeals	89	16	105
Total Number	108	24	132
Per Cent	81.8%	18.2%	100%

T. Brown, Secretary of State, Ohio Election Statistics 1959-60, *passim* (1961); *Id.* 1961-62 (1963); *Id.* 1963-64 (1965); *Id.* 1965-66 (1967); *Id.* 1967-68 (1969); *Id.* 1960-70 (1971). John W. Peck was appointed in 1959, but is included in this analysis because he ran for election for the unexpired term in 1960. Robert E. Leach, appointed to the supreme court September 24, 1970, will not face the electorate until November 1972.

[32] Between 1852 and 1970, 15 of the 29 supreme court appointees who stood for election were defeated. Twelve of the 14 appointed by Democratic governors were defeated; only three of the 15 appointed by Republican governors suffered this fate. There is a statistically significant relationship between the party of the appointing governor and the likelihood of his appointee's

ments have been made across party lines in Ohio since 1953,[33] this means, at least in recent years, defeat of Democratic and election of Republican judicial appointees at the polls.

Relatively wide swings in voter response to the gubernatorial candidates do not explain the partisan pattern of voting in Ohio that appears to favor Republican appointees on the bench. What Herndon defines as a "gross shift" in partisan control of the gubernatorial office (when the winning party turns out the incumbent governor's party by capturing more than 55 per cent of the statewide two-party vote for governor)[34] occurred twice in the past decade in Ohio. In 1962, the Republican party captured the governor's chair with 58.9 per cent of the two-party vote; simultaneously, the only appellate judicial appointee running for election in Ohio that year—a Democrat—was defeated.[35] However, the "gross shift" to the Democrats in 1970 by 55.5 per cent of the two-party vote was not accompanied by a similar defeat of Republican appointees to the bench. In fact, seven appellate judicial appointees were running in 1970; all were Republican, and all were elected.[36] Hence it is clear that wide swings in partisan sentiment in Ohio do not necessarily determine judicial ballot outcomes.

This brief examination of the extent of appointive access to Ohio's elective judiciary, and the tabulation of the electoral fate of judicial appointees, fail to explain the skewed partisan outcome uncovered in the data. To understand the operation of judicial elections which are nonpartisan in form but partisan in results, it may be helpful to explore the universe of appellate judges elected in the past decade, the turnout of voters at the polls, and voter response to the judicial ballot.

B. *Participation in Judicial Elections*

Is the electorate apathetic or acquiescent with respect to judicial elec-

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subsequent election (chi square = 12.5233, $p < .001$). Between 1960 and 1970, seven supreme court appointees have run for election; all three Democratic justices were defeated, while all four Republicans were elected. In the appellate judiciary as a whole in the past decade, six of seven Democratic appointees were defeated, while 12 of 13 Republican appointees were elected (chi square = 12.1748, $p < .001$).

[33] The 1953 appointment across party lines was made by Governor Frank Lausche (Dem.). His Republican appointee was Judge James Collier of the Fourth District Court of Appeals.

[34] Herndon classified state elections as "stable," meaning no shift in party control of the gubernatorial office; "proximate shift," referring to the displacement of the party in office by the opposing party winning 50.1-54.9 percent of the vote; and "gross shift," measured by partisan displacement when the displacing party wins more than 55 percent of the statewide two-party vote. Only a "gross shift" appeared to have a significant effect on judicial races. Herndon, *supra* note 27, at 69-70.

[35] Judge John W. Keefe of the First District Court of Appeals, appointed in 1961 by Governor Di Salle, was defeated in 1962 by Republican C. Watson Hover.

[36] In 1970, Governor Rhodes' supreme court appointees Chief Justice O'Neill and Justices Robert Duncan, J. J. P. Corrigan, and Leonard Stern, and appeals court appointees John M. Manos and Alvin I. Krenzler in the Eighth District, and Judge Robert E. Leach (later elevated

tions, as could be inferred from Herndon's hypothesis of the "normal" pattern? No data on participation are included in his study, and few systematic measurements of this dimension of judicial politics can be found in the literature, in spite of the fact that 32 of the 50 states have elective judicial systems.[37] In a study of the Texas judicial system, Henderson and Sinclair note that since 50 per cent of the state's appellate judges attained their position initially by appointment, the state has "primarily an appointive system."[38] The elected half of the judges as well as the voters who chose them are eliminated from further consideration, and the study treats the politics of appointment, involving the governor and the bar. Ladinsky and Silver examined the judicial electorate in Wisconsin in 1964-65, finding that 30 per cent of the eligible voters participated in a hotly-contested, policy-oriented election for a supreme court seat.[39] However, since no data for participation in choices for other kinds of public office are provided, relative judgments about "high" or "low" participation are difficult to make. Jacob's study of popular attitudes toward judicial politics relates actual participation in the work of the courts (as litigants, jurors or witnesses) to voting in Wisconsin judicial elections.[40] Based on responses from a clustered area probability sample, Jacob found no significant difference in self-reported voting rates in the spring, 1963 judicial election between those who had participated in the work of the courts (35.5 per cent voted) and those who had not been involved in the judicial process (31.9 per cent voted).[41]

If the electorate were apathetic about judicial elections, we would expect fewer people voting for judges than for executives or legislators. To test the hypothesis that participation in judicial electoral politics is significantly lower than in legislative or executive elections, data were collected on participation in both primary and general elections for judicial candidates, and for the top partisan candidate on the Ohio ballot (excluding the presidency), as follows: 1960, state auditor; 1962, governor; 1964, U.S. senator; 1966, governor; 1968, U.S. senator; and 1970, governor.[42] "Participation" in both primary and general election judicial contests is measured by the per cent voting in the judicial race of the total voting in the top partisan race.

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to the supreme court) were elected. T. Brown, Secretary of State, Ohio Election Statistics 1967-68 *passim* (1969); *id.* 1969-70 (1971).

37 Seventeen states provide partisan elections for the state judiciary; fifteen have nonpartisan elections. H. JACOB & K. VINES, POLITICS IN THE AMERICAN STATES 279 (2d ed. 1971).

38 B. HENDERSON & T. SINCLAIR, JUDICIAL SELECTION IN TEXAS 20 (1964).

39 Ladinsky & Silver, *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections*, 1967 WIS. L. REV. 128, 154 (1967).

40 Jacob, *Judicial Insulation—Elections, Direct Participation and Public Attention to the Courts in Wisconsin*, 1966 WIS. L. REV. 801, 813 (1966).

41 *Id.* at 841.

42 The top partisan race in 1960 was state auditor, due to the institution of the four-year gubernatorial term in 1958.

1. Primary Contests and Voter Participation

First, a low level of *candidate* activity in judicial races is suggested by the fact that only 16.7 per cent of the total possible supreme court races in the decade were contested in each party's primaries. Second, a low level of *voter* activity is reflected in significantly lower participation in supreme court primary races than in executive and legislative races, with the exception of the 1960 Republican primary, in which the top office (state auditor) was uncontested.[43] The absence of a Republican primary contest for state auditor illustrates the fact that absence of contests may characterize the selection process for executive or legislative as well as judicial office. Third, it is significant that that with one exception, participation is lower in Democratic than in Republican judicial primaries; that is, Democratic voters are less likely to complete their ballots from top partisan office through judicial candidates than Republican voters.

Participation in the 31 opposed primary races for the intermediate courts of appeals shows a similar pattern. The unit of measure is participation rate by district, in 10 districts from 1960-66, and 11 districts from 1968-70. Contested races have been aggregated for the 12 primaries, by level of participation, as follows: "low" participation occurs when less than 75 per cent of those voting in the statewide top partisan race vote in the appeals court race; "moderate" participation falls between 75 and 90 per cent; and "high" participation is found when more than 90 per cent of the voters in the top partisan race vote for the appeals bench candidates.[44]

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[43] TABLE 2

STATEWIDE PRIMARY PARTICIPATION IN OPPOSED SUPREME COURT RACES AS PER CENT OF VOTE FOR TOP PARTISAN OFFICE, 1960-70

Year	*Republican Primary*	*Democratic Primary*
1960	103.7%	(a)
1962	84.9	65.7%
1964	74.1	69.5
1966	(a)	83.8
1968	(a)	(a)
1970	(a)	(a)

(a) No contest

Calculated from Ohio Election Statistics *supra* note 31.

[44] TABLE 3

DISTRIBUTION OF PARTICIPATION RATES IN OPPOSED COURTS OF APPEALS PRIMARY RACES, BY DISTRICT, 1960-70

	Republican Primary		*Democratic Primary*	
Participation	*No. of Districts*	*Per Cent*	*No. of Districts*	*Per Cent*
Low (under 75%)	1	5.6%	6	46.1%
Moderate (75-90%)	11	61.1	5	38.5
High (over 90%)	6	33.3	2	15.4
Total	18	100.0	13	100.0

Chi square = 7.2023 $p < .05$

Calculated from Ohio Election Statistics, *supra* note 31.

The most striking finding revealed by the distribution of participation rates in appeals court primaries is the significantly greater activism among both Republican candidates and Republican voters than among their Democratic counterparts.

In the Republican appeals court primaries, 20.2 per cent of the total races were contested, in contrast to 14.6 per cent of the appeals court races in the Democratic primaries. Higher participation rates of Republican voters are indicated by the fact that a third of the Republican appellate judicial contests attracted over 90 per cent of those who voted in the top partisan contest, while in less than 6 per cent of the Republican races, participation was low. In the Democratic primary contests for appeals judge, only 15 per cent of the races attracted high participation, while almost half of the contests drew low levels of participation. In individual counties, even wider discrepancies in partisan patterns of activism emerge. Over 100 per cent of those voting in legislative and executive contests made judicial choices in 24 counties in the Republican primaries, while this high a participation rate occurred in only 3 counties in the Democratic judicial primaries in the same period.[45]

2. General Elections and Voter Participation

In turning to the November election of appellate judges, it is important to recall that judges are selected on a separate, nonpartisan ballot, unlike the primary ballot which is, of course, partisan, and which lists all offices to be filled on the same ballot. Contests occur more frequently in judicial general elections than in the primaries. In the supreme court, 84.2 per cent, or 16 of the total 19 races from 1960-70, were contested. Participation in these contested races was "moderate," as defined above.[46] In no race did statewide voting for a supreme court justice exceed voting in the partisan races. This confirms the expectation that separation of the

[45] The extreme high participation rate in the data is found in Mahoning County in the 1964 Democratic primary when 163 per cent of those voting in the Young-Glenn senate race voted in a contested court of appeals race. The lowest rates by county were found in the 1968 Democratic primary when the Lausche-Gilligan contest for the senate induced unusually high participation in the partisan race. This illustrates the care with which these data must be interpreted, since the fluctuations in voting patterns may be due to an exciting partisan contest at the top of the ballot, not to unusual apathy in the judicial contest.

[46] TABLE 4

PARTICIPATION RATES IN SUPREME COURT GENERAL ELECTION CONTESTS, 1960-70

	Supreme Court Races			
Year	*(1)*	*(2)*	*(3)*	*(4)*
1960	84.7%	83.5%	87.7%	
1962	85.4	79.2	79.7	
1964	78.5	81.2	75.4	76.6%
1966	81.1	80.2		
1968	82.8	75.5		
1970	83.9	78.2		

Calculated from Ohio Election Statistics, *supra* note 31.

nonpartisan judicial ballot from the partisan executive and legislative ballot would increase the fall-off in voting which normally occurs even from top to bottom of the partisan ballot.

Peak participation rates (about 85 per cent of those voting for top partisan office) are shown in a 1960 race involving a popular former governor, and a 1962 race in which a Republican incumbent justice engendered unusual excitement by challenging (and defeating) the aging Democratic chief justice.

In the general elections for the courts of appeals, 62.9 per cent, or 56 of the total 89 races, were contested. As in the supreme court elections, in no case did more voters participate in judicial races than in the top partisan race. The participation rates by district show voter activity relatively constant over both time and area, with 85.7 per cent of the races falling in the "moderate" category; the other 14.3 per cent showing "low" participation.[47]

C. *Ohio's Republican Judiciary*

Ohio's nonpartisan elective method of staffing the bench appears to produce partisan results. One of the most striking characteristics of the state's appellate judiciary (and one of which few people are aware) is the Republican affiliation of a large majority of its members. Almost three-fourths of the accessions to Ohio's appellate bench in the 1960's were Republican; slightly more than one-fourth were Democratic. These proportions held roughly true whether the judges were appointed by the governor to fill an unexpired term, or elected by the voters.[48]

Republican candidates for the appellate bench in Ohio are not only more likely to win than Democratic candidates, but are also more likely to win in runaway contests—that is, by more than 60 per cent of the vote. When the winning margins of appellate judges are classified by intensity —close, moderate, and runaway—the disparity between the parties is evident. Only 16.7 per cent of Republican appellate judges in Ohio won in "close" contests, compared to 44.4 per cent of Democratic winners; 53.7 per cent of successful Republican candidates won in "runaway" contests,

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[47] Calculated from Ohio Election Statistics, *supra* note 31.

[48] TABLE 5

ACCESSIONS OF OHIO APPELIATE JUDGES, BY LEVEL OF COURT, METHOD OF ACCESSION, AND PARTY AFFILIATION, 1960-70

Level of	*Elected*			*Appointed*			*Total*		
Court	*Rep.*	*Dem.*	*Total*	*Rep.*	*Dem.*	*Total*	*Rep.*	*Dem.*	*Total*
Supreme Court	17	2	19	5	3	8	22	5	27
Appeals Court	63	26	89	12	4	16	75	30	105
Total Number	80	28	108	17	7	24	97	35	132
% by Party	74.1%	25.9%	100.0%	70.8%	29.2%	100.0%	73.5%	26.5%	100.0%

Calculated from Ohio Election Statistics, *supra* note 31.

while only 22.2 per cent of Democratic appellate judges experienced such success.[49]

A simple explanation of this heavy Republican majority on the appellate bench would be that Ohio is a Republican state, and as in other positions of public trust, Ohio voters tend to prefer Republicans in the judiciary. This is too simple a conclusion, however, since Ohio has been a highly competitive arena for the two major parties from 1960 to 1970, and, in fact, throughout its history.[50] Substantial swings between parties have occurred in statewide popular voting, and Democratic candidates have carried the state for five of twelve major executive and legislative offices.[51] Because no such alternation of party successes has occurred in the state judiciary, there is still a Republican advantage in the judicial elections to be explained.

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[49] TABLE 6

"INTENSITY" OF THE VOTE, CONTESTED RACES FOR THE OHIO APPELLATE JUDICIARY, 1960-70[a]

Margin of Victory	*Republican*		*Democratic*		*Total*	
	Number	*Per Cent*	*Number*	*Per Cent*	*Number*	*Per Cent*
50.1-55%	9	16.7%	8	44.4%	17	23.6%
55.1-60%	16	29.6	6	33.3	22	30.6
Over 60%	29	53.7	4	22.2	33	45.8
Total	54	100.0	18	99.9	72	100.0

Chi square = 7.3916 $p < .05$

[a] Classification scheme, with the extremes of "close" and "runaway" elections, is borrowed from Jacob, *supra* note 40, at 807.

[50] In a seminal historical analysis of Ohio politics published in 1960, Thomas A. Flinn provides data on state and national elections showing Ohio to be a "competitive two-party state in which the Repulicans enjoy the advantage;" elections for governor were "incredibly even contests" even before 1900, and from 1900-1958, "the Republicans won only 12 gubernatorial contests to nineteen for their opponents." Flinn, *Outline of Ohio Politics*, 13 WEST. POL. Q. 702, 702-21 (1960). The ethnic-sectional bases of this competitive pattern, cutting across socioeconomic and status cleavages, are analyzed in Flinn, *Continuity and Change in Ohio Politics*, 24 J. POL. 521, 521-44 (1962). Ohio is classified as "two-party competitive" for the period 1956-1970 by Austin Ranney's "index of competitiveness" in Jacob & Vines, *supra* note 37, at 87. The concept of competition is measured by three basic dimensions: "*Proportion of Success*: the percentage of the votes won by each party for statewide offices and the percentage of seats in the legislature held by each. *Duration of Success*: the length of time each party has controlled the statewide offices and/or the legislature. *Frequency of Divided Control*: the proportion of time in which control of the governorship and legislature has been divided between the parties." *Id.* at 85.

[51] TABLE 7

PER CENT REPUBLICAN OF THE POPULAR VOTE FOR MAJOR STATEWIDE OFFICES IN OHIO, 1960-70

Office	*1960*	*1962*	*1964*	*1966*	*1968*	*1970*
President	53.3%	--	37.1%	--	45.2*	--
U.S. Senator	--	38.4%	49.8	--	51.5	49.7**
Governor	--	58.9	--	62.2%	--	44.5
Cong.-at-Large	--	60.5	47.8	--	--	--

* Per cent Republican of the three-party vote; American Independent Party candidate in the race.

** Per cent Republican of the four-party vote; American Independent Party and Socialist Labor Party candidates in the race.

1. The Nonpartisan Ballot

The major structural difference between executive and legislative elections in Ohio on the one hand, and judicial elections on the other, is the nonpartisan ballot. Numerous studies of nonjudicial elections have shown the tendency of nonpartisan electoral systems to provide advantages to upper-income, better-educated voters, who tend to identify with the Republican party.[52] There are two major dimensions of political behavior involved in this phenomenon: political preference, and participation. People in upper socio-economic groups tend to vote Republican, a dimension of political preference. Persons of generally high socio-economic status are also the most highly educated members of the political system, and education levels are associated with political activity, a dimension of participation. Thus those who tend to vote Republican are the most likely to be psychologically capable of conceptualizing political events, the most likely to talk about politics, thus becoming "opinion leaders," and the most likely to vote.[53] The high proportion of organizational memberships among these upper-income, politically active voters provides them with more cues which would enable them to cope with the directionless nonpartisan judicial ballot.

In contrast, lower-income, less-educated voters, who tend to vote Democratic and to vote less regularly,[54] are more likely to be bewildered by the unlabeled names on a nonpartisan ballot. Responding to this bewilderment, Democratic voters are more likely to withdraw from making a selection (the familiar phenomenon of the "fall-off" from the partisan to the nonpartisan ballot), or to vote for a familiar name, reassured in those rare cases by the warmth of recognition that they can do their civic duty (vote) in a not altogether meaningless way. Since judges have less opportunity to develop a political personality of which the voter may become aware, judicial nonpartisan choices are even more remote from the lower-income, less-educated voter than are other nonpartisan elections such as local councilmanic races.

The data on participation have shown higher participation by Republicans than Demcrats in judicial partisan primaries[55] and significant electoral success for Republican candidates in the nonpartisan elections.[56] The missing piece of evidence in the analysis is the behavior of the voter in casting his ballot for judges. A search of the literature has revealed that public opinion research on attitudes toward judicial candidates and

[52] H. BONE & A. RANNEY, POLITICS AND VOTERS 111-13 (2d ed. 1967); E. LEE, THE POLITICS OF NONPARTISANSHIP 139-40 (1960); C. Adrian, *Some General Characteristics of Nonpartisan Elections*, 66 AM. POL. SCI. REV. 766, 766-76 (1952).

[53] Bone & Ranney, *supra* note 52, at 27-8.

[54] Bone & Ranney, *supra* note 52, at 27-8.

[55] *See* notes 43 and 44, *supra.*

[56] *See* note 48, *supra.*

elections has been conducted only in Wisconsin,[57] where nonpartisan judicial *primaries* and separate (April) elections create a strikingly different political setting for judicial selection from that in Ohio. Public opinion research is beyond the scope of this study, but should be undertaken to explore crucial attitudinal variables. In the meantime, election statistics have been analyzed for clues about the linkages between patterns of participation and electoral results.

2. Supreme Court Races

The only empirical data on partisan voting in judicial elections located in a search of the literature are found in Davis' analysis of the partisan elective judiciary of West Virginia.[58] Davis calculated an average vote, measured by per cent Democratic, for six top state executive offices in eight elections from 1928 through 1956, and found that the vote for supreme court judge on the same partisan ballot in each of those elections deviated from the average party vote by less than one per cent.[59] In contrast, in Ohio wide fluctuations occur between the statewide per cent of a party's vote for top partisan office and for judicial candidates of that party on the nonpartisan ballot.[60]

In 12 of the 16 supreme court races, the Democratic judicial candidate won a lesser share of the statewide vote than the party's top candidate on the partisan ballot, reflecting the characteristics of Democratic voting suggested above. In the four cases in which the Democratic candidate on the judicial ballot ran ahead of the party's top partisan candidate, the characteristics of long-term incumbency and famous name appear to explain the judicial candidate's advantage.[61]

In contrast to the deviation in judicial voting under one per cent from the average party vote, as in West Virginia with its partisan judicial bal-

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[57] Jacob, *supra* note 40.

[58] C. DAVIS, JUDICIAL SELECTION IN WEST VIRGINIA (1959).

[59] *Id.* at 26-7.

[60]

TABLE 8

PER CENT DEMOCRATIC OF THE VOTE FOR TOP STATE PARTISAN OFFICE AND FOR SUPREME COURT CONTESTS, WITH DIFFERENCES, 1960-70

	Top State Race	*Sup. Ct. #1*		*Sup. Ct. #2*		*Sup. Ct. #3*		*Sup. Ct. #4*	
Year	*% Democratic*	*% Dem.*	*Diff.*	*% Dem.*	*Diff.*	*% Dem.*	*Diff.*	*% Dem.*	*Diff.*
1960	40.8%	54.5%	13.7[a]	37.7%	-3.1	38.4%	-2.4	---	---
1962	41.1	49.97	8.9[a]	36.6	-4.5	34.4	-6.7	---	---
1964	50.2	59.4	9.2[a]	32.4	-17.8	48.4	-1.8	33.7%	-16.5
1966	37.8	43.7	5.9[b]	31.6	-6.2	---	---	---	---
1968	48.5	38.5	-10.0	28.7	-19.8	---	---	---	---
1970	55.5	31.0	-24.5	44.0	-11.5	---	---	---	---

[a] Long-time Democratic incumbents ran for re-election.

[b] A Democrat named Brown (Clifford) ran for the supreme court.

Calculated from Ohio Election Statistics, *supra* note 31.

[61] Brown candidacies in Ohio judicial process repeatedly show results due to the venerable character of the name as a traditional Republican symbol.

lot, we find Ohio supreme court justices running from 13.7 per cent ahead of the top partisan candidate to 24.5 per cent behind the ticket leader.[62] Recalling the two criteria set forth at the outset of this study, we can now see that Ohio's appellate judges are not *independent*, since they still depend on popular choice; nor are they *accountable*, since it is apparent from the spread in electoral support that voters who choose them cannot identify their value orientations or their decisional propensities.

Because statewide election statistics may obscure significant variations in patterns of partisan support, the Democratic per cent of the two-party vote was calculated *by county* for these supreme court races and the top partisan races. A matrix of correlation coefficients for the six partisan and 16 nonpartisan races shows striking relationships in voting patterns. First, the matrix of correlation coefficients of the partisan races with each other partisan race shows that the distribution of support for partisan candidates in the 88 counties of Ohio remained relatively constant through the decade of the 1960's.[63] This is not surprising, since the pattern of Republican and Democratic party strength has deep historical roots in Ohio politics.[64] The coefficients are extremely high, showing that where Democratic strength is low (or high) for one partisan office in one election, it tends to be low (or high) in the next election, and for a different office. The slight declines in the strength of the relationships over a decade of voting show that although some shifts in partisan strength have occurred, either through population mobility or changes in partisan attachments, these shifts have been incremental and relatively steady over time.[65]

As we would expect, due to the intervention of the nonpartisan judicial ballot, the correlation coefficients for voting in partisan and non-

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[62] *Supra* note 60.

[63]

TABLE 9

CORRELATION COEFFICIENT MATRIX, TOP PARTISAN RACES, 1960-70[a]

	Aud. 1960	*Gov. 1962*	*Sen. 1964*	*Gov. 1966*	*Sen. 1968*	*Gov. 1970*
1960, Auditor	1.0					
1962, Governor	.89	1.0				
1964, Senator	.86	.86	1.0			
1966, Governor	.77	.84	.82	1.0		
1968, Senator	.69	.76	.78	.85	1.0	
1970, Governor	.63	.73	.68	.82	.91	1.0

[a] Pearson product-moment correlation coefficient.
Calculated from Ohio Election Statistics, *supra* note 31.

[64] Flinn, *Outline of Ohio Politics*, and *Continuity and Change in Ohio Politics*, *supra* note 50.

[65] This consistency in voting patterns for partisan office suggests that the inability to measure the vote for the *same* top partisan office in each election is not a serious defect in the data.

partisan races are neither as high nor as consistent.[66] Although all the relationships are strong enough, either positively or negatively, to be statistically significant (less than one time out of a thousand could the relationship occur by chance), the range is from a high of .81 to a low of .29. The high point in apparently coherent partisan voting occurred in the 1960 supreme court race number 2, where the name Taft, not yet associated in the voters' minds with the bench, evoked a strong partisan response.

The three lowest coefficients can most reasonably be interpreted as illustrations of the common twin phenomena of voting for familiar names and endorsing long-term incumbents. In supreme court race number 3 in 1960,[67] popular former governor O'Neill was the Republican candidate for the bench, and appears to have drawn stronger than normal support in Democratic as well as Republican counties. In supreme court race number 2 in 1962,[68] the Republican nominee had been an incumbent since 1954, when he won the seat his father had held since 1914; hence the name Matthias, having been on the judicial ballot for 48 years, was highly familiar to the voters regardless of party. Inspection of county voting data in supreme court race number 1 in 1966[69] reveals high support in Republican counties for a Democratic candidate named Brown, a traditional Republican name in Ohio politics.

The effect of candidates whose party affiliations betray the electorate's expectations about their names is most dramatic in supreme court race number 2 in 1970. This race was a confrontation between two famous names in Ohio politics, with a reversal of the expected party affiliation: a Democratic Brown (Allen) opposing a Republican Corrigan (J.J.P.). An inspection of the data shows Brown winning majorities in small, rural Republican counties, while Corrigan won 74.6 per cent of the vote in Democratic Cuyahoga County, where the "friends and neighbors" vote

66 TABLE 10

CORRELATION COEFFICIENT MATRIX, TOP PARTISIAN RACES AND CONTESTED SUPREME COURT RACES, BY COUNTY, 1960-70[a]

Top Partisan	*Supreme Court Races*			
Office	*#1*	*#2*	*#3*	*#4*
1960, Auditor	.51	.81	.29	
1962, Governor	.68	.38	.49	
1964, Senator	.44	.61	.43	.52
1966, Governor	.39	.63		
1968, Senator	.50	.41		
1970, Governor	.42	−.42		

[a] Although these coefficients are not derived from a sample population, note that all r's are significant at .001, 86 df, except 1960 Aud./Sup. Ct. #3, which is significant at .01.

Calculated from Ohio Election Statistics, *supra* note 31.

67 1960, Auditor/Sup. Ct. number 3, r = .29, *supra* note 66.

68 1962, Governor/SupCt. number 2, r = .38 *supra* note 66.

69 1966 Governor/Sup.Ct. number 1, r = .39, *supra* note 66.

of his home city enhanced the advantage of his "Democratic" name, and where he ran six percentage points ahead of the winning Democratic gubernatorial candidate. The fact that the voters misidentified the candidates and responded to them in a relatively partisan way is shown by the significant *negative* correlation between the vote by county for governor and for this seat on the bench.[70]

Another way of testing the significance of the difference between the vote, by county, on the partisan and nonpartisan ballots, is a difference of means test.[71] The only contested supreme court race in which there was no significant difference in the mean Democratic vote in the counties of Ohio on the partisan and nonpartisan ballots was the K. Taft-Ellison race in 1960, noted earlier as the most partisan of the decade for the supreme court. All other supreme court races show significant fluctuations in voting patterns, either negative or positive, from the relatively steady and consistent pattern of voting for executives and legislators.

In seven races, the Democratic judicial candidate garnered a significantly larger share of the vote than the top partisan candidate of the Democratic party in the counties of Ohio. These races involved the features noted earlier, long-term incumbents and Democrats named Brown. In eight races, the top partisan candidate ran significantly ahead of the Democratic judicial candidate across the 88 counties.[72] This apparently

[70] 1970, Governor/Sup. Ct. number 2, r = –.42, *supra* note 66.

[71] TABLE 11

DIFFERENCE OF MEANS, PER CENT DEMOCRATIC OF THE VOTE FOR TOP PARTISAN OFFICE AND SUPREME COURT RACES, BY COUNTY, 1960-70[a]

Year and S.C. Race	*Republican Candidate*	*Democratic Candidate*	*Mean Difference*	*T Value*	*Level of Significance*
1960 (1)	Hoover	*Bell	–15.6	–24.022	.001
(2)	*K. Taft	Ellison	.001	.002	ns
(3)	*O'Neill	Peck	2.0	2.192	.05
1962 (1-CJ)	*K. Taft	Weygandt	–7.0	–11.859	.001
(2)	*Matthias	Mayer	–1.9	–2.515	.05
(3)	*P. Herbert	Cole	2.8	4.046	.001
1962 (1)	Douglas	*Zimmerman	–9.4	–13.522	.001
(2)	*O'Neill	Bryan	15.1	29.023	.001
(3)	*Schneider	Griffith	–4.2	–5.146	.001
(4)	*P. Brown	Gibson	17.1	28.118	.001
1966 (1)	*Schneider	C. Brown	–12.5	–17.943	.001
(2)	*P. Brown	Bryan	6.8	14.685	.001
1968 (1-CJ)	*K. Taft	Duffy	8.0	11.328	.001
(2)	*T. Herbert	Brothers	15.3	20.531	.001
1970 (1-CJ)	*O'Neill	Bryant	18.9	24.505	.001
(2)	*Corrigan	A. Brown	–3.0	–2.012	.05

* Denotes winner.

[a] Difference of means test, t test at 87 df. At. .001, t = 3.421; at .01, t = 2.638; at .05, t = 1.991.

Calculated from Ohio Election Statistics, *supra* note 31.

[72] *Supra* note 71. Negative values of t show that the Democratic judicial candidate won a higher mean county vote than the top partisan candidate; positive t values show that the partisan candidate had the higher mean vote.

inconsistent pattern of partisan voting confirms the hypothesis that Republican success in the judiciary is not simply a reflection of a Republican-dominant state, but results from the complex effects of the nonpartisan ballot.

A final characteristic to be noted here of supreme court voting in Ohio is its insulation from state and national trends, also attributable to the separate, nonpartisan ballot. Strong Republican tides in state politics in 1962 and 1966, a strong national Democratic trend in 1964, and a strong state Democratic trend in 1970 had no significant effect on judicial voting in the state. In these four tidal years, the politics of judicial elections exhibited their usual erratic patterns, and illustrated the lack of accountability in this method of judicial selection.

3. Courts of Appeals Races

Districting for the courts of appeals is done by law in Ohio.[73] The legislature divided the state into 10 judicial districts for the years prior to 1967, and 11 districts since 1968. This division of the state into judicial districts introduces a new variable into analysis of judicial elections. Because of the uneven distribution of party strength in the state, differential benefits and handicaps are created for one party or the other, however the state is districted. To examine this variable, an index of apportionment[74] was calculated for the judicial districts, as well as the per cent voting Democratic in the district for the top partisan race, the per cent of the appeals judge vote in the district cast for the Democratic candidate in the 56 contested races from 1960 to 1970, and "participation" on the nonpartisan ballot, as per cent voting for appeals judge of those voting for the top partisan office. Correlation coefficients were calculated for each pair of variables.

It may be recalled that in the supreme court races, even though there were wide partisan discrepancies between voting for a justice and voting for an executive or legislative candidate, there was still an observable tendency among a significant number of voters to vote consistently.[75] In the 56 courts of appeals races, even this tendency disappears, and there is *no* relationship between voting for the judge nominated by one's party and voting for the top executive or legislative candidate nominated by

[73] OHIO CONST. art. IV, § 3.

[74] The David-Eisenberg Index relates the population of a district to the mean population of all districts in the state. Equality of population (i.e., perfect apportionment) would be indicated by DE(v) = 1, for all districts. A vote value (v) greater than 1 indicates overrepresentation (smaller district population per judge than the mean population of all judicial districts), while a vote value (v) less than 1 indicates underrepresentation (larger district population per judge than the mean population of all judicial districts). Although this measure has generally been applied to legislative districts, it can be used as a valid index to representation in any geographically-distributed electoral system. 1 P. DAVID & R. EISENBERG, DEVALUATION OF THE URBAN AND SUBURBAN VOTE 18 (1962).

[75] *See supra* note 66.

that party.[76] It is not entirely clear why this difference between supreme court and intermediate appeals court voting should exist. It is possible that the greater perceived salience of supreme court elections for those who do vote the nonpartisan ballot helps some voters overcome the confusion due to lack of a party label. At least it can be said that the appeals court judges' location "closer to the people" does not necessarily mean *more clearly identifiable*, again diminishing the possibility of accountability.

In the appeals court races, as in supreme court races, Democratic voters are clearly less likely to vote the nonpartisan ballot than Republican voters.[77] When participation rates are high on the nonpartisan ballot, however, suggesting that more Democratic voters are voting for judicial candidates, there is not greater support for Democratic judicial candidates.[78] Since these voters may not know how to vote Democratic in the absence of a party label, the nonpartisan ballot appears to function as intended, to interrupt partisan patterns of voting.

The measure of apportionment suggests that judicial districts which could be expected to elect Democratic judges were over-populated as drawn from 1960-66. The more people voting Democratic on the partisan ballot, the lower the value of each vote—that is, the farther the district was from the standard of one-man, one-vote.[79] The existence of a Republican gerrymander by malapportionment of the state legislative districts prior to 1966[80] makes it possible to speculate that the party in control of districting viewed the state judiciary as a component of the partisan system of rewards and deprivations through electoral patronage.

The overconcentration of population in Democratic districts, however, does not lead to greater support for Democratic judicial candidates in those districts,[81] again suggesting voter confusion on the nonpartisan bal-

[76] Pearson product-moment correlation coefficient is used in this and subsequent analysis; $r = .21$, not significant.

[77] The more people voting Democratic in partisan races in the district, the lower the proportion voting the nonpartisan ballot. This is confirmed by a significant negative relationship ($r = -.32$, $p < .02$) between the Democratic vote on the partisan ballot and the participation rates in contested courts of appeals races.

[78] Participation rates are negatively correlated with voting rates for Democratic judicial candidates ($r = -.23$, $p < .10$).

[79] A significant negative relationship exists between per cent Democratic of the vote for partisan office and the David-Eisenberg Index of Apportionment ($r = -.34$, $p < .05$). Due to the addition of District Eleven in 1968, the index has been calculated separately for the periods 1960-66, and 1968-70. The United States Supreme Court's one-man, one-vote standards established for legislative elections in Reynolds v. Sims, 377 U.S. 533 (1964), and Wesberry v. Sanders, 376 U.S. 1 (1964) diminished the chances of a gerrymander by population imbalance in the 1968 judicial redistricting, although the rule has not been extended specifically to judicial districts.

[80] K. Barber, Reapportionment in Ohio and Michigan: Political Revolution Reconsidered, 146-154 (1968) (Ph.D. dissertation Case Western Reserve Univ.).

[81] The correlation between the Index of Apportionment (1960-66) and per cent voting for Democratic candidates on the judicial ballot is not significant ($r = .15$).

lot. Manipulation of judicial district boundaries for partisan purposes could be a factor contributing to Republican dominance in the state judiciary as in the state legislature, but the evidence for this hypothesis is obviously inconclusive.

A variable which may be relevant here but which is not susceptible to statistical analysis is the strength of the party organization in a judicial district. Since nominations for the primaries are customarily made by the county party leaders in any given judicial district, the variability among districts in voter turnout and candidate success may relate to the strength or political style of operation of the party organizations. This point may be illustrated by contrasting an intensely competitive judicial district (the Seventh) with a district (the Ninth) where only one of seven possible appeals court races in the decade from 1960 to 1970 was contested, and that single contested race was for an unexpired term.[82]

Both districts have elected a bipartisan bench: five Republicans and four Democrats in the Seventh, four Republicans and three Democrats in the Ninth. It could be hypothesized that in the Seventh District, strong party organizations compete strenuously and regularly in the electorate for judicial office; while in the Ninth, strong party organizations (capable of shutting out attempts by mavericks to enter the primaries) divide the judicial offices by mutual agreement (with rare exceptions), and avoid the necessity and inconvenience of competing in the electorate. Additional evidence of strong party control in the Ninth District may be drawn from the one judicial race (1966), in which the Democratic candidate for the appeals bench won a proportion of the total vote (40.9 per cent) uncannily close to that won by the Democratic candidate for governor (40.5 per cent). In the absence of a careful investigation of the political culture in individual judicial districts, such propositions must remain speculative.

D. *Summary of Empirical Findings*

To summarize the empirical findings about the nonpartisan elective judiciary of Ohio:

The appellate judiciary of Ohio is largely elective, in practice as well as theory.

The appellate judges who gain access to the bench by gubernatorial appointment tend to be defeated by the electorate for the unexpired term if they are Democratic, and elected if they are Republican.

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[82] The Seventh District (1960-66), the most overpopulated district (DE[v] = .688), contained the following counties: Ashtabula, Belmont, Carroll, Columbiana, Geauga, Harrison, Jefferson, Lake, Mahoning, Monroe, Noble, Portage and Trumbull. After redistricting (1968), the Seventh District contained: Belmont, Carroll, Columbiana, Harrison, Jefferson, Mahoning, Monroe and Noble (DE[v] = 1.169). The Ninth District, unaffected by redistricting, combined the following counties for the entire period: Lorain, Medina, Summit, and Wayne.

The appellate judiciary of Ohio, elected on a nonpartisan ballot, is overwhelmingly Republican in party affiliation. Not only are Republican candidates more likely to win judicial races, but Republican winners are significantly more likely to win by wide margins than the relatively few Democratic winners.

Higher participation in Republican than in Democratic judicial primaries suggests a higher level of interest in and concern about the judiciary among Republican than Democratic voters. This interest appears to be carried into the elections, in which Republican candidates not only win more often, but win by greater margins on the nonpartisan judicial ballot than do Democratic candidates. Higher Republican participation reflects the wider organizational affiliations, greater access to channels of communication, and stronger political motivation characteristic of better-educated, higher-income voters.

Lower-income, less-educated voters, who tend to be Democratic, are less likely to vote the judicial ballot because they are confused by the lack of a cognitive map supplied on the partisan ballot by the party label, are less motivated by an education-oriented sense of civic duty to vote the judicial ballot, have less information about judicial candidates, and, lacking knowledge or direction, are likely to vote only when they recognize a familiar name.

The electorate responds to supreme court races somewhat more coherently than to contests for the courts of appeals.

Significant relationships are found between voting for a supreme court justice and for the top executive and legislative candidate; the wide discrepancies which were identified appear to be attributable to long-term incumbencies which develop familiarity of the name on the judicial ballot; and to the partisan misidentification of well-known names.

Appeals court voting exhibits no underlying consistency with partisan patterns; at this level, the nonpartisan ballot appears to be most "successful" in reducing the potentiality of accountability to a minimum.

IV. Lawyers and Judges

The empirical results of Ohio's nonpartisan judicial election system illustrate the "invisible" characteristics identified at the outset of this investigation. The alternative "invisible" means of staffing the bench, the Missouri Plan, is currently being promoted not only by the state bar association in Ohio, but also by the American Bar Association and the American Judicature Society across the nation for selection of state judges, and at the federal level for staffing the federal courts. This combination elective-appointive plan has been adopted with minor variations by thirteen states for selection of supreme court judges; five of these states use it for staffing the intermediate appellate courts, and in sixteen states

some trial courts or courts of limited and special jurisdiction are staffed by this method.[83]

The basic assumption of the plan is that judges are "a special type of public official for which the Bar has a unique responsibility."[84] The central feature of the plan is an official nominating commission on which the organized bar and laymen appointed by the governor have equal representation. The commission submits to the governor a panel of judicial candidates from which the appointment to a vacancy on the bench must be made. The electorate participates in a referendum after a period of judicial service, when the judge runs "against his record," and may be retained or turned out of office.[85]

Watson and Downing's thoroughly documented study of Missouri's 25 years of experience with this plan leads to a number of significant conclusions. The politics of the governor and the bar have replaced the politics of county chairmen and voters in the judicial selection process.[86] The bar itself has become politicized, with the development of a virtual two-party system operating in the election of bar representatives to the nominating commissions.[87] In the metropolitan areas of Missouri, distinct bar associations represent opposing interests: one group tends to represent plaintiffs' lawyers and criminal attorneys in solo practice or in small firms, with lower median income, Democratic party affiliation, and legal education at a local law school; while members of the other group tend to be corporation attorneys and defendants' lawyers in large law firms, with a higher median income, Republican party affiliation, and legal education at "prestige" law schools out of state. These bar groups sponsor competing candidates for the lawyers' positions on the nominating commissions. Although a few appear to be concerned with patronage payoffs —judicial positions for themselves or for their friends, most do appear to seek "policy payoffs." "[T]hey want to get persons on the Bench who will be sympathetic, or at least not hostile, to their clients' interests."[88] The lay members of the nominating commissions in Missouri have been drawn largely from the business community, and have tended to reflect the attitudes and preferences of lawyers they know best, those representing their own business interests.[89]

Finally, a majority of lawyers evaluate plan-selected judges as "better" than those selected under the former system of partisan elections. How-

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[83] American Judicature Society, Report No. 18, The Extent of Adoption of the Non-Partisan, Appointive-Elective Plan for the Selection of Judges, (1969 mimeo).

[84] R. WATSON & R. DOWNING, THE POLITICS OF THE BENCH AND THE BAR 330 (1969).

[85] Ohio H.J.R. No. 27, 108th General Assembly (1969-70).

[86] WATSON and DOWNING, *supra* note 84, at 352.

[87] *Id.* at 20-21.

[88] *Id.* at 39.

[89] *Id.* at 338.

ever, analysis by type of attorney-respondent reflects the socio-economic cleavage in the bar: the defendants' lawyers were more likely to evaluate plan-selected judges as "better," while plaintiffs' attorneys tended to see no difference in the quality of the judiciary.[90] Watson and Downing do not assume that the Missouri Plan would operate with identical results in other states. They suggest that the "cronyistic" conservative nature of the political culture in Missouri would shape any selection process, while the cleavage in Missouri's organized bar is relevant to this particular method.[91]

Although a detailed study has been made of the process by which organized bar advice is provided in the federal judicial system,[92] little systematic information is available about bar participation in state judicial politics outside Missouri. As part of this study of Ohio judicial politics, a small-scale investigation was conducted of the advisory activities of the bar associations in Ohio's largest metropolitian center. Interviews were conducted with officials of the Cleveland bar,[93] and data were collected on lawyer participation in bar polls for endorsement of judicial candidates. Endorsements were analyzed for characteristics of incumbency and partisan affiliation.

The interest of lawyers in bar polls appears to be relatively low. The high point of participation in the past decade occurred in 1960, when 48.3 per cent of eligible lawyers returned judicial poll ballots of the Cleveland Bar Association. With the exception of a slight increase in 1964, participation has decreased over the past decade to 35.4 per cent in 1970. From the one instance of a judicial primary poll, it appears that lawyers, like the average voter, show less interest in primaries than in the final selection.[94]

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[90] *Id.* at 345-47.

[91] *Id.* at 98, 164-65, 336.

[92] J. GROSSMAN, LAWYERS AND JUDGES: THE A.B.A. AND THE POLITICS OF JUDICIAL SELECTION (1965).

[93] Interviews were conducted as follows:
Peter Roper, Exec. Dir., Cleveland Bar Assoc., July 20, 1970. Edwin F. Woodle, Past Pres., Cuyahoga County Bar Assoc., Aug. 7, 1970. John M. Cronquist, Chmn., Bar Poll Committee, Cuyahoga County Bar Assoc., July 20, 1970. The latter two were contacted on recommendation of the current president of the Association, Robert Disbro.

[94] TABLE 12

LAWYER PARTICIPATION IN CLEVELAND BAR ASSOCIATION JUDICIAL POLLS, 1960-70[a]

Year	*Estimated Per Cent of Ballots Returned*	*Year.*	*Estimated Per Cent of Ballots Returned*
1960	48.3%	1968 Primary[b]	32.4%
		Election	35.7
1962	45.0		
		1970 Primary[c]	---
1964	45.5	Election	35.4
1966	41.1		

By testimony of leaders of both organized associations in Cuyahoga County, the organizational base for a legal-political sub-system of representation of opposing interests appears to exist. The Cleveland Bar Association is believed to reflect the "defendants' lawyers" syndrome, while the Cuyahoga County Bar Association is said to represent the "plaintiff lawyers" constellation of characteristics identified by Watson and Downing in Missouri. The potentiality for conflict representation is mitigated, however, by an unknown degree of overlapping membership. This overlap in membership may explain the fact that the reputed socio-economic cleavage in the organized metropolitan bar is not reflected in judicial endorsements. Both groups have tended to endorse incumbents and Republicans.

Although there is no significant difference in the proportion of incumbents or Republicans endorsed by the two bar associations, it is interesting to note that the Cuyahoga County Bar, which reputedly represents the interests of the less privileged groups in society, endorsed a higher proportion of incumbents and Republicans than its rival, the Cleveland Bar.[95] Because of the high degree of overlap between Republican and incumbent judges, it could be argued that the apparent Republican bias in endorsements is simply an inevitable result of the incumbency bias. The sample of non-incumbents endorsed by either association is too small to provide conclusive evidence, but Republicans appear to be favored. All four non-incumbents endorsed by the Cuyahoga County Bar were Republicans; Cleveland Bar endorsements of non-incumbents were divided 4-3, with Republicans in the majority.

Lawyer response to advisory bar polls in one Ohio metropolitan area appears to resemble voter response to judicial selection not only in relative lack of interest, but also in preference for Republicans and incumbents. The articulation of opposing interests in society has not occurred

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[a] Calculated from estimates provided by Peter P. Roper, Executive Director, in letter dated Aug. 20, 1970; data furnished in Feb., 1971. Ballots are sent to all members of the bar in Cuyahoga County, whether or not they belong to the Association. Because the ballot is secret, no separate tabulation is made of members' and non-members' returns. The Cuyahoga County Bar Association was unable to furnish participation data.

[b] First year of endorsements in judicial primaries.

[c] No appellate judicial contests in the 8th District Court of Appeals or in the Ohio Supreme Court.

95 TABLE 13

INCUMBENCY AND PARTISAN AFFILIATION AS VARIABLES IN APPELLATE JUDICIAL ENDORSEMENTS BY LOCAL BAR ASSOCIATIONS, 1960-70[a]

	Per cent of Total Endorsements		*Per cent of Total Endorsements*	
Organization	*Incumbents*	*Non-Incumbents*	*Republicans*	*Democrats*
Cleveland Bar Assoc.	81.6%	18.4%	68.4%	31.6%
Cuyahoga Co. Bar Assoc.	84.0	16.0	76.0	24.0

[a] Calculated from endorsements, 1960-70, supplied by Roper, *supra* note 93; and David Arnold, Sec'y., Cuyahoga County Bar Assn., letter dated Nov. 17, 1970.

through the organized bar under the present system of selection in Ohio. However, it is reasonable to predict that institutionalization of lawyer participation in the official selection process, as in the Missouri Plan, would increase the salience of judicial politics for lawyers, and could lead to politicization of the bar.

V. CONCLUSION

This empirical profile of the partisan operation of a nonpartisan elective system equips us to return to the question posed at the outset: what selection method best meets the criteria of independence and accountability in the judiciary?

The nonpartisan elective system fails to meet the criterion of accountability in that the lack of a party label deprives the voter of any aggregate information which would enable him to predict the decisional propensities of a judicial candidate. This deficiency is most serious at the appellate level, where judicial policy-making is most likely to occur. The voter tends to be guided by familiarity or identity of the name, which may depend on incumbency or ethnic affiliation. Upper-status voters are more likely to have information enabling them to overcome the anonymity of the nonpartisan ballot, and therefore derive an advantage from its use. Lower-status voters, less capable of coping with the nonpartisan ballot, are disadvantaged by its use. The "invisibility" of the system disqualifies it.

The selection plan advocated by the organized bar also fails to meet the criterion of accountability because of the "invisibility" of the process. The nominating commission provides for a combination of secrecy and private group influence which should not be legitimized in the selection process for public officials. Lawyers may be especially qualified to evaluate judges, but they also have a vested interest in the selection of judges potentially favorable to their clients. For the organized bar to dominate or to become a veto group within an official nominating commission is undesirable and may be improper. The governor, although technically responsible for judicial appointments under the plan, cannot be held responsible by the voters for bad appointments, since his responsibility is shared with an anonymous group of decision-makers. The noncompetitive election for retention of incumbent judges is a meaningless routine, admittedly built into the plan for the public relations purpose of reducing voter hostility to adoption of the new method.[96]

Either partisan election or simple appointment by the governor with confirmation by the state senate would meet the criterion of accountability. Partisan election, creating conditions for maximum responsiveness, is

[96] Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 DUQUESNE L. REV. 77 (1968-69).

less likely than appointment to meet the criterion of independence, since repeated partisan campaigns may require judicial candidates to play the game of extractive politics in addition to the larger politics of policy-making. Gubernatorial appointment provides the "visible" condition under which the voters can hold the judges accountable indirectly through the appointing agent. At the same time, the judges, through tenure, can decide cases independently of popular passion or interest group pressures which are sometimes brought to bear on judicial campaigns.

These conclusions are, of course, limited by the single-state scope of the study. Further research should be done in three distinct but related areas. First, intensive examination of electoral judicial politics in other states where voters staff the bench would provide further testing ground for the conclusions drawn here. Secondly, public opinion research should be undertaken to explore the parameters of voters' response to judges' candidacies in states with partisan and nonpartisan ballots. Finally, further analysis of the decisional output of state appellate courts, carefully controlled for party affiliation of the judges and for the method of judicial selection,[97] would illuminate the relationship hypothesized here between decisional propensities and *visibility* of selection method.

[97] Nagel's pioneering research in this area did not distinguish between Missouri Plan appointment and simple executive appointment. He found that appointed judges were more likely to vote contrary to the expected partisan pattern than elected judges, but his explanatory hypothesis for this behavior suggested the influence of bipartisan or nonpartisan nominating commissions in appointive systems. No distinct analysis was made of decisional propensities of judges appointed by visible and invisible means.