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NOTES

JUDICIAL SLATING IN MARION COUNTY, INDIANA: DEFENDING ITS CONSTITUTIONALITY WHILE ADVOCATING REFORM

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INTRODUCTION

Critics of Marion County's judicial selection process should blame Richard Nixon. Although Nixon was never directly involved in structuring Indiana's judiciary, the aftermath of the Watergate scandal created the political environment that led the Indiana General Assembly to enact a unique judicial selection process in Marion County.¹ In the 1974 elections, continued displeasure with the Republican Party stemming from Watergate led Marion County² voters to elect Democratic candidates to all seven seats on the Marion Superior Court,³ which included the defeat of three Republican incumbents.⁴ Other Democratic candidates also defeated their Republican challengers for six other spots on other courts within the county.⁵ The reforms that followed these elections shaped the judicial selection process that the county used for the next forty years later.⁶

Although courts around the country use a variety of judicial selection measures, Marion County's system is unique.⁷ Marion County voters elect judges

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1. Dave Stafford, *Marion County Slating Reform Gets New Push*, IND. LAW. (Aug. 29, 2012), <http://www.theindianalawyer.com/marion-county-slating-reform-gets-new-push/PARAMS/article/29543> [<http://perma.cc/ANV8-T938>].

2. Marion County is the largest county in Indiana and is home to the state's capital, Indianapolis. *See About Indy*, CITY INDIANAPOLIS & MARION CTY., <http://www.indy.gov/pages/aboutindy.aspx> [<http://perma.cc/5KBN-8SXC>] (last visited Jan. 1, 2015).

3. Jeff Devins, *Demo 'New Broom' Sweeps GOP Off County Benches*, INDIANAPOLIS STAR, Nov. 6, 1974, at 13.

4. *Id.*

5. *Id.*

6. *See generally* 1975 Ind. Acts 1715.

7. Dave Stafford, *Judge: Suit Challenging Marion County Judicial Slating May Proceed*,

through partisan elections, but the Indiana Code limits the number of candidates a political party may nominate for the general election to half the positions on the court.⁸ The county's Democratic and Republican parties also use a system called "slating" in which party leaders endorse certain candidates for the primary election.⁹ Lawyers and other members of the community criticize the combination of these two processes and contend that it prevents many voters from meaningfully participating in judicial selection in Marion County.¹⁰

This Note assesses the constitutionality of this process and advocates reforming this system to promote a more accountable and independent judiciary. Part I of this Note summarizes the history of judicial selection for the Marion Superior Court and the court's current structure. It includes results from past elections, which demonstrate that judicial candidates supported by party leaders are substantially more likely to be elected to the court. Part II analyzes and critiques the Seventh Circuit's holding that Marion County's system is unconstitutional. This Note argues that although this process may be poor policy, recent United States Supreme Court precedent suggests this system is constitutional. Part III proposes enacting merit selection at the trial level, similar to the processes used in Lake and St. Joseph County, Indiana. Part III also recommends implementing judicial performance evaluations to make retention elections more meaningful and uses Colorado as a framework for creating these systems at the trial level.

I. JUDICIAL SELECTION IN MARION COUNTY

Marion County's judicial selection process is the product of the unique political climate that resulted from the 1974 elections. Following the elections, both Republicans and Democrats seemingly recognized that the changing political attitudes of a given election cycle could lead to each party's complete exclusion from the Marion Superior Court, which would be highly undesirable to both parties.¹¹ Reacting to this political climate, the Indiana General Assembly

IND. LAW. (Sept. 13, 2013), <http://www.theindianalawyer.com/judge-suit-challenging-marion-county-judicial-slating-may-proceed/PARAMS/article/32374> [<http://perma.cc/H48-5W7R>].

8. IND. CODE § 33-33-49-6 (2014).

9. Marisa Kwiatkowski, *Money, Politics, and Judges: Do Judicial Candidates Pay to Play?*, INDIANAPOLIS STAR (Mar. 15, 2014, 11:05 PM), <http://www.indystar.com/story/news/2014/03/15/money-politics-and-judges-do-judicial-candidates-pay-to-play/6470879/> [<http://perma.cc/H58M-Q3Y2>].

10. Complaint for Declaratory and Injunctive Relief/Notice of Challenge to the Constitutionality of State Statute at 5, *Common Cause Ind. v. Ind. Sec'y. of State*, 60 F. Supp. 3d 982 (S.D. Ind. 2014) (No. 1:12-cv-01603-RLY-DML), *aff'd* No. 14-3300, 2015 WL 5234614 (7th Cir. 2015) [hereinafter *Plaintiffs' Complaint*].

11. *See* 1975 Ind. Acts 1715; *see also* IND. SEC'Y OF STATE, ELECTION REPORT STATE OF INDIANA 55 (1978) [hereinafter 1978 ELECTION REPORT]. If the legislature failed to reform this selection process before the next election four years later, one-party electoral dominance likely would have continued. Six of the seven candidates receiving the most votes in 1978 were

in 1975 passed legislation reforming judicial selection within the county.¹²

The legislature capped the number of judicial candidates each political party could nominate to prohibit a single party from winning every position.¹³ The statute specified that a political party could nominate seven candidates for the thirteen positions available on the court.¹⁴ Although the language initially did not include express limiting language, the legislature amended the statute in 1977 to specify that one party could “nominate *not more than* seven (7) candidates.”¹⁵ Later amendments to the statute gradually expanded the number of judges on the court from thirteen to thirty-six.¹⁶ The most significant of these amendments occurred in 2006 when the legislature created an even number of judges on the court and changed the process so that each major party could elect candidates for half the positions.¹⁷ Previously, voters elected an odd number of judges.¹⁸ As a result, each major party nominated candidates for exactly one more than half the positions—with the consequence that one judicial candidate nominated by the two major parties would lose in the general election.¹⁹

Since these reforms, each judge elected to the Marion Superior Court has been either a Democrat or Republican.²⁰ Although candidates unaffiliated with the Democratic or Republican parties have run in the 2000 and 2002 elections, none of these unaffiliated candidates ultimately won.²¹ In 2000, the candidate

Republicans. *Id.*

12. 1975 Ind. Acts 1715.

13. *Id.*

14. *Id.* The Marion Superior Court previously consisted of only seven judges. The 1975 revisions included expanding the number of judges on the Marion Superior Court from seven to thirteen. *Id.*

15. 1977 Ind. Acts 1458 (emphasis added).

16. IND. CODE § 33-33-49-6 (2014). Although the Marion Superior Court has thirty-six judges, voters do not elect every judge during the same election cycle. Voters elect twenty of the judges every six years starting from 2006 and elect the sixteen other judges every six years starting from 2008. *Id.* § 33-33-49-13.

17. 2006 Ind. Acts 1641.

18. *See* 1978 ELECTION REPORT, *supra* note 11, at 55.

19. *See id.* For example, in 1978, each party could nominate seven judges even though there were only thirteen positions. Voters elected all seven Republican candidates that year and elected only six of the seven Democratic candidates. *Id.*

20. *See id.*; IND. SEC’Y OF STATE, ELECTION REPORT STATE OF INDIANA 74 (1984) [hereinafter 1984 ELECTION REPORT]; IND. SEC’Y OF STATE, ELECTION REPORT STATE OF INDIANA 57 (1990) [hereinafter 1990 ELECTION REPORT]; IND. SEC’Y OF STATE, ELECTION REPORT OF THE STATE OF INDIANA 57 (1996) [hereinafter 1996 ELECTION REPORT]; IND. ELECTION DIV., IND. SEC’Y OF STATE, STATE OF INDIANA 2000 ELECTION REPORT 77 (2000) [hereinafter 2000 ELECTION REPORT]; *Election Results*, IND. SEC’Y OF STATE ELECTION DIV., <http://www.in.gov/sos/elections/2400.htm> [<http://perma.cc/WW7G-R45K>] (last visited Nov. 7, 2014) [hereinafter *Election Results*]. Cited print election reports are available at the Indianapolis Public Library at its central location and the Indiana State Library.

21. 2000 ELECTION REPORT, *supra* note 20, at 77; *Election Results*, *supra* note 20. In 2000,

with the most votes among those unaffiliated with either of the main parties received over 60,000 fewer votes than the Democratic or Republican candidate with the least amount of votes.²² The margin was wider in 2002, as over 75,000 votes separated the only Libertarian candidate in the race from the major party candidates.²³ Because candidates unaffiliated with the Democratic and Republican parties have struggled to challenge these party-affiliated candidates, succeeding in the Democratic and Republican primary elections largely secures victory in the general election.²⁴

The slating process heavily influences these elections.²⁵ Both the Democratic and Republican parties in Marion County use slating to endorse candidates.²⁶ During slating, party ward chairmen, ward vice chairmen, and precinct committee members vote on which candidates should be slated, or endorsed, for their primary election.²⁷ However, slated candidates do not automatically appear as the party's candidate in the general election.²⁸ They must compete against any additional candidates in the primary, as unslated candidates may participate in the primary.²⁹ However, out of the twelve unslated candidates³⁰ who participated in these primaries since 2002,³¹ only two defeated slated candidates.³² Eleven other candidates challenged the party slate in a primary from 1978 to 1996.³³

six candidates unaffiliated with the two major parties participated in the general election. 2000 ELECTION REPORT, *supra* note 20, at 77.

22. 2000 ELECTION REPORT, *supra* note 20, at 77. Libertarian candidate Jamie Sue Goldstein received 31,760 votes in 2000 and the candidate from the two major political parties receiving the least amount of votes still received 96,093 votes. *Id.*

23. *Election Results*, *supra* note 20. For the purposes of this Note, "major party" only includes the Democratic and Republican parties.

24. Stafford, *supra* note 7.

25. *See* Mulholland v. Marion Cty. Election Bd., 746 F.3d 811, 813 (7th Cir. 2014) ("The two major political parties in Marion County, Indiana, both follow a long tradition of 'slating' their preferred candidates in primary elections.").

26. Kwiatkowski, *supra* note 9.

27. *Id.* Voters elect precinct committeemen, who constitute a large majority of the voting bloc during slating elections. IND. CODE § 3-10-1-4.5 (2014).

28. Kwiatkowski, *supra* note 9.

29. *See* IND. CODE § 3-8-1-5.5 (2014). The statute only restricts candidates' access to the general election ballot if they fail to win their party's endorsement during slating. *Id.*

30. Since 2002, ninety-eight total candidates participated in the primaries, which means that approximately twelve percent of the candidates were unslated. *Election Results*, *supra* note 20.

31. 2000 ELECTION REPORT, *supra* note 20, at 77; *Election Results*, *supra* note 20. Three unslated candidates participated in the Republican primaries since 2002, while eight unslated candidates participated in the Democratic primaries. *Id.*

32. Kwiatkowski, *supra* note 9. Neither party responded to requests to obtain slating records from before 2000. This data is not otherwise available as a party's endorsement does not appear on the ballot. Therefore, to calculate the number of unslated candidates in these primaries, the author added together the number of additional candidates in each primary.

33. 1978 ELECTION REPORT, *supra* note 11, at 55; 1984 ELECTION REPORT, *supra* note 20,

Although slating is largely associated with political parties, there is no statute in Indiana that prohibits other political or special interest organizations from slating candidates to increase their electoral chances.³⁴

Although unslated candidates may challenge the party's slate in the primary election, failing to win this primary ends their candidacy.³⁵ Indiana's "sore loser" law prohibits candidates who unsuccessfully participate in a party's nominating process or primary election from running in the general election.³⁶ Therefore, a candidate must balance the risks of seeking the party's endorsement with choosing to forgo the nomination and primary process in favor of running as an independent or third-party candidate in the general election.

Money plays a significant role in this slating process.³⁷ The parties ask candidates seeking their endorsement for the primary to contribute between \$12,000 and \$14,000.³⁸ In recent elections, candidates generally contributed more than this minimum, as each of the Democratic candidates slated in 2012 raised over \$14,000.³⁹ Most candidates slated in the Republican primary raised over \$20,000 during that year.⁴⁰ The parties spend most of these funds on each of their "legitimate election costs."⁴¹ Despite the party's fundraising request, these campaign donations must be voluntary because state law prohibits a political party from requiring a candidate to pay slating fees.⁴² However, failing to contribute this money appears to diminish one's chances of being slated, as it is unlikely that the party leadership making these slating decisions looks favorably on candidates who refuse to raise support.⁴³

The lack of competition in these elections, the inability of unslated candidates to win primary elections, and the money that candidates must "voluntarily" contribute garners significant criticism.⁴⁴ A 2009 poll from the Indianapolis Bar Association found that 83.9 percent of its members preferred

at 74; 1990 ELECTION REPORT, *supra* note 20, at 57; 1996 ELECTION REPORT, *supra* note 20, at 57.

34. The codified definition of "slate" in the Indiana Code omits language limiting organizations other than political parties from nominating candidates. *See* IND. CODE § 3-14-1-2(b) (2014) (declared unconstitutional in *Mulholland v. Marion Cty. Election Bd.*, 746 F.3d 811 (2014)).

35. IND. CODE § 3-8-1-5.5 (2014).

36. *Id.*

37. Kwiatkowski, *supra* note 9.

38. *Id.*

39. *Id.*

40. *Id.*

41. These costs include mailers about judicial and non-judicial candidates. *Id.*

42. *Id.*

43. It also dissuades candidates from seeking a party's nomination. Tony Cook, *Unslated Candidate for Judge Seeks Review of Democrats' Mailing*, INDIANAPOLIS STAR (May 3, 2014, 9:52 PM), <http://www.indystar.com/story/news/politics/2014/05/03/unslated-candidate-judge-seeks-review-democrats-mailing/8665581/> [<http://perma.cc/FXE4-9ZP8>].

44. Stafford, *supra* note 1.

nonpartisan merit selection over the current system.⁴⁵ Some of these critics assert that the process essentially allows local party leaders to select judges in Marion County by creating a pay-to-play system.⁴⁶ They contend that most voters do not have the opportunity to participate meaningfully in judicial selection in Marion County because the election is already decided before they submit their votes.⁴⁷ As mentioned previously, the vast majority of slated candidates ultimately become judges in Marion County.⁴⁸ Others point out that the system also deprives Republicans and Democrats of an opportunity to elect more candidates to the court.⁴⁹ Although these parties may have contested primaries, partisan voters may not meaningfully participate in the general election because they cannot vote for their party's chosen candidate for *all* the positions.⁵⁰ Citing these concerns, the American Civil Liberties Union and Common Cause Indiana filed a lawsuit on November 10, 2012 in the United States District Court for the Southern District of Indiana challenging the constitutionality of this system.⁵¹ Both parties later filed motions for summary judgment, leading to the district's court decision on October 9, 2014.⁵²

II. A CONSTITUTIONAL, YET FLAWED SYSTEM

A. Rejecting the Status Quo

Despite the apparent widespread criticism of Marion County's judicial selection process, it took forty years for a court finally to intervene.⁵³ On October 9, 2014, Judge Richard Young reignited the judicial selection conversation in Marion County by holding the county's unique system unconstitutional because of the burden it created on Marion County voters' right to vote.⁵⁴ Although the State appealed the decision, criticizing several aspects of

45. *Id.*

46. Kwiatkowski, *supra* note 9.

47. Plaintiffs' Complaint, *supra* note 10, at 5.

48. See 1978 ELECTION REPORT, *supra* note 11, at 55; 1984 ELECTION REPORT, *supra* note 20, at 74; 1990 ELECTION REPORT, *supra* note 20, at 57; 1996 ELECTION REPORT, *supra* note 20, at 57; 2000 ELECTION REPORT, *supra* note 20, at 77; *Election Results*, *supra* note 20.

49. Kwiatkowski, *supra* note 9.

50. *Id.*

51. Dave Stafford, *Common Cause, ACLU Sue over Marion County Judge Slating*, IND. LAW. (Nov. 2, 2012), <http://www.theindianalawyer.com/common-cause-aclu-sue-over-marion-county-judge-slating/PARAMS/article/30027> [<http://perma.cc/MG44-3G2N>].

52. *Common Cause Ind. v. Ind. Sec'y. of State*, 60 F. Supp. 3d 982 (S.D. Ind. 2014), *aff'd* No. 14-3300, 2015 WL 5234614 (7th Cir. 2015).

53. *Id.*

54. *Id.* at 993. Although the district court held the system was unconstitutional, it stayed the ruling until after the 2014 general election. *Id.* In effect, the court allowed an unconstitutional election process to proceed. The court should have held the opinion until after the elections to prevent this odd situation.

the district court's reasoning, the Seventh Circuit affirmed the holding almost a year later.⁵⁵ The Seventh Circuit focused on the burden that limiting the number of candidates each party may nominate created.⁵⁶ To determine whether this burden rose to an unconstitutional level, the court weighed

“the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden plaintiff's rights.”⁵⁷

The Seventh Circuit held that limiting the number of candidates each party may nominate constitutes a severe burden on the First and Fourteenth Amendment right to vote.⁵⁸ According to the court, these restrictions prevent many voters from having an effective voice in judicial selection within Marion County because the statute created a system that essentially does not allow for competitive elections.⁵⁹ Although the State argued that the ballot access provisions did not prohibit other parties from holding primaries or petitioning to get on the ballot, the court held that the statute does not give “the full electorate the opportunity to consider and choose between the available candidates.”⁶⁰ The court noted that even if an additional candidate appeared on the general election ballot, it would only meaningfully impact the election for one of the positions on the court.⁶¹ The vast majority of the judges on the ballot would still be elected by simply voting for himself or herself.⁶²

According to the Seventh Circuit, the State's purported interests did not outweigh this substantial burden.⁶³ The State contended the selection process advanced legitimate state interests by encouraging impartiality and fair political representation, reducing the costs of judicial elections in the county, and “ensuring stability and public confidence in the court.”⁶⁴ Although it did not reject the legitimacy of the State's interests, the Seventh Circuit found these interests did not justify the current selection process.⁶⁵ For example, although

55. *Common Cause Ind. v. Ind. Sec'y. of State*, No. 14-3300, 2015 WL 5234614, at *4-7 (7th Cir. 2015).

56. *Id.*

57. *Id.* at *4 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983))).

58. *Id.* at *7.

59. *Id.*

60. *Id.* at *5 (“[T]he Statute burdens the vote by essentially removing all competition and electoral choice before the general election.”).

61. *Id.* at *7.

62. *Id.*

63. *Id.* at *13.

64. *Id.* at *8-12.

65. *Id.* at *13.

promoting impartiality and confidence in the judiciary may be a legitimate interest, the court noted that the Indiana Code of Judicial Conduct (“Judicial Code”) sufficiently protects this interest by setting the boundaries of judicial conduct, whereas the current system may actually “damage public confidence in the impartiality of the court.”⁶⁶ Similarly, although the State may have an interest in discouraging “contentious and extreme partisanship,” a partisan balance statute is not the only policy option for achieving this goal, as the State could enforce the current provisions of the Judicial Conduct that address judicial campaigning.⁶⁷ Therefore, considering the substantial burden on the right to vote and the lack of state interests to justify the system, the Seventh Circuit concluded the system is unconstitutional.⁶⁸

B. Mistaking Opportunity and Results

Marion County’s judicial selection process may give elected party leaders a more influential role in selecting judges, but any burden on the right to vote caused by this process does not rise to an unconstitutional level. Although most elections for the Marion Superior Court are uncompetitive, the Seventh Circuit mischaracterized the opportunity voters have in Marion County to have an effective voice in judicial selection.⁶⁹ It erroneously mistook opportunity for results, which the United States Supreme Court distinguished in *New York State Board of Elections v. Lopez Torres*.⁷⁰ *Lopez Torres* involved New York’s judicial selection process for its Supreme Court judges in which political parties nominate their judicial candidates for the general election through a party nominating convention.⁷¹ Unlike Indiana, New York does not use primaries, so individuals endorsed by the party during these nominating conventions appear on the general election ballot.⁷² One political party dominates many districts in New York, so whichever candidate the party leaders choose at the conventions often determines the result of the election.⁷³ Like judicial elections in Marion County after 1974, by the time voters go to the ballot box, the elections in many New York districts are already decided as a practical matter.⁷⁴

Despite the lack of competition in many districts, the Court upheld the system as constitutional.⁷⁵ Although New York’s system inevitably allowed party leaders to choose judges, the Court held that “[p]arty conventions, with their

66. *Id.* at *11.

67. *Id.* at *11-12.

68. *Id.* at *13.

69. *See generally* N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196 (2008).

70. *Id.* The Seventh Circuit distinguished *Lopez Torres* in its opinion. *Common Cause*, 2015 WL 5234614, at *6-7.

71. *Lopez Torres*, 552 U.S. at 200.

72. *Id.* at 200-01.

73. *Id.* at 207.

74. *Id.*

75. *Id.* at 209.

attendant ‘smoke-filled rooms’ and domination by party leaders, have long been an accepted manner of selecting party candidates.”⁷⁶ Even though Lopez Torres was unlikely to receive the party’s nomination because she refused to make patronage hires,⁷⁷ the Court held that nothing in the Constitution confers a right for a candidate to have a “fair shot” at a party nomination.⁷⁸ Lopez Torres’s real problem was that the majority of voters preferred the party leadership’s slate.⁷⁹ This system satisfied any constitutional interest in having competitive elections.⁸⁰ The Court held that “as long as a candidate has an opportunity to access a ballot, the interest in competition is protected.”⁸¹ It refused to impose additional requirements to make these elections more competitive to balance one-party dominance in some districts.⁸² Although states may enact statutes that discourage an electoral monopoly by one party, “the Constitution provides no authority for federal courts to prescribe such a course.”⁸³ According to the Court, New York’s system might be poor policy, but it is not unconstitutional.⁸⁴

Although *Lopez Torres* did not address statutory provisions limiting the number of candidates a party may nominate, two other court decisions upheld provisions similar to Marion County’s framework.⁸⁵ In *Blaikie v. Power*, the New York Court of Appeals upheld a statute limiting each party to nominating one candidate for each New York City borough, which each have two at-large seats on the New York City Council.⁸⁶ Similar to *Common Cause*, the issue for the *Blaikie* court was whether this statutory framework deprived a voter of the “right to vote for a candidate of his choice for both of the elected offices to be filled.”⁸⁷ Noting similar restrictions existed since the nineteenth century, the *Blaikie* court held that the statute did not violate the Fourteenth Amendment.⁸⁸ Additionally, in *LoFrisco v. Schaffer*, the United States District Court for the District of Connecticut upheld a state statute limiting the number of members from one political party that may serve on a local school board.⁸⁹ Although, under the

76. *Id.* at 206.

77. *Id.* at 201.

78. *Id.* at 205 (“What constitutes a ‘fair shot’ is a reasonable enough question for legislative judgment.”); see also *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (“[T]he processes by which political parties select their nominees are not wholly public affairs that States may freely regulate.”).

79. *Lopez Torres*, 552 U.S. at 205.

80. *Id.* at 207.

81. *Id.*

82. *Id.* at 208.

83. *Id.*

84. *Id.* at 209.

85. See *Blaikie v. Power*, 193 N.E.2d 55 (N.Y. 1963); *LoFrisco v. Schaffer*, 341 F. Supp. 743 (D. Conn. 1972).

86. *Blaikie*, 193 N.E.2d at 56.

87. *Id.*

88. *Id.* at 58-59.

89. *LoFrisco*, 341 F. Supp. at 751. Voters elect members of these local school boards. CONN.

statute, the number of seats one party may hold differs depending on the size of the school board, one party cannot hold all of the seats no matter the size.⁹⁰ Like the *Blaikie* court, the *LoFrisko* court held that this statutory scheme did not violate the Constitution.⁹¹ However, the Seventh Circuit distinguished both of these cases.⁹²

The Seventh Circuit's conclusion that the current system "does not contemplate a contested general election" is erroneous in light of these decisions, as Marion County's current system provides sufficient opportunity for contested, competitive elections.⁹³ The court failed to recognize the link between ballot access and the burden on the right to vote. Although the electoral scheme may discourage contested elections between Democrats and Republicans, the two major parties do not have a monopoly on the ballot.⁹⁴ As the Seventh Circuit correctly noted, Indiana's election laws expressly allow third-party and independent candidates to appear on the ballot.⁹⁵ The requirements for getting on the ballot do not present an insurmountable hurdle.⁹⁶ To appear on the ballot, independent or third-party candidates⁹⁷ may submit a petition "signed by the number of voters equal to two percent (2%) of the total vote cast at the last election for secretary of state in the election district that the candidate seeks to represent."⁹⁸ For the 2014 elections, these candidates needed to retrieve only 4251 signatures in Marion County.⁹⁹ Third parties whose secretary of state

GEN. STAT. § 9-167a (2014).

90. CONN. GEN. STAT. § 9-167a. For example, if the board has three seats, one party may only hold two of the seats. *Id.* If the board has four seats, one party may only hold three seats. *Id.*

91. *LoFrisko*, 341 F. Supp. at 751. However, the *LoFrisko* court did not address the burden on the right to vote. *Id.* at 745. Instead, the contested issue was the existence and effect of vote dilution. *Id.*

92. *Common Cause Ind. v. Ind. Sec'y. of State*, No. 14-3300, 2015 WL 5234614, *9 (7th Cir. 2015). The court distinguished these cases by noting that each involved efforts to protect the interests of minority parties in legislative processes. *Id.* A judge, on the other hand, "is not elected to represent a particular viewpoint but must exercise his or her own independent authority to make decisions that uphold and apply the law fairly and impartially." *Id.*

93. *Id.* at *5.

94. *See* IND. CODE §§ 3-8-6-3, -4-10(a) (2014).

95. *Id.* §§ 3-8-6-3, -4-10(a).

96. *Id.* §§ 3-8-6-3, -4-10(a).

97. This could include candidates within the Democratic or Republican parties who choose to run in the general election because they are unlikely to receive the party's nomination.

98. IND. CODE § 3-8-6-3. The Seventh Circuit previously held that this petition requirement is constitutional. *Hall v. Simcox*, 766 F.2d 1171, 1177 (7th Cir. 1985).

99. *State Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of the Motion for Summary Judgment* at 5, *Common Cause Ind. v. Ind. Sec'y. of State*, 60 F. Supp. 3d 982 (S.D. Ind. 2014) (No. 1:12-cv-01603-RLY-DML), *aff'd* No. 14-3300, 2015 WL 5234614 (7th Cir. 2015). The United States Supreme Court upheld statutes that required candidates to collect over 20,000 signatures in *Norman v. Reed*, 502 U.S. 279, 295 (1992), and *American Party of Texas v. White*, 415 U.S. 767, 783 (1974).

candidate received between two and ten percent of the vote in the last statewide election for that office may also nominate candidates for the ballot during their party nominating convention.¹⁰⁰ Although third-party candidates only ran in two previous elections, their absence from the ballot in more recent elections should not support the inference that they will not be able to compete in future elections. Lastly, individuals may file a declaration of intent to be a write-in candidate.¹⁰¹

Addressing these ballot access provisions, the Seventh Circuit reasoned that even if a third-party candidate gained access to the ballot, all but one of the spots would be contested.¹⁰² As a result, the court concluded the system largely “forecloses the opportunity for electoral choice.”¹⁰³ However, other electoral situations expose problems with this reasoning. Consider an election in which voters elect sixteen Marion Superior Court judges and sixteen third-party or independent candidates meet the statutory requirements to get on the ballot. Also assume that these third-party or independent candidates enjoy at least as much support as the Democratic and Republican candidates. In this hypothetical scenario, both Republicans and Democrats would have to compete for every seat on the court. Although this scenario may be unlikely given the current dominance of Democrats and Republicans in Marion County politics, it is *possible* that Democrats and Republicans could be completely shut out under the current framework. Like New York voters’ preference for the party’s slate in *Lopez Torres*, Common Cause and ACLU’s real problem appears to be that voters simply prefer Democratic and Republican candidates over these third-party and independent candidates. The burden of the right to vote is minor because ballot access provisions in Marion County allow for meaningful, competitive elections.

Even in past elections where no third-party and independent candidates challenged the major parties, voters in Marion County had a meaningful opportunity to participate in the judicial selection process by voting in primary elections.¹⁰⁴ Political primaries are a “major avenue for political participation”

100. IND. CODE § 3-8-4-10(a). The Libertarian Party in Indiana would have been eligible to nominate candidates for the 2014 elections under this provision. The Libertarian Party’s candidate for secretary of state received 100,795 out of the 1,709,734 votes cast in the 2010 election. IND. SEC’Y OF STATE, 2010 INDIANA ELECTION REPORT, *available at* http://www.in.gov/sos/elections/files/2010_ELECTION_RESULTS_155618.pdf [<http://perma.cc/VBG7-KXAA>].

101. *See* IND. CODE § 3-8-2-2.5.

102. *Common Cause Ind. v. Ind. Sec’y. of State*, No. 14-3300, 2015 WL 5234614, *7 (7th Cir. 2015).

103. *Id.*

104. *See* Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2188-89 (2001); IND. CODE § 3-10-1-6 (2014). The openness and potential competitiveness of these primaries did not change the Seventh Circuit’s constitutional analysis. *Common Cause*, 2015 WL 5234614, *5 n.6. The court noted that even in competitive primary elections, voters may only choose between half the candidates for the Marion Superior Court. *Id.* Because there often are no third-party or independent candidates in the general election, these voters do not have an effective voice in selecting the other half of the judges. *Id.* However, the court once again failed to recognize that there could be enough third-party or

and “provide an outlet for democratic action on a massive scale.”¹⁰⁵ In Indiana, primaries are open to almost all voters as Indiana’s primary access laws are far from stringent.¹⁰⁶ Registered voters in Indiana may participate in a party’s primary if they voted for a majority of a party’s candidates in the previous general election.¹⁰⁷ As third-party and independent candidates rarely appear in many races, it would appear that most voters will likely vote for a majority of one party’s candidates in a general election. Although this might leave a bad taste in the mouths of independent voters in Marion County who identify with neither party, the United States Supreme Court bluntly held in *California Democratic Party v. Jones*¹⁰⁸ that “[t]he voter who feels himself disenfranchised should simply join the party.”¹⁰⁹

These primaries can be competitive.¹¹⁰ Although most slated candidates in Marion County succeeded in the primaries, unslated candidates contested most of these races.¹¹¹ A total of twenty-five unslated candidates competed in these primaries since the current system’s adoption and only a few thousand votes decided these elections.¹¹² In the 2008 Democratic primary, nine candidates ran for the party’s eight available spots and the candidate receiving the least amount of votes cast finished only 1266 behind the next finisher.¹¹³ In the 1990

independent candidates to contest every seat on the court.

105. Persily, *supra* note 104, at 2188-89.

106. See IND. CODE § 3-10-1-6.

107. *Id.*

108. 530 U.S. 567 (2000).

109. *Id.* at 584 (“[This decision] may put him to a hard choice, but it is not a state-imposed restriction upon *his* freedom of association . . .”).

110. See 1978 ELECTION REPORT, *supra* note 11, at 24; 1984 ELECTION REPORT, *supra* note 20, at 35; 1990 ELECTION REPORT, *supra* note 20, at 25; 1996 ELECTION REPORT, *supra* note 20, at 25-26; *Election Results*, *supra* note 20.

111. See 1978 ELECTION REPORT, *supra* note 11, at 24; 1984 ELECTION REPORT, *supra* note 20, at 35; 1990 ELECTION REPORT, *supra* note 20, at 25; 1996 ELECTION REPORT, *supra* note 20, at 25-26; *Election Results*, *supra* note 20. This number does not include election results from the 2000 primary election. However, the exclusion of these results does not change the competitiveness of previous elections.

112. 1978 ELECTION REPORT, *supra* note 11, at 24; 1984 ELECTION REPORT, *supra* note 20, at 35; 1990 ELECTION REPORT, *supra* note 20, at 25; 1996 ELECTION REPORT, *supra* note 20, at 25-26; *Election Results*, *supra* note 20.

113. *Past Election Results*, MARION COUNTY ELECTION BOARD, http://www.indy.gov/eGov/County/Clerk/Election/Election_Info/Past_Results/Pages/Election%20Results%20Archive.aspx [<http://perma.cc/Y4QW-HJNU>] (last visited Oct. 4, 2014). The eighth-place finisher received 63,703, while the ninth-place finisher received 62,437. *Id.* The only unslated candidate in the 2008 Democratic primary received the second most number of votes. *Id.*; Joel Schumm, *Ind. Courts—The Kimberly Brown Judicial Ethics Saga: Some Thoughts on Assessing Remorse and the Re-Election Process*, IND. L. BLOG (Dec. 13, 2013, 3:03 PM), http://indianalawblog.com/archives/2013/12/ind_courts_the_43.html [<http://perma.cc/PZ42-Y3EX>] (noting Judge Brown was not slated in 2008).

Republican primary, the difference between the candidate with the least amount of votes among those who won and the candidate with the highest amount of votes among those who lost was under 3000 votes.¹¹⁴ In 2012, the margin (30,727 to 26,790) was approximately 4000 votes in the Republican primary.¹¹⁵ It is doubtful the judges participating in these elections considered these races to be uncompetitive when a few thousand votes could have changed their fate. Although only two candidates defeated the party's slate since 2000 in these primaries,¹¹⁶ as the Court recognized in *Lopez Torres*, "this says nothing more than that the party leadership has more widespread support than a candidate not supported by the leadership."¹¹⁷

However, the Court in *Lopez Torres* also noted that "[c]andidates who fail to obtain a major party's nomination via convention can still get on the general-election ballot for the judicial district by providing the requisite number of signatures of voters resident in the district."¹¹⁸ Although Indiana Code section 3-8-1-5.5 prohibits candidates who lose in primaries or during the nominating process from running in the general election,¹¹⁹ it does not entirely bar candidates from the general election.¹²⁰ Like candidates in New York, candidates have another way to get on the general election ballot by forgoing the nomination process and retrieving the necessary signatures to run as an independent candidate.¹²¹ These candidates must balance the risks of seeking the party's nomination with the risks of running in the general election without the Democratic or Republican label. Marion County judicial candidates, like every other candidate in Indiana, choose their own path and by choosing to seek the party's endorsement, they accept the risk of later exclusion from the general election. Although they might not have access later to the general election as a Democrat or Republican, they have access initially.¹²² Additionally, the State has an interest in preventing "sore-loser" candidates.¹²³ Analyzing a similar "sore-loser" statute, the United States Supreme Court in *Storer v. Brown* held that the statute was constitutional because "[i]t protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot."¹²⁴ Allowing every candidate who lost in a primary to run in the general election "might sacrifice the political stability of the system."¹²⁵

114. 1990 ELECTION REPORT, *supra* note 20, at 25.

115. *Election Results*, *supra* note 20.

116. Kwiatkowski, *supra* note 9.

117. N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 205 (2008).

118. *Id.* at 207-08.

119. See IND. CODE § 3-8-1-5.5 (2014).

120. See *id.* § 3-8-6-3.

121. See *id.*

122. See *id.*

123. *Burdick v. Takushi*, 504 U.S. 428, 439 (1992).

124. *Storer v. Brown*, 415 U.S. 724, 735 (1974).

125. *Id.* at 736.

Furthermore, voters elect precinct committeemen, who play a substantial role in the slating process, in these primaries.¹²⁶ This gives voters at least some role in the slating process. If voters are not satisfied with the candidates party leaders choose, they may simply vote out these party leaders.¹²⁷ This role is especially weighty considering the Supreme Court's recognition in *Cousins v. Wigoda* that "[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made."¹²⁸ Although most voters have little to no knowledge of the individuals running to be precinct committeemen, and in many cases party chairman appoint precinct committeemen because no one seeks the position, the constitutionality of electoral statutes should not turn on voter ignorance.¹²⁹ Therefore, voters have an effective voice in almost every phase of the judicial selection process: they may elect the party leaders for the slating convention, choose between slated and unslated candidates in the primary, and decide whether to support independent or third-party candidates in the general election.

The district court and Seventh Circuit's apparent attempt to make the "general election to mean something" is a noble goal, but not a constitutional requirement when there is not a substantial burden on the right to vote. General elections often do not mean anything in many jurisdictions, especially in those jurisdictions where one party enjoys an electoral monopoly.¹³⁰ For example, in Hamilton County, Indiana, every elected partisan county official is Republican.¹³¹ In 2014, only one Democrat ran for county office in Hamilton County and county voters did not elect any Democratic candidate over the past fourteen years.¹³² Although the nation elected Barack Obama as president by decisive margins in 2008 and 2012, Mitt Romney carried the county by over sixty-five percent and John McCain garnered sixty percent of the county's vote.¹³³ Under the present political environment in Hamilton County, it appears that the winner of the Republican primary is almost assured victory in the general election. May voters who do not identify with the Republican Party meaningfully participate in these

126. See IND. CODE § 3-10-1-4.5 (2014).

127. See *id.*

128. *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975) (quoting *Newberry v. United States*, 256 U.S. 232 (1921) (Pitney, J., concurring in part)).

129. See generally Ilya Somin, *What No One Talks About During Election Season: Voter Ignorance*, FORBES (Nov. 3, 2014, 3:08 PM), <http://www.forbes.com/sites/realspin/2014/11/03/what-no-one-talks-about-during-election-season-voter-ignorance/> [<http://perma.cc/7SS7-JPF3>] (discussing voter ignorance generally).

130. *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 207 (2008).

131. Michael Auslen, *Just 1 Democrat Running for Hamilton County Office*, INDIANAPOLIS STAR (Oct. 28, 2014, 6:42 PM), <http://www.indystar.com/story/news/politics/2014/10/28/just-democrat-running-hamilton-county-office/18062675/> [<http://perma.cc/DGP2-SEUY>].

132. *Id.* The Democratic candidate only received twenty-eight percent of votes in that race. *Past Election Information*, HAMILTON COUNTY ELECTIONS OFF., <http://www.hamiltoncounty.in.gov/225/Past-Election-Information> [<http://perma.cc/NH3Q-F4QA>] (last visited Aug. 25, 2015).

133. *Past Election Information*, *supra* note 132.

elections by only voting in the general election? Like independent and third-party candidates in Marion County, other candidates' names may appear on the Hamilton County ballot, but their loss is somewhat inevitable. Under the Seventh Circuit's conception of meaningful participation and effective voice, it is hard to imagine why judicial reform would not be warranted in places like Hamilton County.¹³⁴ The Seventh Circuit is trying to make Marion County judicial elections more competitive than the Constitution requires.

Furthermore, the practice of asking candidates to contribute money to cover a party's legitimate election costs does not affect the system's constitutionality. Although it may be poor policy to involve money in party nominations for judicial candidates, the Court in *Jones* held that "the processes by which political parties select their nominees are . . . [not] wholly public affairs that States may regulate freely."¹³⁵ Similarly, the Court in *Lopez Torres* recognized that the First Amendment confers a right of association for political parties that protects how a party chooses its candidates.¹³⁶ The New York Democratic Party in *Lopez Torres* used far more pernicious criteria than parties in Marion County for excluding candidates from the party's nomination list.¹³⁷ The Democratic Party declined to nominate Lopez Torres because she refused to hire a court attorney of the party's choosing.¹³⁸ The attorney the party wanted Lopez Torres to hire was the daughter of one of the precinct committeemen involved in the nominating process.¹³⁹ However, the Court refused to strike down the system because "the First Amendment confers on political parties [the right] to structure their internal party processes and to select the candidate of the party's

134. The Seventh Circuit distinguished this scenario by noting that in jurisdictions nominated by one-party rule, each party may still select candidates for each position. *Common Cause Ind. v. Ind. Sec'y. of State*, No. 14-3300, 2015 WL 5234614, *7 (7th Cir. 2015). However, Marion County's system "structurally guarantees that there will be no competition between the two major parties in the general election." *Id.* The court misstates the potential competitiveness of these races by choosing the phrase "structurally guarantees." If enough third-party or independent candidates get on the ballot and enjoy substantial support, the two parties may be forced to compete against one another for *every* seat. Including the word "largely" would have been more appropriate.

135. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572-75 (2000) ("In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate . . .").

136. *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 203 (2008); *see also* *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (noting that states need a compelling interest in most cases to justify limiting a political party's First Amendment right); *Nat'l Ass'n for Advancement of Colored People v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

137. *See* Justin Schneider, *Lopez Torres: A Lost Opportunity for Judicial Reform*, 86 *DENV. U. L. REV.* 285, 288 (2008).

138. *Id.*

139. *Id.*

choosing.”¹⁴⁰ Although state law prohibits the parties in Marion County from explicitly forcing candidates to contribute money to the party, the First Amendment protects each party’s consideration of fundraising in their nomination process.¹⁴¹

Not only is the burden on the right to vote slight, but the State has a significant interest in adopting party nomination limits because of the special nature of the judiciary.¹⁴² At the Constitution’s inception, the Founding Fathers understood the unique role of the judicial branch.¹⁴³ Alexander Hamilton recognized that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.”¹⁴⁴ As a result, the Constitution excluded any right for citizens to elect their judges.¹⁴⁵ Even in Indiana, the state constitution afforded the Indiana General Assembly the opportunity to create judicial elections, but did not mandate partisan, non-partisan, or retention elections as necessary components of judicial selection.¹⁴⁶ Policymakers seemingly prioritized judicial independence over public accountability by enacting these provisions.¹⁴⁷

Eliminating party nomination barriers, thereby creating partisan elections for all thirty-six positions on the Marion Superior Court, in exchange for little to no added accountability could severely threaten the court’s independence. Judicial elections could become contentious and the county could do little to prohibit candidates from taking public stances in contested elections on political issues.¹⁴⁸ More importantly, one party likely will occupy most, if not all, of the seats on the court based on recent election results.¹⁴⁹ Since 2006, every Democratic candidate received more votes in each election than every Republican candidate.¹⁵⁰ In the most recent election in 2014, over 10,000 votes separated the Democratic candidate with the least amount of votes and the Republican candidate receiving

140. *Lopez Torres*, 552 U.S. at 203.

141. *Id.*

142. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015) (“The concept of public confidence in judicial integrity does not easily reduce to precise definition . . . But no one denies that it is genuine and compelling.”).

143. THE FEDERALIST NO. 78 (Alexander Hamilton).

144. *Id.*

145. *See generally* U.S. CONST. art. II.

146. *See* IND. CONST. art. II § 14 (“The General Assembly *may* provide by law for the election of all judges . . .”) (emphasis added).

147. Judicial independence, as used in this Note, “embodies the concept that a judge decides cases fairly, impartially, and according to the facts and law, not according to whim, prejudice, or fear, the dictates of the legislature or executive, or the latest opinion poll.” Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3, 3 (2003).

148. Frank Sullivan, Jr., *Assuring Due Process Through Merit Selection of Judges*, 46 IND. L. REV. 123, 127 (2013).

149. *Election Results*, *supra* note 20.

150. *Id.*

the most support.¹⁵¹ Democratic electoral dominance in Marion County judicial campaigns is unlikely to change in the near future given the prevalence of straight-ticket voting in Marion County and the difference in straight-ticket voting totals between the two major political parties. Out of the 160,568 votes cast in Marion County in the 2014 general election, over sixty percent (97,001) were straight-ticket ballots.¹⁵² Of these 97,001 straight-tickets ballot, there were 17,000 more straight-ticket Democratic ballots than straight-ticket Republican ballots.¹⁵³ Although Marion County voters elected a Republican mayor in 2007 and 2011,¹⁵⁴ judicial elections are low-information races where voting based on party-affiliation is more prevalent.¹⁵⁵ One should not draw the inference that elected Democratic judges would make decisions based on their partisan affiliation, but it may hurt its perception as the independent branch, especially when the court addresses political issues like city-council redistricting.¹⁵⁶ Although these limits might not be justified in elections for positions within other branches of government, the unique role of the judiciary makes the structure of judicial selection in Marion County permissible.¹⁵⁷

C. "Image Is Everything"

Andre Agassi may not be a constitutional scholar, but his famous line, "image is everything," from the popular Canon commercial airing during the 1990s has constitutional relevance.¹⁵⁸ To fulfill its constitutional role effectively, the judiciary must be perceived as the neutral, third branch of government that is free from the partisan conflicts that now define the executive and legislative branches.¹⁵⁹ More than other branches, the judiciary derives much of its legitimacy from public perception.¹⁶⁰ Court participants must be confident that

151. *Id.*

152. *Id.*

153. *Id.*

154. *Past Election Results*, *supra* note 113.

155. See Meryl Chertoff & Dustin F. Robinson, *Check One and the Accountability is Done: The Harmful Impact of Straight-Ticket Voting on Judicial Elections*, 75 ALB. L. REV. 1773, 1774 (2011-12) ("Straight-ticket voting 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.").

156. See, e.g., *Ballard v. Lewis*, 8 N.E.3d 190 (Ind. 2014).

157. However, as mentioned previously, other courts upheld the use of party limits in contexts outside of the judicial branch. See *Blaikie v. Power*, 193 N.E.2d 55 (N.Y. 1963); *LoFrisco v. Shaffer*, 341 F. Supp. 743 (D. Conn. 1972).

158. James O'Brien, *Canon's Marketing Strategy: Capture Moments That Count*, MASHABLE (May 8, 2014), <http://mashable.com/2014/05/08/canon-marketing-strategy/> [<http://perma.cc/YKV4-ZJMY>].

159. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015).

160. *Id.* ("The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions.").

the presiding judge in their case will fairly adjudicate their case and will not be guided by other influences.¹⁶¹ They must be assured that their constitutional due process rights will be respected.¹⁶² As Justice Anthony Kennedy aptly noted, the law “commands respect *only if* the public thinks the judges are neutral.”¹⁶³ Without public confidence, judicial legitimacy erodes.¹⁶⁴

Although Marion County’s system is constitutional, parts of the process jeopardize this perception.¹⁶⁵ The money involved in Marion County judicial elections does little to rid the perception that the current process creates a “pay-to-play” system.¹⁶⁶ Although money may not actually have this effect, some perceive the system as selecting judges based on who financially supports the party, instead of factors like experience and legal expertise, which are more relevant criteria.¹⁶⁷ Other aspects of the slating process draw similar ire. If candidates participate in the slating process and lose, they might not get back the money they contributed to the party.¹⁶⁸ They will only receive the contributed money if they do not participate in the primary election.¹⁶⁹ Therefore, this practice does not incentivize competitive primary elections.¹⁷⁰ It actually acts as a disincentive.¹⁷¹ It leaves candidates who fail to gain the party’s nomination in the difficult position of deciding whether to choose to run in the primary or get their money back.¹⁷²

Critics also fear that this money later impacts judicial decision-making and creates conflicts of interest.¹⁷³ Many of the financial contributions come from

161. Jordan M. Singer, *Attorney Surveys of Judicial Performance: Impressionistic, Imperfect, Indispensable*, 98 JUDICATURE 20, 21 (2014).

162. See Sullivan, *supra* note 148, at 123 (“[W]hat we really want from the judge is not so much to win but to receive a fair and impartial adjudication of our claim or defense.”).

163. Nathan Richard Wildermann, *Bought Elections*: Republican Party of Minn. v. White, 11 GEO. MASON L. REV. 765, 784 (2003) (quoting Justice Anthony Kennedy) (emphasis added).

164. See *Williams-Yulee*, 135 S. Ct. at 166.

165. However, the flaws in the current system do not justify only striking the party nomination limits from the statute. As mentioned in the previous section, the problems associated with using partisan elections without party nomination limitations could similarly lead to increased partisanship on the bench.

166. Kwiatkowski, *supra* note 9.

167. *Id.*

168. One of the party’s slating contracts is available with the author.

169. One of the party’s slating contracts is available with the author.

170. One of the party’s slating contracts is available with the author.

171. One of the party’s slating contracts is available with the author.

172. One of the party’s slating contracts is available with the author.

173. The effect of money on judicial decisions has been discussed at length since the United States Supreme Court decision in *Caperton v. A.T. Massey Coal Co., Inc.*, where the Court held that the Due Process Clause required a West Virginia Supreme Court justice to recuse himself from a case involving a company whose chairman donated to the justice’s campaign. 556 U.S. 868 (2009); see Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80 (2009); see also *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

area lawyers and firms who regularly appear before the court.¹⁷⁴ Marion County voters are not alone in sharing this fear.¹⁷⁵ Eighty-three percent of Americans indicated campaign donations affected judicial decision-making in a 2011 survey.¹⁷⁶ In a similar poll, eighty-nine percent characterized the impact of money on judicial decisions as a “problem.”¹⁷⁷ Even many judges recognize the link between campaign donations and the public’s perception of courts.¹⁷⁸ In a 2001 poll of trial court judges, over half acknowledged the perception that campaign contributions impacted later decisions.¹⁷⁹ When such a large amount of voters and judges believe such a relationship exists between money and judicial decision-making, individuals are unlikely to perceive the adjudication of their case as fair and impartial.¹⁸⁰ Whether the money actually has an impact is irrelevant because the *perceived* impact alone justifies reforming the current system.

III. MERIT SELECTION AND JUDICIAL PERFORMANCE EVALUATIONS AS AN ALTERNATIVE TO JUDICIAL SLATING

Although the Court upheld New York’s judicial selection process in *Lopez Torres*, Justice Stevens in his concurrence noted that “[t]he Constitution does not prohibit legislatures from enacting stupid laws.”¹⁸¹ Whether one considers Marion County’s system to be “stupid,” Marion County must reform its judicial selection structure to safeguard the bench from partisan pressures for “[a]n independent . . . judiciary is indispensable to justice in our society.”¹⁸² As mentioned previously, Marion County, along with many other trial courts around the state and country, currently fails to promote this goal effectively. Discarding this system and implementing merit selection with a comprehensive judicial performance evaluation program will better encourage a more independent and accountable judiciary.

A. Implementing Merit Selection at the Trial Court Level

Merit selection is not only possible for trial courts, it is already happening

174. See MARION CTY. ELECTION BD., CANDIDATE CAMPAIGN FINANCE REPORTS, available at http://www.indy.gov/egov/county/clerk/election/candidate_info/pages/candidatecommittees.aspx [http://perma.cc/AZZ2-YZQN] (last visited Aug. 25, 2015).

175. See Shira J. Goodman, *The Danger Inherent in the Public Perception that Justice is for Sale*, 60 DRAKE L. REV. 807, 810 (2012).

176. *Id.*

177. *Id.*

178. *Id.* at 817.

179. *Id.*

180. *Id.* at 818.

181. N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008) (Stevens, J., concurring) (quoting Thurgood Marshall).

182. Peterson v. Borst, 786 N.E.2d 668, 672 (2003) (quoting Ind. Judicial Conduct Canon 1(A)).

in two Indiana counties.¹⁸³ Both Lake and St. Joseph County use a selection process similar to the merit selection process for appointing judges to Indiana's appellate courts.¹⁸⁴ These counties provide a workable framework for how to structure judicial nominating commissions at the local level.¹⁸⁵ In Lake County, nine members comprise its judicial nominating commission, which a justice on the Indiana Supreme Court or judge from the Indiana Court of Appeals chairs.¹⁸⁶ Each of the three county commissioners appoints one non-attorney to the board and the county board of commissioners appoints the fourth non-attorney member by a majority vote.¹⁸⁷ Attorneys within Lake County also elect four attorneys to the commission.¹⁸⁸ St. Joseph County uses a similar structure, but employs a different process for selecting the non-attorney members of its commission.¹⁸⁹ A committee comprised of a judge from the St. Joseph Circuit Court, the president of the St. Joseph County Board of Commissioners, and the mayors from the two largest cities in the county appoint three non-attorney members.¹⁹⁰ The composition of these nominating commissions gives local residents and lawyers a significant role in the selection process.¹⁹¹ Although these commissions submit a list of candidates to the Governor, who ultimately chooses which applicant to appoint,¹⁹² the Governor is limited to the list of candidates the local commission decides is qualified for the bench in that county.¹⁹³

Both counties have statutory safeguards that limit the role of partisan politics in this process.¹⁹⁴ First, both counties have term limits that prevent members of the nominating commission from maintaining their influence over long periods of time.¹⁹⁵ Commission members from both counties also may not hold an elected office or position within a political party.¹⁹⁶ St. Joseph County goes further and forbids more than half of the members of the commission from being from the

183. See generally IND. CODE §§ 33-33-71, -45 (2014).

184. See generally *id.* §§ 33-33-71, -45.

185. See generally *id.* §§ 33-33-71, -45.

186. *Id.* § 33-33-45-28. As of August 2015, Justice Robert Rucker chairs the Lake County commission and Justice Mark Massa chairs the St. Joseph County commission. In the Matter of the Designation of Chairs and Liaison Representatives to the Court's Agencies, Boards, Committees, Commissions, and Task Forces, No. 94S00-1411-MS-712 (Ind. 2014), available at <http://www.in.gov/judiciary/files/order-other-2014-94s00-1411-ms-712.pdf> [<http://perma.cc/SGQ9-QZMY>].

187. IND. CODE § 33-33-45-28.

188. *Id.*

189. *Id.* § 33-33-71-30.

190. *Id.*

191. See generally *id.* §§ 33-33-71, -45.

192. See *id.* §§ 33-33-71-37, -45-35. The Lake County commission submits three names to the governor, while the St. Joseph County commission submits five. *Id.*

193. *Id.* § 33-33-71-40.

194. See generally *id.* §§ 33-33-71, -45.

195. *Id.* §§ 33-33-71-35, -45-33.

196. *Id.* §§ 33-33-71-30, -45-28.

same political party.¹⁹⁷ Additionally, only two of the non-attorney members of the commission may be from the same party.¹⁹⁸ These statutes are not limited to commission members.¹⁹⁹ The statutes' express language prohibits the Governor from considering partisan affiliations in making these appointments.²⁰⁰ Although it would be difficult, if not impossible, to ever prove that political affiliations predominated the Governor's appointment decision, the importance of an appearance of nonpartisanship cannot be overstated.²⁰¹ As mentioned previously, the judiciary derives its legitimacy in its perception as the neutral third branch of government.²⁰² Taking politics completely out of judicial selection may be an unattainable goal, but merit selection at the trial level appears more effective at reassuring court participants that when they go into court, the judge's political affiliation will not affect his decision.²⁰³ The current selection structure does little to promote this confidence in the court's independency.

Although processes in Lake and St. Joseph County provide a model for judicial nominating commissions at the trial level, the legislature must enact additional statutory safeguards to prevent partisanship and political influence from compromising the legitimacy of these commissions. First, attorney members of these commissions should not be elected. Allowing attorneys to campaign for these positions opens the process to the same political and partisan influences that characterized past judicial elections in Marion County. Without this provision, a certain political party or group of lawyers within a certain field could band together to elect members who reflect their interests. Members might also aggressively campaign for these positions promising only to select judges who represent a certain view point or set of beliefs. To lessen this influence, a bipartisan group of state legislators could appoint these members, thus preventing one party or interest group from only electing members of its choice.²⁰⁴ Although politics and other factors could influence which attorneys are appointed, these dangers appear to be less inherent than in a system where attorneys actively campaign to be on the commission.

Additionally, the list of names sent to the Governor should require a supermajority of votes by the members of the nominating commission.²⁰⁵ Such

197. *Id.* § 33-33-71-30.

198. *Id.*

199. *See id.* §§ 33-33-71-40, -45-38.

200. *See id.* §§ 33-33-71-40, -45-38.

201. *See* Singer, *supra* note 161, at 21.

202. Edwin L. Felter, Jr., *Accountability in the Administrative Law Judiciary: The Right and the Wrong Kind*, 86 DEN. U. L. REV. 157, 163 (2008) (quoting William Rehnquist). Judicial independency is "the cornerstone of our constitutional system of separation of powers." *Id.* at 162.

203. Sullivan, *supra* note 148, at 124 ("Our constitutional right to due process of law guarantees us a fair and impartial adjudication of our case.").

204. The commission could include an attorney member and non-attorney member appointed from each of the four caucuses in the Indiana General Assembly.

205. For example, under the proposed scenario in the previous footnote, a candidate would not be selected unless he or she received at least six votes from the eight member commission.

a provision would prevent the commission's majority, who may be from a single interest group, from selecting every candidate. This mechanism would force members of the commission with different interests and political affiliations to work together. Although it may lead to significantly longer discussions and meetings by the commission, it assures that nominees enjoy a broad consensus of support.

The list of applicants should also be confidential. Although this may, admittedly, reduce the perceived transparency of the selection process, keeping this list private would lead to a greater pool of qualified candidates.²⁰⁶ The availability of applicant lists may limit the number of candidates that apply for a vacancy on the Marion Superior Court. Prospective applicants may fear that applying, but ultimately failing to gain the appointment, could negatively affect their current practice, as they could foresee clients switching to another lawyer that may not have judicial aspirations. They may also fear the potential public embarrassment that may accompany failing to gain the appointment. Prohibiting public disclosure of the list would not completely eradicate some of these fears, but would better encourage qualified, capable candidates to apply. Keeping this list confidential would also reduce the political game that often accompanies the merit selection process. Although candidates could attach letters of recommendations with their applications, supporters of a certain applicant would be unable to lobby against other candidates, who may actually be better suited for the court.²⁰⁷ Without these additional safeguards, merit selection could become as partisan and political as past judicial elections.²⁰⁸

Opponents of merit selection fear that although merit selection may produce a less partisan judiciary, it may also produce a less diverse bench.²⁰⁹ They fear that racially diverse candidates in Marion County might not enjoy as much success in merit selection as they have under the current system.²¹⁰ As of 2014, ten out of the thirty-six Marion Superior Court judges are racial minorities.²¹¹

206. Keeping applicant lists confidential is not out of the ordinary, as applications for federal magistrate positions are generally confidential. *See, e.g., Job Details for U.S. Magistrate Judge*, U.S. CTS., <http://www.uscourts.gov/careers/current-job-openings/83634> [<http://perma.cc/QZU6-2SN3>] (last visited Sept. 20, 2015).

207. However, eliminating letters of recommendation altogether may be the only way to eliminate this unsavory aspect of many merit selection processes.

208. Kwiatkowski, *supra* note 9.

209. Having a racially diverse bench has many benefits, including "increase[d] public confidence in the courts." Malia Reddick, Michael J. Nelson & Rachel Paine Caufield, *Racial and Gender Diversity on State Courts*, 48 JUDGES J. 28, 28 (2009).

210. Minority legislators in Illinois expressed similar concerns about judicial reform in Cook County, Illinois, fearing merit selection would lead to less diversity on local benches. Rene A. Torrado, Jr., *The Challenge of Merit Selection*, CBA REC., April 1996, at 11. However, the merit selection system passed by the Illinois General Assembly did not decrease minority representation on the bench. *Id.*

211. *Court Listings*, MARION COUNTY SUPERIOR CT., <http://www.indy.gov/eGov/Courts/Superior/CourtInfo/Listings/Pages/Home.aspx> [<http://perma.cc/FTL2-TJW6>] (last visited Jan. 1,

Additionally, the current selection process produced minority judges who went on to serve with distinction on other courts, including Carr Darden, who served on the Indiana Court of Appeals from 1994 to 2012,²¹² and Tanya Walton-Pratt, Indiana's first female African-American federal court judge.²¹³ However, there is evidence that merit selection processes select racial minority candidates at a higher rate than other selection systems.²¹⁴ The American Judicature Society found in a 1999 study that "merit selection commissions [generally] tend to affirmatively select minority applicants as nominees for judicial vacancies."²¹⁵ In 2009, authors of a similar study concluded that "minorities and women fared very well in states that used merit selection."²¹⁶ Given the success of minority candidates in other merit selection systems, its implementation in Marion County is unlikely to lead to a homogeneous bench.

B. Legitimizing Retention Elections

However, comprehensive accountability mechanisms must accompany merit selection reform if the Marion Superior Court and other trial courts truly want to eradicate partisan politics from judicial selection.²¹⁷ Without these evaluations, ineffective, partisan judges could serve decades on the court with little accountability.²¹⁸ This is possible because removal is problematic in merit selection processes.²¹⁹ Merit selection systems often use low-information, retention elections where voters choose to retain a judge with a simple "yes" or "no" vote.²²⁰ A judge then serves a long term before voters have the opportunity once again to vote on the judge's retention.²²¹ These retention elections are often

2015).

212. *Judge Carr L. Darden*, CT. APPEALS INDIANA, <http://www.in.gov/judiciary/appeals/2452.htm> [<http://perma.cc/7N4E-XVRR>] (last visited Aug. 25, 2015).

213. *Judge Tanya Walton Pratt*, U.S. DIST. CT. FOR S. DIST. INDIANA, <http://www.insd.uscourts.gov/content/judge-tanya-walton-pratt> [<http://perma.cc/U5E9-D9FU>] (last visited Aug. 25, 2015).

214. K.O. Myers, *Merit Selection and Diversity on the Bench*, 46 IND. L. REV. 43, 48 (2013). At the very least, merit selection produces as much diversity as other selection processes. *Id.*

215. *Id.* at 50 (quoting KEVIN M. ESTERLING & SETH S. ANDERSEN, DIVERSITY AND THE MERIT SELECTION PROCESS: A STATISTICAL REPORT, AM. JUDICATURE SOC'Y 9 (1999), available at http://www.judicialselection.us/uploads/documents/diversity_and_the_judicial_merit_se_9C4863118945B.pdf [<http://perma.cc/847N-CK7B>]).

216. Reddick et al., *supra* note 209, at 30.

217. See generally Rebecca D. Gill & Kenneth J. Retzl, *The JPE Commission Toward a More Transparent and Informative Evaluation*, 98 JUDICATURE 26, 26-27 (2014).

218. See *id.*

219. See *id.*

220. *Judicial Retention 2014*, DIV. ST. CT. ADMIN., <http://www.in.gov/judiciary/admin/2924.htm> [<http://perma.cc/QF65-AXW8>] (last visited Aug. 25, 2015).

221. Indiana appellate court judges face retention at the next general election after their appointment, but then do not face retention for another ten years. IND. CONST. art. VII, § 11.

uncompetitive, as voters retain over ninety-nine percent of judges nationwide in retention elections.²²² Voter participation and turnout in these elections is low.²²³

The lack of competitiveness could be attributed to the absence of readily-available, qualitative information about these judges.²²⁴ Although a few local and state evaluation programs exist, these programs fail to provide this necessary type of information.²²⁵ The most thorough source of information is the Indianapolis Bar Association's judicial survey.²²⁶ Before Marion Superior Court elections, the Indianapolis Bar Association ("IndyBar") surveys its members and asks each to critique the superior court judges.²²⁷ IndyBar posts this information online where it is accessible to the public.²²⁸ However, this poll only provides feedback from one group of court participants—lawyers.²²⁹ Feedback from plaintiffs, defendants, jurors, witnesses, and other court participants, who are familiar with the judge and his performance, is not included.²³⁰ Additionally, these types of polls by bar associations are less reliable because they are influenced more by reputation than experiences with that judge in the courtroom.²³¹ Therefore, although Indiana's Division of State Court Administration also posts information about each appellate court judge up for retention election on its website, this information is similarly inadequate because the only evaluative data is a link to an Indiana Bar Association survey.²³² Furthermore, Indiana prohibits judicial incumbents from campaigning in retention election unless they face organized opposition.²³³ Although judicial campaigning has its drawbacks, voters lack information that could provide important insight about the judge's performance.²³⁴

A more comprehensive evaluation system is necessary. Indiana should create a judicial performance evaluation system similar to the system that Colorado²³⁵ currently uses for its trial courts.²³⁶ When a trial judge is up for a retention

222. Gill & Retzl, *supra* note 217, at 26.

223. *Id.*

224. *Id.* ("The same lack of information plagues retention elections. Perhaps this is one reason very few judges lose retention elections.").

225. See *Judicial Retention 2014*, *supra* note 220.

226. See INDIANAPOLIS B. ASS'N JUD. SURV., <http://www.indyjudges.org> [<http://perma.cc/XEN5-8Q6C>] (last visited Aug. 25, 2015).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. Jennifer K. Elek et al., *Judicial Performance Evaluation in the States: A Re-Examination*, 98 JUDICATURE 12, 13 (2014).

232. *Id.*

233. *Judicial Retention 2014*, *supra* note 220.

234. Gill & Retzl, *supra* note 217, at 26-27.

235. Colorado is one of eighteen states with its own judicial evaluation program. *Id.*

236. Eighteen other states using merit selection currently have formal judicial performance evaluations. *Id.*

election in Colorado, a local judicial performance commission evaluates that judge.²³⁷ These commissions also perform one interim evaluation on the judge.²³⁸ Like the judicial nominating commission at the appellate level in Indiana, both attorneys and non-attorneys serve on these commissions.²³⁹ State officials appoint many of the commission members.²⁴⁰

The commission gathers data from a variety of individuals that appear in the judge's court.²⁴¹ Not only do lawyers fill out surveys, but litigants, jurors, expert witnesses, and law enforcement officials do as well.²⁴² Other citizen feedback is not completely excluded from these evaluations, as²⁴³ Colorado also holds public hearings to allow public input about a judge's performance.²⁴⁴ General members of the public may also submit written comments for consideration by the commission.²⁴⁵ The process does not exclude the judge either.²⁴⁶ The commission also interviews judges,²⁴⁷ in which judges may "evaluate themselves and defend their performance to the commission."²⁴⁸

States like Colorado do not limit performance evaluations to the content of each judge's substantive opinions.²⁴⁹ These evaluation commissions also consider other subjective factors,²⁵⁰ including each judge's integrity, legal knowledge, communication skills, temperament, administrative performance, and service to the legal profession.²⁵¹ Instead of assessing personality traits or general reputation, commissions ask individuals familiar with the judge about the judge's procedural fairness.²⁵² The main inquiry is whether participants received a fair

237. COLO. REV. STAT. § 13-5.5-106 (2014). Each twenty-two local judicial district has its own commission. *Id.* § 13-5.5-104.

238. *Id.* § 13-5.5-106.3.

239. Gill & Retzl, *supra* note 217, at 29.

240. *Id.*

241. Rebecca Kourlis, *Judicial Performance Evaluation*, 56 WAYNE L. REV. 765, 767 (2010).

242. *Id.*

243. Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375, 1381-82 (2001).

244. *Id.*

245. *Id.*

246. Gill & Retzl, *supra* note 217, at 29.

247. Andersen, *supra* note 243, at 1381.

248. Gill & Retzl, *supra* note 217, at 29.

249. *See* COLO. REV. STAT. § 13-5.5-105.5 (2014).

250. Singer, *supra* note 161, at 21 ("While certain objective measures can roughly capture a judge's commitment to providing fair procedures, they cannot fully capture the litigant's feeling that she (and her counsel) have been treated fairly and with dignity and have been afforded the opportunity to tell her story.").

251. COLO. REV. STAT. § 13-5.5-105.5. These criteria allow a commission to inform voters not only whether a judge should be retained, but how the commission came to its conclusion. Kourlis, *supra* note 241, at 766.

252. Kourlis, *supra* note 241, at 767. Not only does Colorado's system focus on procedural fairness to prevent a judge's reputation from guiding his evaluation, but procedural factors are also

trial.²⁵³ This allows judges to focus on “fair and efficient adjudication rather than reaching politically popular outcomes.”²⁵⁴

Based on these evaluations, the commission will recommend to voters whether to retain the judge.²⁵⁵ The commission may make one of three recommendations: “Do Not Retain,” “Retain,” or “No Opinion.”²⁵⁶ However, before making this determination, many jurisdictions, including Colorado, allow judges to respond to unfavorable evaluations.²⁵⁷ These commissions sometimes publish the judge’s responses along with the commission’s evaluations.²⁵⁸ The commissions may also highlight an area of concern and create a performance improvement plan along with their recommendations.²⁵⁹ The commissions then send their evaluations and recommendations directly to voters, instead of only appearing on a website.²⁶⁰ Therefore, voters have the necessary information at their fingertips when they go to the polls.²⁶¹

However, budgetary concerns could prevent the implementation of a performance evaluation system in Marion County and in Indiana more broadly.²⁶² Evaluating each trial court judge may be expensive. Alaska spends between \$2000 and \$4000 for each survey²⁶³ and Virginia spends approximately \$5000 per survey.²⁶⁴ States like Massachusetts spend far less, but do not publish judicial surveys for voters to use in determining whether to retain a judge.²⁶⁵ Although using online surveys may reduce costs, implementation of comprehensive judicial performance systems is necessary to insure the judiciary fulfills its constitutional role as the fair and impartial branch—even if it comes at a price.

CONCLUSION

As discussed in this Note, judicial selection in Marion County may only be described as unique. Forty years of election results demonstrate that the current structure gives local party leaders significant influence in the selection of the court and often leads to uncompetitive primary and general elections. However,

easier to quantify. Elek et al., *supra* note 231, at 16.

253. Singer, *supra* note 161, at 21.

254. *Id.*

255. COLO. REV. STAT. § 13-5.5-106.

256. *Id.* The commission gave out “Do Not Retain” recommendations to less than one percent of judges from 2002 to 2012. Gill & Retzl, *supra* note 217, at 30.

257. Gill & Retzl, *supra* note 217, at 29.

258. *Id.*

259. *Id.*

260. COLO. REV. STAT. § 13-5.5-106.

261. *Id.*

262. See Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DEN. U. L. REV. 7, 24-25 (2008).

263. *Id.* at 25.

264. Virginia expected the costs to be later reduced to \$3500-\$4000 per survey. *Id.*

265. Massachusetts also does not have a judicial performance commission. *Id.*

the Seventh Circuit erroneously held that this system was unconstitutional because, despite its flaws, the selection process does not create a substantial burden on the right to vote. Voters may meaningfully participate in these elections because the ballot access provisions are far from stringent, as independent and third-party candidates may easily access the general election ballot and independent voters may vote in political party primaries. Similarly, the slating process used by both major political parties does not affect the constitutionality of the system because the First Amendment right of association extends to political parties to allow them to endorse and choose certain preferred candidates.

Unique problems require unique solutions. Reform at the trial level must focus on promoting a more accountable and independent judiciary. To achieve these goals, Marion County and other local trial courts should implement merit selection and create a local nominating commission safeguarded from partisan and political influences. These jurisdictions must also implement judicial performance evaluations, similar to the system used in Colorado, to prevent ineffective judges from essentially attaining life tenure. Although completely eliminating partisan influences is likely impossible, these reforms will build confidence that Marion County is selecting qualified judges to serve on the bench. Marion County cannot wait for another Richard Nixon to trigger judicial selection reform.