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Judges and Politics: Accountability and Independence in an Election Year

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REVIEW ARTICLE

JUDGES AND POLITICS: ACCOUNTABILITY AND INDEPENDENCE IN AN ELECTION YEAR

by James W. Ellis*

Judging Judges: The Investigation of Rose Bird and the California Supreme Court
by Preble Stolz, New York: Free Press, 1981; $19.95

From Ballot to Bench: Judicial Elections and the Quest for Accountability
by Philip L. Dubois, Austin and London: University of Texas Press, 1980; $23.00

> *"The judge was a Chicagoan and a politician, and his racket was equal justice under the law."*[1]

One need not share Saul Bellow's cynicism about the judiciary to be concerned about the relationship between judges and the political system. New Mexicans must confront this subject as we approach the 1982 elections which will include partisan contests for judicial offices. Two recent events make the relationship between the judicial and political systems more momentuous than usual this year. The first was the decision of the legislature to include on the November general election ballot a proposed constitutional amendment which would replace partisan election of judges with a form of merit selection.[2] The other important event was the state Supreme Court's action in 1979 drastically revising that part of the Code of Judicial Conduct which regulated political activity by judges.[3] The independence and accountability of New Mexico's judiciary are called into question by these two actions, and the New Mexico voter will make a choice which will greatly affect the future role of the courts. Therefore, the consequences that attend that choice must be re-examined.

An extraordinary diverse pair of books recently shed new light on these matters. The first is a controversial account of the recent investigation of alleged misconduct by justices of the California Supreme Court. The other volume is an analysis by a political scientist of the factors involved in the selection of judges by partisan election and by so-called merit

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1. S. Bellow, Humboldt's Gift 232 (1975).
2. 1981 N.M. Laws 2210.
3. Code of Judicial Conduct, Canon 7 (Repl. Pamp. 1981).

selection plans. Together, these two books illuminate, but do not resolve, the perennial tension between accountability and independence as competing public concerns about the judiciary.

I.

Judging Judges[4]

Preble Stolz's is the juicier and livelier of the two books under consideration. Professor Stolz has exhaustively documented and analyzed the unraveling of one of the nation's great courts.[5] The events in California, as well as Stolz' commentary, raise important issues about the proper role of the judiciary.

The California courts' crisis began during the re-election campaign of Chief Justice Rose Bird in 1978. Bird had been appointed by Governor Edmund G. (Jerry) Brown, Jr. in 1977 and was to stand in a "yes-or-no" retention election without an opponent on the general election ballot in November of 1978.[6] On the morning of the election, the *Los Angeles Times* printed a front page story which accused members of the Supreme Court of having withheld a controversial opinion in a criminal case until after the election. Bird's appointment was confirmed by the voters, but by a bare 51.7% majority. Controversy over the actions of Chief Justice Bird and other members of the court continued in the weeks following the election. Bird requested that the state Commission on Judicial Performance conduct an investigation of the charge of improper delay of the release of a case, and an inquiry into the possibility that leaks from members of the court had prompted the original newspaper story.

The Commission decided to hold public hearings, and called justices and their clerks to testify about the court's consideration of several cases.[7] The testimony reached discussions in the court's secret conference sessions, private memoranda between justices, and individual conversations between justices and the clerks and among the justices themselves. Revelations from the hearings were widely reported in the press, and portions of the testimony were televised in some parts of the state. The hearings were aborted when Justice Stanley Mosk refused to testify in public, a refusal which was eventually upheld by an ad hoc appellate court.[8] The

4. P. Stolz, Judging Judges: The Investigation of Rose Bird and the California Supreme Court (1981) [hereinafter cited as Stolz].

5. On the California Supreme Court's distinguished background, *see* Stolz, *supra* note 4, at 76–82; G. E. White, The American Judicial Tradition 292–316 (1976).

6. For a fuller discussion of non-contested retention elections for judges, *see infra* Part III.

7. People v. Tanner (I), 151 Cal. Rptr. 299 (1978), *reh'g granted*, Fox v. City of Los Angeles, 22 C.3d 794 (1978); Hawkins v. Superior Court, 22 C.3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978); People v. Levins, 22 C.3d 620, 586 P.2d 939, 150 Cal. Rptr. 458 (1978); People v. Tanner (II), 24 C.3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979).

8. Mosk v. Superior Court, 25 C.3d 474, 601 P.2d 1030, 159 Cal. Rptr. 494 (1979). Because the supreme court was involved, an ad hoc supreme court composed of randomly selected justices from the state courts of appeal heard the Mosk case.

Commission heard the remaining testimony in closed sessions and concluded its work a year after the election with a terse announcement that "the investigation is . . . now terminated and the result hereby announced is that no formal charges will be filed against any Supreme Court justice."[9]

This resolution fell far short of a complete exoneration of the court and its members. Although the evidence which was presented in the commission's public hearings indicated no serious impropriety, some of the actions of the justices are open to criticism. Chief Justice Bird and Justice Tobriner probably did not intentionally withhold opinions for the purpose of electoral advantage; the political consequences of impending opinions, however, did not escape the attention of several of the justices. It seems fair to conclude that Justice William Clark[10] provided information to the *Times* which served as a major source of the election day story about Bird,[11] and, while Justice Mosk's refusal to testify in public makes his role less clear, it seems likely that he also contributed information to the *Times* story.

Specific instances of judicial impropriety, however, were overshadowed by other aspects of the court's operation. Through the commission's hearings, the public got a look at how the personal styles of the justices affected their work. Several members of the court found their reputations diminished by the revelations. Bird appeared as a hard-working and conscientious judge, whose personality made her ill-suited to the administrative responsibilities she faced as chief justice. Clark came across as a judge of modest ability, with continuing interest and involvement in political affairs. Personality conflicts between Bird and Clark seem to have substantially exacerbated the difficult set of circumstances surrounding the election. Mosk's portrait, of necessity, is more obscure, but such evidence as was made public suggests that he was petulant or even vindictive in his dealings with Bird. Justice Frank Newman appeared quixotic at best in his refusal to recuse himself from cases touching upon the investigation.[12] Perhaps saddest of all is the picture presented of former Justice Mathew Tobriner,[13] a respected jurist who became Bird's chief defender on the court. Tobriner's testimony seemed shrill and perhaps lacking in candor.

9. Stolz, *supra* note 4, at 395.

10. Mr. Clark is now National Security Advisor to President Reagan.

11. There is thus some irony in Mr. Clark's current outrage about news leaks from the Reagan administration. *See Clark Cracks the NSC Whip,* Newsweek 25 (March 15, 1982).

12. *See infra* note 15.

13. Tobriner has since retired, and has been replaced by Justice Cruz Reynoso, a former professor at the University of New Mexico School of Law. Justice Reynoso's name will appear on the November 1982 general election ballot for a retention election like Bird's in 1978. Opposition is already developing on the ground that Reynoso's opinions as a judge on the California Court of Appeal too frequently favored criminal defendants. *See* Reich, [gubernatorial candidate Mike] *Curb Raps Reynoso's Nomination,* L.A. Times, Jan. 10, 1982, at A3; and "Reynoso Puzzled by D. A. Unit's Opposition," *Id.*

Thus the overall result of the hearings was a view of the justices behaving in a most unjudicious manner. The secrecy with which courts—especially appellate courts—surround their deliberations was penetrated, and the mystique about the process of judging that this secrecy promotes was at least partially destroyed. It may be that no court could withstand the kind of microscopic inspection which the Bird court underwent, not even the California Supreme Court during the legendary time of Chief Justices Phil Gibson and Roger Traynor.[14] Whether the Bird court was actually a less high-minded operation than its predecessors must be left to speculation, but the commission's public hearings have firmly implanted in the public mind the impression that this was true. This debunking came at a time when the courts generally, and the California court in particular, had already become controversial and politicized in the minds of the California electorate. The damage may or may not be irreparable, but it is certainly not amenable to any overnight cure. The public esteem enjoyed by the California Supreme Court is not the same as it was ten years ago, and that will not be remedied easily.

The impressions of these events gained by the non-California reader of Professor Stolz's book necessarily are filtered through Stolz's perspective.[15] The author cannot be faulted for treating his subject lightly. He gives the reader 427 pages of text plus an appendix consisting of a chronological summary of events. Much of the testimony is quoted verbatim, as are many of the memoranda placed in evidence before the commission. Neither can the author be faulted for merely presenting undigested raw materials from which the reader must draw his own conclusions. The reader is placed on notice by the book's title—Stolz is nothing if not judgmental. He gives his own detailed analysis of each of the opinions in each of the cases under review, plus the precedents upon which they relied, and considers at length the cases which litigated the ground rules of the commission's activities.

Readers will differ in the extent to which they find the book overburdened with detail and analysis. The author's generosity in this regard may strike some as obsessive. Stolz has read everything printed about the

14. Judicial debunking may be well on its way to becoming a cottage industry. *See* B. Woodward and S. Armstrong, The Brethren: Inside the Supreme Court (1979) (hereinafter cited as The Brethren); B. Murphy, The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices (1982); *but see* Cover, *The Framing of Justice Brandeis*, The New Republic, 17 (May 5, 1982).

15. The cast of characters in this drama is small and intimately connected. Newman was a colleague of Stolz's at Boalt Hall for many years, and reportedly plans to return to that faculty following his retirement from the bench. While Stolz and Newman taught at Boalt, their students included later-Governor Jerry Brown and later-Chief Justice Rose Bird. Stolz had served in the administrations of both Jerry Brown and his father, Governor Edmund G. (Pat) Brown, Sr. Rose Bird was a colleague of Stolz in Jerry Brown's cabinet.

investigation, attended all its public hearings, interviewed key participants, pored over the exhibits and record, and he disgorges information and impressions generously. Whether Stolz tells more than the reader—especially the non-California reader—might prefer to know is a matter of personal preference. As a reader casually acquainted with the California courts and politics, this reviewer found the book anything but dull. The story is fascinating and well told.[16]

Readers who are not lawyers will face a different problem. Stolz claims to have tailored the account to readers without legal training, but in this effort he has probably failed—the intricacies of appellate procedure are described only in cursory fashion, and the lay reader should be forgiven for surrendering in despair as he attempts to follow the case analyses presented.

The question of Stolz's bias has been the topic of much discussion since the book's publication.[17] Stolz analyzes or speculates upon the motives of each of the actors in each of the transactions and conversations under consideration. Too frequently (for this reviewer's taste) he waxes snide, as when describing Justice Newman's word choice in an opinion as a "stunt."[18] Stolz is particularly harsh in his judgments of Bird and Tobriner. He charitably advises that "[t]he polite thing to do with Bird's *Tanner* opinion is to look the other way and change the subject."[19] Stolz's discussions of Tobriner harp on an "inability to see"[20] certain important points, and a refusal to admit his own involvement.[21] It is difficult to miss the author's implication that Justice Tobriner was either obtuse or culpable. Stolz is rather gentler with Mosk and Clark, who were allied against Bird and Tobriner insofar as sides can be identified, and who appear to have been the sources of leaks to the press. The criticism of

16. Stolz' book is of far higher quality than the recent best-seller to which it bears some superficial resemblance, Woodward and Armstrong's The Brethren, *supra* note 14. First, Stolz' sources are better. He relies, not upon anonymous gossip by law clerks, but rather upon hard testimonial and documentary evidence, to which we have unique access because of the California court's political misfortunes. But even more important, Stolz, unlike his journalistic brethren, knows what he is writing about. Woodward and Armstrong sought to tell a political tale and were forced in the process to discuss particular cases. They clearly believed that the doctrines expounded by the justices were barely relevant to the story. Thus they made little effort to understand the questions of law they were describing. Stolz knows that, in large part, the doctrines and positions of the justices *are* the political story. His account is by far the more illuminating on the appellate process because he does not attempt to portray judicial politics in a legal vacuum.

17. *See* Tribe, *Courts Should Not Be Criticized for Ignoring Public Opinion*, 2 California Lawyer 11 (Jan. 1982). Some, apparently including Governor Brown, have accused Stolz of bias stemming from his own frustrated judicial aspirations. Stolz vehemently denies this accusation. DeBendictis, *Judging Judging Judges*, 3 Western L. J. 21 (Jan./Feb. 1982).

18. Stolz, *supra* note 4, at 240.

19. *Id.* at 238.

20. *Id.* at 289.

21. *Id.* at 285.

these justices seems less than is warranted by the facts presented—particularly with respect to Clark, whose dealings with the press reveal indiscretion, if not outright antagonism to the Chief Justice. The Foreword to the book, written by Anthony Lewis,[22] takes Stolz to task for being too harsh with the Chief Justice and too lenient toward Mosk, Clark and the *Los Angeles Times*.[23] This criticism seems valid, but the bias (if any) does not cripple the book's usefulness or prevent the reader from viewing the subject fairly. The author presents plenty of material from which the reader can draw contrary conclusions if he so chooses.

The book's value for lawyers and judges is clear—even for those who choose to skim over some particularly detailed passages on the California political scene. Few lawyers are so intimately acquainted with the processes by which appellate courts consider and decide cases that they will not learn a good deal from reading about the tortured birth of the opinions in *People v. Tanner* and *People v. Tanner (II)*. Trial judges may find it instructive to learn about the fate of their carefully crafted work once it reaches higher courts. For anyone interested in the improvement of the appellate justice system, there are even more crucial lessons. The reader learns how different techniques of judicial administration helped or hindered the court in its deliberations, and how the sum of relatively small administrative decisions, personal and legal misjudgments, and the workings of the electoral system brought a great court into disrepute.

Stolz's conclusions are more disappointing than his narrative. In a short chapter entitled "Some Observations about Accountability," Stolz observes that judges need to have political skills, that governors need to keep personal characteristics in mind when making judicial appointments, and that courts need to pay more attention to audiences such as the law schools and the press.[24] These appear to be inadequate lessons to draw from the California experience. This fact does not significantly reduce the value of *Judging Judges*, however. The events that the book describes so clearly and completely are of too much topical concern to be rendered uninteresting by Stolz's rather uninteresting conclusions. The California court's travail suggests that the accountability and independence of judges may become an important political issue in other states in the future,[25]

22. Columnist for the New York Times. Lewis is also the author of a superb account of the consideration of the United States Supreme Court in the case of Gideon v. Wainright, 372 U.S. 335 (1963): A. Lewis, Gideon's Trumpet (1964).

23. Stolz, *supra* note 4, at xii.

24. *Id.* at 401–427.

25. For an analysis of the current assault on the jurisdiction of the United States Supreme Court in such controversial areas as school desegregation, abortion, and school prayer, *see* Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.–C.L. L. Rev. 129 (1981); *Special Issue: Limiting Federal Court Jurisdiction*, 65 Judicature 177–219 (1981).

and that the courts' defenders will need to prepare carefully for the impending battles.

II.

From Ballot to Bench[26]

Philip Dubois's study of judicial elections lacks the narrative interest of *Judging Judges. From Ballot to Bench* is a political scientist's contribution to the debate over merit selection vs. partisan election of judges. It summarizes the existing political science literature and adds the author's own studies on the nature of judicial election. The primary focus is on comparing partisan elections, nonpartisan elections, and retention elections under merit plans (such as California's system for appellate judges).

Devising an acceptable method for selecting judges has presented a problem throughout American history. In the decades after the Revolution, the legislatures of some states elected judges, but this system has since been universally abandoned.[27] Some states have modelled their selection and tenure policies after those of Article III of the federal constitution, but today only two states give judges lifetime tenure.[28] The Jacksonian period gave impetus to partisan election as a method of selecting (and removing) state judges. One reform of this system, adopted by some states, keeps the popular election aspect of the Jacksonian system but attempts to remove partisanship by prohibiting the use of party labels in judicial elections. In this system of nonpartisan elections, opponents may run against sitting judges, but neither the incumbent nor the challenger is identified by party on the election ballot.

Since the 1940s, however, the debate over judicial selection has centered around the pros and cons of the so-called Missouri plan of merit selection. The plan was devised by the American Bar Association and the American Judicature Society and was first adopted by Missouri in 1940.[29] It calls for the governor to select judges in the first instance from a list of qualified candidates drawn up by a commission, and for judges so chosen to stand for "retention" or re-election in a nonpartisan election, without opponent, in which voters make a yes or no decision. A quarter of a century later, twelve states had adopted the plan for the selection of

26. P. Dubois, From Ballot to Bench: Judicial Elections and the Quest for Accountability (1980) [hereinafter cited as Dubois].

27. *See* Winters, *Selection of Judges—An Historical Introduction*, 44 Tex. L. Rev. 1081 (1966); L. Friedman, A History of American Law 110–11 (1973).

28. Massachusetts is an example. *See* Drinan, *Judicial Appointments for Life by the Executive Branch of Government: Reflections on the Massachusetts Experience*, 44 Tex. L. Rev. 1103 (1966).

29. For an analysis of the workings of the Missouri plan in its state of origin, *see* R. Watson & R. Downing, The Politics of the Bench and the Bar: Judicial Selection under the Missouri Nonpartisan Court Plan (1969) [hereinafter cited as Watson & Downing].

judges for their courts last resort,[30] and many other states have considered the plan.[31] The relative merits of the merit selection plan have been debated extensively,[32] but while the literature is voluminous it is also disappointing. Proponents and opponents rarely seek to support the empirical assumptions and predictions they make about the behavior of both voters and judges. More disturbing is the fact that the crucial debate between the value of judicial independence and the need for judicial accountability to the public is seldom joined with any real sophistication.

Dubois's book seeks to remedy the first problem—the lack of empirical data in the debate. He summarizes the debate between proponents and opponents of merit selection, identifies what he believes to be the key empirical questions raised, and provides the available evidence on those points. In particular, he focuses on the number of voters who participate in judicial elections under different systems, the kinds of decisions those voters make regarding incumbent judges, and the extent to which party labels provide an accurate clue to judicial behavior once the judge is on the bench.

Dubois believes that partisan election is a much maligned and underestimated system for selecting judges. The book is written in the form of a brief in support of that proposition. Dubois's data, while complete, are marshalled to support his conclusion in favor of partisan election. He finds that a party label on the ballot greatly increases the number of voters who participate in judicial elections, presumably because the party identification gives them some clue in choosing between candidates about whom they know little or nothing.[33] He finds that in most states with partisan election of judges—although not New Mexico—there is a high correlation between the voter's choice for governor and selection of judicial candidates of the same party.[34] He finds that party labels give voters

30. Dubois, *supra* note 26, at 5. *See* Berkson, *Judicial Selection in the United States: a special report*, 64 Judicature 176 (1980).

31. The plan is also important because it has been informally adopted in other states, including New Mexico, by governors who voluntarily solicit nominations for appointments to fill judicial vacancies from some form of commission or committee. Lowe, *Voluntary Merit Selection Plans*, 55 Judicature 161 (1971).

32. *See* the extensive bibliography provided by Dubois, *supra* note 26, at 297–306. For a sampling of the arguments, *see* Garwood, *Judicial Revision—An Argument for the Merit Plan for Judicial Selection and Tenure*, 5 Tex. Tech. L. Rev. 1 (1973), and Mullinax, *Judicial Revision—An Argument Against the Merit Plan for Judicial Selection and Tenure*, 5 Tex. Tech. L. Rev. 21 (1973). Dubois also summarized the arguments with a modicum of bias. Dubois *supra* note 26, at 3–35. *See also* Atkins, *Judicial Elections: What the Evidence Shows*, 50 Fla. B.J. 152 (1976), and Atkins, *Merit Selection of State Judges*, 50 Fla. B.J. 203 (1976).

33. Dubois, *supra* note 26, at 51. States which change from a partisan election system to a merit retention system experience a substantial decline in voter participation on the judicial portion of their ballots. *Id.* at 59.

34. *Id.* at 64–100. Dubois discusses the New Mexico anomaly at p. 76.

some substantial clue to the performance of appellate judges on such issues as criminal appeals, civil liberties, economic distribution, and government regulation.[35] Dubois concludes that partisan elections promote the accountability of appellate judges,[36] and that, because no verifiable data exist to demonstrate that judicial quality is lower in partisan election states, partisan elections have much to commend them.

Dubois is persuasive in demonstrating that partisan elections promote accountability, but his data do not end the inquiry. He only pays lip service to the debate about the value of accountability and provides no new insights into the proper balance between accountability and judicial independence. It is universally conceded that accountability to the voters is a desirable goal in the executive and legislative branches of government. Judges present a particular problem, however. Enhancing voter control over the judiciary may allow voters to punish those judges who make unpopular decisions in cases involving minority rights or sensitive constitutional issues. This power to punish is less desirable in the judiciary than either of the other branches of government. While judges, in the words of Mr. Dooley, are known to "follow th' iliction returns,"[37] they are also supposed to follow the law. Therefore, they must be freer than a governor or a legislator to adhere to unpopular principles even in defiance of public opinion. A system providing complete political accountability abrogates this freedom. The system of appointment and retention may make a substantial difference in the extent to which a judge feels free to follow his view of the requirements of law in the face of contrary public opinion. For example, the judge who ordered school busing to end segregation in Boston, a federal judge, is still on the bench; the judge who ordered similar busing in Los Angeles, an elected state judge, was defeated at the next election. The implications of such results are unlikely to be lost upon elected judges.

Judicial independence, however, has its own costs. Recently, the judiciary has decided crucial social and political issues through the medium of test case litigation.[38] In the context of such questions, the pressure for accountability imperils judicial independence. Taking those kinds of decisions out of the hands of the "political" branches of government can

35. *Id.* at 178–241.

36. Dubois's studies only consider judges of each state's highest appellate court. It should be noted that issues of judicial independence and responsibility to the electorate may be somewhat different for trial judges than for appellate judges. While Missouri has implemented merit selection at all levels, other states have done so only for appellate courts. For example, while California uses merit retention for Supreme Court justices and judges of the Court of Appeal, it uses nonpartison elections (in which opponents can run against sitting judges) at the trial level.

37. *See generally,* F. Dunn, Mr. Dooley on the Choice of Law (1963).

38. *See, e.g.* Brown v. Bd. of Educ., 349 U.S. 294 (1955), Baker v. Carr, 369 U.S. 186 (1962), Roe v. Wade, 410 U.S. 113 (1973).

lead to substantial unrest when the decisions are contrary to the views of the majority.[39]

Ultimately, the question of how much independence to give our judges does not admit of resolution by analysis of empirical data, and Dubois joins those who have failed to give comprehensive treatment to the question of the proper method for selecting the judiciary. This is not to suggest that Dubois does not make a substantial contribution to the debate. He tells us things we need to know about the behavior of voters and of judges, and which will undoubtedly be of importance in the impending New Mexico debate on merit selection. *From Ballot to Bench* is not exciting reading, but it is accessible to the lay reader because the author has reduced the use of political science jargon more successfully than have many of his peers. While Dubois has not answered the important questions about the desirability of independence of judges and the extent to which they should be answerable to the voters, readers will find that this book stimulates their thinking on these issue.

III.

The issues of judicial accountability and independence are made manifest for New Mexicans this year by two circumstances. The most immediate is the presence on the November ballot of a proposed constitutional amendment which would adopt a form of merit selection and retention for appellate and district court judges.[40] This is not the first time the issue has been presented in New Mexico. In the mid-1930s, dissatisfaction with partisan election of judges was expressed by a wide variety of interest groups,[41] but no change was accomplished. Opponents of partisan elections came closer to success in 1951 when they persuaded the legislature to place a version of the Missouri plan on the ballot at a special election. The measure was defeated by a margin of 21,935 to 12,958 votes.[42] Reformers tried again in the 1960s, when a proposal for merit selection was suggested as a companion to a proposal to create an intermediate court of appeals. The proposals were severed, and the merit selection

39. Compare the "court-packing" proposal of Franklin Roosevelt and the response it received, *see generally,* A. Schlesinger, The Age of Roosevelt (1960), and the current dispute over controversial Supreme Court decisions, *see supra* note 25.

40. 1981 N.M. Laws 2210.

41. *Proceedings of the Conference for the Non-Political Selection of Judges, Held in Rodey Hall, University of New Mexico Campus, May 15, 1936,* 5 N.M. Business Rev. 194 (1936). Legislation providing for nonpartisan election of judges was introduced in the legislature in 1933, but did not pass. Winters, *The New Mexico Judicial Selection Campaign—A Case History,* 35 J. Am. Judicature Soc'y 166, 167 (1952).

42. *Id.* at 169. Winters, an official of the American Judicature Society, attributes the defeat to opposition by Hispanic voters, who feared that a commission of "corporate lawyers" would never recommend Hispanic candidates for the bench, and by the *Albuquerque Tribune* and the *Santa Fe New Mexican,* which objected to specific provisions of the plan. *Id.* at 169–172.

question never reached the voters.[43] The 1969 constitutional convention defeated proposals which would have placed either a system of merit selection or of nonpartisan election of judges in the ill-fated proposed state constitution.[44]

The current proposal has the merit system at its center, although it differs from its New Mexico predecessors and its Missouri ancestor in some respects. Sitting judges would face the voters in a nonpartisan retention election (in which they would not have an opponent) at the first general election which occurs more than three years after their appointments, and again every fourth year.[45] This form for the retention election is similar to the system used for California appellate judges. New Mexico's retention elections would differ from other merit plans (such as California's) in that the retention ballot would include an evaluation of the judge's qualifications for retention. The evaluation would be prepared by the State Judicial Standards Commission.[46] The appearance on the ballot of this official assessment would greatly increase the scope of the Commission's operations.[47]

The new proposal expands the role of the Judicial Standards Commission in other areas as well. The Commission would play a part in initial judicial appointments. The proposal calls for the Commission to meet within 45 days of the creation of a judicial vacancy and to "submit to the governor the names of all persons qualified for the judicial office."[48] Under the new proposal, the Commission would have three separate sets of responsibilities: 1) placing a recommendation on the election ballot evaluating candidates for judicial vacancies and submitting their names to the governor; 2) evaluating the performance of those appointed after three years in office; and 3) adjudicating allegations of misconduct by sitting judges (its current function). Whether these three functions should

43. Roberts, *A Political History of the New Mexico Supreme Court*, Special Issue N.M. L. Rev. 70–73 (1975) [hereinafter cited as Roberts].

44. *Id.* at 76–77. Roberts attributes the defeat of the proposed reforms in the convention to opposition by a coalition of Hispanics and conservatives. *Id.* at 77.

45. 1981 N.M. Laws 2212 § 7. Thus the proposal would also effectively reduce the term of office of appellate judges.

46. *Id.* at 2212–13 § 8. This feature would create a different form of accountability. The prospect of the Commission's evaluation could have an effect on the behavior of sitting judges.

47. For the Commission's current functions, *see* N.M. Const. Art. VI, § 32 (Cum. Supp. 1981); and N.M. Stat. Ann. § 34-10-1 (Repl. Pamp. 1981).

48. 1981 N.M. Laws 2213 § 9. The phrase "all persons qualified for the judicial office" may be ambiguous. It is not clear whether the Commission ought to submit the names of everyone who meets the constitutional requirements for the office (*i.e.*, bar membership of requisite duration), or should merely select those candidates whose credentials recommend them for appointment. The legislature clearly intends that the Commission should transmit more than one candidate's name, since the proposal refers to the governor's selection of "one of two or more persons nominated by the commission." *Id.* This latter phrase suggests that the Commission is to do some qualitative screening of candidates, but the phrase "all persons qualified" remains puzzling. *Quaere:* how many names would be an appropriate submission for a vacancy for a Bernalillo County District Judgeship?

be performed by the same body is an open question. The new proposal gives the Commission authority at every stage of a judge's career: his nomination, his election, and upon reviews of his performance. The proposal would transform a relatively inactive Commission into a very powerful body.

IV.

The second circumstance which brings the issues of judicial accountability and independence to the fore in New Mexico is a recent change in New Mexico law governing the standards of judicial conduct in political campaigns. This change will have a bearing on the decision to accept or reject the new proposal on merit selection. The rules under which judges must conduct their campaigns are directly relevant to the choice between systems of judicial selection and retention. One of the salient issues is the extent to which we want judges participating in the political process, and the change in New Mexico law has substantially altered the rules.

For the better part of this century, the American Bar Association has been propounding standards for judicial conduct, and in 1972 these standards were codified into the current Code of Judicial Conduct.[49] These Canons proscribe a variety of improprieties and place limitations on a judge's extrajudicial activities. Canon 7 is captioned "A judge should refrain from political activity inappropriate to his judicial office," and provides specific guidelines for acceptable and unacceptable political activities.[50] The New Mexico Supreme Court adopted this Canon, along with the others propounded by the ABA, in 1974.

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49. National College of the State Judiciary, Ethics for Judges (1973).

50. The Canon as it stood in 1975:

16-11-7. Canon 7—A judge should refrain from political activity inappropriate to his judicial office.

A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) except as permitted by subsection A(2), make speeches for a political organization or candidate or publicly endorse a candidate for public office, provided however that a judge may speak out for and publicly endorse candidates for judicial office.

Commentary. A candidate does not publicly endorse another candidate for public office by having his name on the same ticket.

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, or purchase tickets for political party dinners, or other functions, except as authorized by subsection A(2), except that a judge may make contributions to candidates for judicial office, and he may attend political gatherings provided that he does not participate in the program therein. [As amended, effective January 1, 1975].

(2) An incumbent judge or other person when a publicly announced candidate for election or reelection to a judicial office may, during the year in which the election is to be held, attend political gatherings, speak to such gatherings,

In 1979, the New Mexico Supreme Court repealed Canon 7, and replaced it with a statement that judges could participate in political activity to the same extent as other citizens as long as the judge's participation did not violate other canons on impartiality and propriety.[51] The replace-

identify himself as a member and supporter of a political party, and contribute to a political party organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a nonjudicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates may establish committees of responsible persons to secure and manage the expenditure of funds campaign and to obtain public statements of support for his candidacy. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

N.M. Stat. Ann. § 16-11-7 (Supp. 1975) (Repealed 1979). The court made minor amendments to Canon 7 on two occasions, which changed provisions regarding specific campaign activities but the Canon remained essentially identical to the ABA canon.

51. The revised (1979) Canon reads:

Canon 7. A judge should refrain from political activity inappropriate to his judicial office.

The New Mexico constitution provides that judges shall be elected. Judges are obligated to participate as candidates for judicial office the same as other publicly elected officials. The constitution does not place any special restrictions on participation in politics by judges. Prior court rules have severely restricted such participation. *These rules are inconsistent with the constitutional mandate that* judicial offices shall be elective. Therefore, judges may hereinafter participate in the political process to the same extent as is provided by law for other citizens, but only in strict conformity with the provisions of the Code of Judicial Conduct regarding upholding the integrity and independence of the judiciary, avoiding impropriety, performing impartially and diligently and avoiding conflicts of interest.

Code of Judicial Conduct (Repl. Pamp. 1981).

ment Canon reads less like a standard of judicial conduct than an apology for the lack of such standards. The court apparently believed that explicit guidelines on political activity were inconsistent with the needs of judges selected in partisan elections. Yet the original Canon 7 explicitly provided relief for judges who faced partisan elections,[52] and thus the ABA must have had those judges in mind when it ratified the Code. Further, approximately forty states have adopted the ABA Canon, and these include many which have partisan election of judges.[53] Presumably, neither the ABA nor these other jurisdictions saw unacceptable inconsistency between partisan elections and detailed guidelines for political activity by the judiciary.

What substantive changes will accompany New Mexico's adoption of a laissez faire policy toward political conduct by judges remains an open question. There will be no change insofar as the political activity in question is improper or fails to be impartial as defined by other canons. Some improprieties proscribed by the original Canon 7 will also run afoul of provisions of Canons 1 through 6. Other political behavior which was previously prohibited, however, apparently is now condoned.[54] This almost certainly includes the previous prohibition on judges running for nonjudicial offices while remaining on the bench.[55] The United States Court of Appeals for the Fifth Circuit recently considered a provision identical to that in former Canon 7 and observed that "[r]elegating one's robes to the closet is a heavy price to pay for tossing one's hat in the ring."[56] The court was clearly sympathetic to the plight of a judge who wishes to run. Nevertheless, the court held that the state had a compelling interest in judicial integrity which was advanced by the prohibition on sitting judges running for nonjudicial offices, and sustained the constitutionality of Canon 7.[57] New Mexico has chosen no longer to assert the state interest that the Fifth Circuit found compelling. Allowing judges to run for nonjudicial office without resigning from the bench creates problems for the judge and for the public which are not addressed by the remaining Canons.

The repeal of former Canon 7 effects another change which is perhaps more important: the elimination of the guidelines for campaign conduct

52. *See supra* note 50.

53. *See* Morial v. Judiciary Comm'n of Louisiana, 565 F.2d 295, 307 (5th Cir. 1977); Woodward, *What the Morial Decision Means*, 61 Judicature 422, 423 (1978).

54. If this were not true there would be no logical reason for amending the Canon.

55. N.M. Stat. Ann. § 16-11-7(A)(3) (Supp. 1975) (repealed 1979).

56. Morial v. Judiciary Comm'n of Louisiana, 565 F.2d 295, 301 (5th Cir. 1977). Morial was a state court judge who wished to run for mayor of New Orleans. He eventually resigned from the bench and was elected.

57. Morial v. Judiciary Comm'n of Louisiana, 565 F.2d 295 (5th Cir. 1977).

contained in part B of the previous Canon.[58] These provisions limited the kinds of campaign promises which could be made by candidates for judicial office and generally sought to promote the dignity of judicial campaigns. With the revision of Canon 7, it is not clear that a judicial candidate cannot promise the voters that he or she would vote to repeal the exclusionary rule, or "get tough on criminal defendants," or help personal injury plaintiffs get large awards from insurance companies, etc.[59] The prospect of such campaigns is not comforting; judges should hear cases before deciding them.

The repeal of Canon 7 of the Code of Judicial Conduct raises troubling issues under any system of judicial selection and retention. Even if the voters decide to retain partisan election of judges, further discussion may be appropriate on whether the public needs some or all of the protections previously provided by Canon 7. The question becomes especially acute in this election year, when the political status of the judiciary may be redefined.

V.

The books by Dubois and Stolz provide some clues as to how a merit selection system would work in New Mexico, especially in the light of the changes in Canon 7, as does our experience with partisan election of judges. Predictions of future behavior of judges and voters are notoriously risky, if not foolhardy, but some guesses are necessary in the course of deciding whether the proposed change is desirable.

Dubois's data suggest that fewer New Mexico voters would participate in judicial elections under the merit system than currently vote when the candidates bear partisan labels.[60] Two factors unique to New Mexico may affect this conclusion, however. The first is the fact that New Mexico currently has by far the lowest percentage of actual contested judicial races of any state which holds partisan elections.[61] Many judges run without opponent, which makes it impossible, as a practical matter, for a voter to express opposition to that judge. A single positive vote will result in his re-election. Under the proposed system of retention elections, the voter actually has a 100% increase in his options because he can vote "no." The second consideration is that Dubois's data on retention elec-

58. N.M. Stat. Ann. § 16-11-7(B) (Supp. 1975) (repealed 1979).

59. Campaigns in which these or similar promises were made would be the ultimate triumph of judicial accountability to the voters. They would also represent a significant diminution in judicial independence, and would hold the prospect of drastically altering our understanding of the rule of law.

60. Dubois, *supra* note 26, at 49.

61. *Id.* at 50.

tions come from states in which the voter receives no guidance from the ballot except the candidate's name. Under the New Mexico proposal, the voter would also have an evaluation from the Judicial Standards Commission. It is impossible to say with certainty whether voters will trust the Commission's recommendation,[62] but the availability of information has a substantial effect on the ability of the voter to make a wise decision. Dubois has contended that voters obtain relevant information from party labels,[63] and this appears to be a consensus position among political scientists.[64] This clue will be unavailable if the state adopts the merit plan. In its place, New Mexico voters would have the evaluation of the Commission[65] plus other guides which currently exist such as newspaper endorsements and judicial performance polls.[66] Whether this combination will provide the voter with information of equal or greater relevance is a matter for speculation.[67] The information which the voter would receive from the Commission's recommendation differs in kind from the information he receives from a party label—the latter may tell the voter something about the candidate's ideological orientation,[68] while the former would not. It is possible that the presence of an evaluation on the ballot that is unrelated to party politics may make the reader feel more reliably informed and may increase voter participation over that experienced in other merit states.

Of perhaps greater interest is whether incumbent judges are more likely to remain in office in a retention system than in a system of partisan elections. On first impression, the answer would appear to be yes,[69] although the California experience leaves the issue in doubt. An old political adage warns that "you can't beat somebody with nobody," and that adage seems apt in these circumstances. Ordinarily some substantial effort will be required to persuade the voters to fire an incumbent judge. Under the partisan election system, aspiring judicial candidates who covet the incumbent's position are motivated to campaign against him. Under the merit system, there can be no opposing candidate, and thus no in-

62. Voters might eventually give more weight to the Commission's recommendation if they perceived that the Commission did not automatically recommend retention—*i.e.*, if the Commission had recommended a "no" vote on some judges.

63. Dubois, *supra* note 26, at 248–49.

64. *See, e.g.*, V. O. Key, Jr., The Responsible Electorate (1966).

65. *See supra* note 47.

66. *See* D. Maddi, Judicial Performance Polls (1977); Stookey & Watson, *Merit Retention Elections: Can the Bar Influence Voters?*, 64 Judicature 234 (1980).

67. It is possible that Dubois' data on the assistance voters receive from party labels is only partially applicable in New Mexico because of the nature of our parties. The voter may receive a relatively unambiguous clue about the ideology of a judicial candidate from the label "Republican." Greater ambiguity may accompany the label "Democrat," however, because New Mexico Democrats occupy such a broad band of the political spectrum.

68. Dubois, *supra* note 26, at 178–241.

69. Jenkins, *Retention Elections: Who Wins When No One Loses?* 61 Judicature 79 (1977). The author's answer is that almost all judges win retention elections. *See also* Carbon, *Judicial Retention Elections: Are They Serving their Intended Purpose?* 64 Judicature 210 (1980).

dividual has as much incentive to work for the judge's defeat.[70] Working against the retention of an incumbent may also be awkward as matter of appearances. Members of the bar who are aggrieved by a particular judge's actions may have sufficient incentive to work for his defeat under either system. Those lawyers risk the judge's wrath if he is retained or re-elected, and may also find disfavor from the ousted judge's colleagues on the bench who take a dim view of judicial challenges. Under the partisan system, however, the malcontent has the "excuse" of personal ambition to become a judge. Under the merit system the dissatisfaction with the incumbent cannot be disguised.[71]

The merit system may work a further change in shifting the focus of the election. The system of retention elections provides an outlet for generalized dissatisfaction with the judiciary. California's experience may be instructive. In earlier decades, appellate judges in that state could expect only an insubstantial "no" vote in retention elections. Most of that vote was composed of a small minority who voted against all judges, regardless of their individual characteristics, viewpoint, or performance. In the 1960s and 1970s, the number of automatic "no" voters increased and by 1978, even the most popular (and politically conservative) justice on the ballot, Frank Richardson, received a 27.5% "no" vote.[72] Negative

70. Of course, even under the merit plan a judge who loses a retention vote will be replaced. An aspirant has no assurance that he will be chosen as the replacement by the governor, however. The hope of appointment is a much smaller incentive to work for a judge's defeat than is the certainty of getting the job if he is successfully defeated.

71. A related matter is the role of campaign finances in judicial elections. *See* Dubois, *supra* note 26, at 21–22. Campaign contributions and spending raise serious concerns of judicial ethics. Logic suggests that a retention plan would occasion less need for campaign funds. Where there is an organized campaign against a judge's retention, however, supporters are likely to raise and spend money. In the 1978 California campaign, Rose Bird's supporters raised and spent more money ($341,452) than her opponents ($301,156). Stolz, *supra* note 4, at 47–52.

72. Stolz has compiled statistics which document the increasing "no" vote:

Table 1.
Percentage "No" Vote for Supreme Court Justices

Year	1958	1960	1962	1964	1966*	1970	1974	1978
Justice	Carter	Dooling	Gibson	Peek	Traynor	Wright	Wright	Bird
% No vote	12.7	11.9	9.2	11.8	33.6	19.4	24.3	48.
Justice	Schauer	Peters	Tobriner	—	Burke	Burke	Clark	Manuel
% No vote	11.6	12.3	11.0		35.3	21.7	25.9	27.
Justice	—	White	Traynor	—	McComb	Peters	Mosk	Newman
% No vote		11.6	10.3		20.8	27.6	25.7	26.
Justice	—	—	—	—	Mosk	Sullivan	Tobriner	Richardson
% No vote					36.9	26.8	27.2	18.
Justice	—	—	—	—	Peek	—	—	—
% No vote					37.8			

*Since the Constitutional revision of 1966, Supreme Court Justices appear on the ballot only on Gubernatorial election years.

Source: California Secretary of State: *Statement of the Vote* (various years).

votes on his colleagues were 34.7% (Newman), 38.5% (Wiley Manuel), and 48.3% (Bird).[73] There was no organized opposition to any of the candidates except Bird; thus a substantial number of voters chose to vote "no" without encouragement.[74] When organized groups such as associations of district attorneys mount campaigns against judges with whose rulings they are dissatisfied (as was true with Bird, and appears likely with California's most recent appointee, Justice Reynoso), they only need to persuade one quarter of the electorate to join the automatic no-voters. If this trend develops in other states as it has in California,[75] merit retention may provide less insulation and independence for judges than was originally anticipated.[76] Popular disgruntlement with the judiciary in general

Table II.
Average Percentage of "No" Vote by District for Courts of Appeal
Number in ( ) is the number of justices appearing on the ballot

Year	1958	1960	1964	1966	1970	1974	1978	
1st District	10.2	10.5	10.8	10.2	19.4	21.5	22.8	n.a.
Bay Area & No. Coast	(3)	(4)	(6)	(2)	(4)	(9)	(6)	
2nd District	10.3	9.4	9.8	11.9	25.6	25.2	27.3	n.a.
L.A. Basin	(4)	(3)	(5)	(2)	(7)	(13)	(9)	
3rd District	9.3	—	10.3	10.3	19.6	18.1	25.6	n.a.
No. Valley & Mountains	(3)		(3)	(2)	(2)	(2)	(1)	
4th District	—	12.9	9.3	13.0	25.8	22.9	23.9	n.a.
So. Coastal		(2)	(1)	(1)	(5)	(6)	(3)	
5th District*	—	—	9.9	—	21.2	21.2	21.6	n.a.
So. Valley & Mountains			(3)		(1)	(3)	(2)	

*The 5th District was created in 1962 for the southern end of the Central Valley. Fresno, Kern, Kings and Tulare counties were taken from the old 4th District, and Madera, Mariposa, Merced, Stanislaus and Tuolumne counties from the old Third District.

Source: California Secretary of State: *Statement of the Vote* (various years).

Stolz, *Voting for Justice: Elections of Judges in* California, 12 The Transcript (Boalt Hall Alumni Magazine) 7, 9 (1979).

73. Stolz, *supra* note 4, at 119.

74. This negative vote is difficult to interpret. It is hard to believe that the voters were *for* someone else, on the slim chance that a particular person would be appointed in the place of the incumbent. It is slightly more likely that the vote expressed a feeling that anyone with more compatible political views would be acceptable. The negative vote is most often understood, however, to signify a dislike of all judges. These last two possible interpretations indicate a disturbing confusion between the two ends of merit selection and partisan election. Insofar as the desire for someone with more compatible political views is the correct explanation of the "no" vote, the election is no longer directed purely at merit. Insofar as the dislike of all judges is the correct explanation, the system allows this general dislike to be used for specific political purposes.

75. In California, besides the popular retention vote, there is a commission which confirms the nominees before they take office.

76. The merit retention system was originally intended to be a compromise between an election of judges and the federal system of lifetime tenure. The California experience suggests that it only works as long as a judge is never seriously challenged, and his retention is never a serious question.

may find easier expression in a for-or-against election setting than in a contested election in which each opposing candidate at least wants to be a judge.

Another effect of the New Mexico merit proposal concerns the initial selection of judges. The role of the Judicial Standards Commission in this regard has already been discussed.[77] Other questions involve the likely effect of the proposed changes on the identity of those chosen to serve as judges.

Will the proposed reform affect the percentage of seats the bench occupied by members of minority ethnic groups or the Republican party?[78] Each of these issues has been a matter of concern when merit selection was considered in New Mexico in the past.

Of primary concern is the matter of ethnic representation. It seems unlikely that the effect of the adoption of merit selection on the appointment of Hispanics and other minority groups would be great. Even under the current system of partisan election, the majority of all judges ascend to the bench by gubernatorial appointment to fill a vacancy. Merit selection seems unlikely to substantially increase or decrease a governor's political incentive to appoint minorities to the bench. There is little or no reason to believe that the Judicial Standards Commission will bring a different set of biases to bear than are already operating in the appointment process. Voters who are inclined to discriminate against (or in favor of) Hispanic candidates for judgeships can do so under either a merit or partisan system.

The effect of the merit selection system on the minority party, historically the Republican party in New Mexico, is somewhat murkier. Over the last several decades, Republican governors of New Mexico have nominated a substantial number of Republican justices to the state supreme court, but none of them has been successful in seeking re-election.[79] The explanation usually offered for this phenomenon is that the voters' prejudice against judicial candidates bearing the Republican label on the ballot is too strong to overcome.[80] On the information standing alone, it might be concluded that merit selection would favor the Republicans, because those who initially obtained appointment would then be able to face the voters in retention elections without the albatross of their party label. There is reason to believe that the situation is changing, however. New Mexico is becoming a more competitive battleground between the parties for a wide range of public positions. New Mexico voters have always been willing to entertain the notion of electing a Republican governor, but have traditionally balked at the prospect of electing Re-

77. *See supra* text accompanying notes 46–48.

78. There may also be concern about the fate of women who seek judgeships. *See generally, Special Issue: Women in the Judiciary,* 65 Judicature 285–326 (1982).

79. Roberts, *supra* note 43; Dubois, *supra* note 26, at 111–14.

80. *Id. See generally* J. Holmes, Politics in New Mexico (1967).

publicans to more obscure offices. In recent years, however, Republican candidates have been remarkably successful in increasing their representation on the state's congressional delegation and in the legislature. Even more striking was the success of Republican Judge William Riordan in defeating incumbent (appointed) Democratic Justice Edwin Felter for a supreme court seat in the 1980 general election. If the voters' resistance to Republican judicial candidates is diminishing, as it appears, then the effect of merit selection on the partisan composition of the judiciary is likely to be small; Republicans are most likely to obtain judgeships from Republican governors under either system, and seem fairly likely to retain their positions under either system.

The larger issue is whether merit selection will take politics out of the business of judicial recruitment and retention. On this question the answer from other states is a clear and resounding "no." The nature of the political process may change, but bar politics will surely take its place alongside partisan politics if the new system is adopted.[81] And the recent experience of the California Supreme Court suggests that when the courts are controversial, retention elections are anything but nonpolitical.

VI.

None of these considerations provide a definite answer to whether New Mexicans should adopt the merit system proposed by the 1981 legislature. We must return to more basic philosophical questions about the role of the judiciary in our government and society, and the relative importance of judicial independence and judicial accountability. Some voters may wish to choose the system they consider most likely to facilitate the removal from office of judges whose performance they consider inadequate. Others may choose the system they consider most likely to insulate judges from political pressures. Still others will find sufficient value in having judges humbled by the necessity of campaigning that contested elections will appear to them the superior plan. Some voters will conclude that that system is best which provides the greatest voter control over judicial performance.

The experiences of other states do not provide definitive answers for New Mexicans in choosing among these competing values. They may, however, assist us in determining which system of selection best serves which values.

81. Watson & Downing, *supra* note 29, discuss this phenomenon extensively from the perspective of Missouri's experience under merit selection. *See also* Dubois, *supra* note 26, at 9–11.