What the Polls Produce: Why Kentucky Should Retain Nonpartisan Elective Selection of its Supreme Court Justices

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1 J.D., 2016, University of Kentucky College of Law. B.A. Political Science, 2013, magna cum laude, University of Kentucky. The author thanks Professor Melissa N. Henke, Director of Legal Research and Writing, University of Kentucky College of Law, for her academic sponsorship, enthusiasm in this scholarship, and mentorship toward its completion; John McKee, and the staff at the Legislative Research Commission library, for his helpfulness identifying and compiling records and resources that inform and support this scholarship; Congressman Carroll Hubbard, Jr., for his willingness to share his recollections of the passage and ratification of the Judiciary Article, for those recollections incomparably contributed to and corroborated Part II of this writing; the authors of works in which this scholarship finds support and on whom it relies; the Commonwealth of Kentucky's Capitol Annex and University of Kentucky for use of their facilities while writing this scholarship; and the editorial staff of the 105th Volume of the Kentucky Law Journal.
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INTRODUCTION

“There is room for debate about whether the election of state court judges is a good idea or a bad one.”

Over-politicization, exemplified by the infusion of money into state judicial elections, has moved some to discredit elective selection as an efficacious method for selecting independent, impartial state supreme court judges and justices. But criticism of elective judicial selection is nothing new. Some scholars not only criticize the efficacy of popular election of judges, but also assert that it violates the United States Constitution. Criticism of popular election of judges has not bypassed Kentucky. In fact, such criticism has inspired state bar programming and legislative reform, as well as framed recent United States Supreme Court jurisprudence. Whether those who discredit popular election as an efficacious method for selecting state supreme court judges and justices have properly placed their criticism might depend on a state's existing framework for regulating its supreme court elections and the electoral and political realities of those elections. This Article explores whether those who discredit Kentucky's judicial selection

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1 Carey v. Wolnitzek, 614 F.3d 189, 209 (6th Cir. 2010).
2 See Sandra Day O'Connor, The Essentials and Expendables of the Missouri Plan, 74 MO. L. REV. 479, 480-81, 486-89 (2009) (identifying judicial impartiality and judicial independence as goals of judicial selection, decrying the infusion of politics into electoral judicial selection, and citing studies that show that an overwhelming majority of the public believes campaign contributions influence state judges).
3 Among the critics of elective judicial selection is the Honorable Sue Bell Cobb, former Chief Justice of the Alabama Supreme Court, who scrutinizes the popular selection of judges critically and with condemnation. See Sue Bell Cobb, I Was Alabama's Top Judge. I'm Ashamed by What I Had to Do to Get There., POLITICO MAG., March/April 2015, http://www.politico.com/magazine/story/2015/03/judicial-elections-fundraising-115503[https:/perma.cc/FDQ8-KJ6D] ("[P]ublic trust is eroded when judicial candidates are forced to court big donors and spenders.").
7 This Article uses the phrase “state supreme court” to refer to a state's highest court; it refers to states' supreme court judges and justices collectively as "justices."
system have misplaced their criticism. In so doing, this Article advocates that—because the framework that regulates Kentucky's Supreme Court elections efficaciously controls over-politicization and promotes impartiality and independence—Kentucky should retain nonpartisan elective selection of Kentucky's Supreme Court justices. This Article recognizes, however, that Kentucky must also take steps to revise statutory controls on over-politicization undermined by recent court precedent.

Generally, this Article defends the efficacy of nonpartisan elective selection, particularly in Kentucky where a protective regulatory framework controls over-politicization of Kentucky Supreme Court elections. Part I outlines Kentucky's system for selecting Supreme Court justices and summarizes the alternative selection systems used in other states. Part II relies on legislative and other sources to narrate the history of judicial selection in Kentucky, answering why, in 1974, the legislature proposed nonpartisan elective selection instead of alternative selection systems. Part III measures whether Kentucky's system for judicial selection works effectively, specifically whether the framework that regulates judicial elections sufficiently controls over-politicization. Finally, Part IV finds that nonpartisan elective selection promotes impartiality and independence and advocates for its retention.

I. HOW KENTUCKY'S NONPARTISAN ELECTIVE SELECTION SYSTEM COMPARES TO ALTERNATIVE SELECTION SYSTEMS

"[T]he bill envisioned a four-tiered court structure with the Supreme Court at its head. . . . Judges would continue to be elected, but would do so in non-partisan elections."

Section A identifies how Kentucky selects its Supreme Court justices. Section B describes alternative state supreme court selection systems.

A. How Kentucky Selects its Supreme Court Justices

The Kentucky Constitution provides for nonpartisan elective selection of Kentucky Supreme Court justices. Upon its ratification in November 1975, the Judicial Article restructured Kentucky's Court of Justice by establishing a

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9 Part II(B) does not consider how states fill supreme court vacancies. Seeinfra Part IV(C) (describing the procedure Kentucky uses to fill a supreme court vacancy as a constraint on over-politicization of nonpartisan elective selection).
10 KY. CONST. § 117 (LEXIS through the 2016 Legislative Session).
hierarchical Supreme Court. Specifically, the Judicial Article exclusively vests the judicial power of the Commonwealth of Kentucky in one “Court of Justice,” with a Supreme Court of appellate jurisdiction at its head. The Kentucky Supreme Court consists of seven justices elected on a nonpartisan basis, one from each of seven districts. From each district, one justice is popularly elected on a nonpartisan basis for an eight-year term. A Kentucky Supreme Court Justice may serve unlimited terms. The elective selection system is not unique to Kentucky.

B. How Other States Select Their Supreme Court Justices

i. Elective Selection

Twenty-four states, including Kentucky, directly or indirectly (by legislative election) involve the electorate when initially selecting justices of the highest appellate state court. In these states, voters select justices in partisan or nonpartisan elections, or select the state legislators who fill their state supreme courts. Fourteen states accompany Kentucky in using direct, nonpartisan, popular election to select their high-court justices. Of the fifteen states that use nonpartisan elective selection, seven elect supreme court justices to six-year terms; six states, including Kentucky, elect justices for eight-year terms; and two states elect justices to ten-year terms.

Seven states use direct, partisan, popular election to select their state supreme court justices. Three of these states elect justices by partisan election for ten-year terms, two states have six-year terms, one state has an eight-year term, and one

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12 KY. CONST. §§ 109, 110(2)(a) (LEXIS through the 2016 Legislative Session).

13 Id. §§ 110, 117. Although Kentucky initially used the existing Kentucky Court of Appeals districts as the Kentucky Supreme Court districts, the General Assembly later redistricted the Commonwealth “into seven Supreme Court districts as nearly equal in population and as compact in form as possible.” Id. § 110(4).

14 Id. § 119.

15 See id. (limiting terms of Supreme Court justices to eight years, but not limiting the number of terms).


17 Id. (Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, and Wisconsin).

18 Id. (Georgia, Idaho, Minnesota, Nevada, Ohio, Oregon, and Washington elect for six-year terms; Arkansas, Kentucky, Michigan, Mississippi, Montana, and North Carolina elect for eight-year terms; North Dakota and Wisconsin elect for ten-year terms).

19 Id. (Alabama, Illinois, Louisiana, New Mexico, Pennsylvania, Texas, and West Virginia).
state elects its justices to twelve-year terms. Of the seven states that use partisan elective selection, five hold elections statewide, while two states demarcate elections inside supreme court districts. For subsequent supreme court terms, three of these seven states use retention elections, in which the electorate votes to retain or reject the incumbent.

Finally, three states use their legislatures to select supreme court justices. Thus, constituents—through the legislators whom they directly elect—indirectly select the justices of the state supreme court. In South Carolina, a joint, public vote by the General Assembly selects state supreme court justices for ten-year terms. Election to a full, twelve-year term on the Virginia Supreme Court requires a majority of each house of the General Assembly; subsequent terms also require legislative reelection.

ii. Appointive Selection

Apart from elective selection, alternative systems for selecting state supreme court justices exist. Indeed, Judge Daniel R. Deja identifies four “primary methods” for selecting state high-court jurists two of which are gubernatorial appointment and gubernatorial appointment followed by a retention election. Twenty-six states initially select their supreme court justices by gubernatorial appointment or gubernatorial nomination.

No state provides for unilateral, unfettered gubernatorial appointive selection of supreme court justices. Of the twenty-six states that initially select their supreme court justices by gubernatorial appointment or gubernatorial nomination, twenty-two require that appointees or nominees come from a list of candidates provided by

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20 Id. (Illinois, Louisiana, and Pennsylvania elect for ten-year terms; Alabama and Texas elect for six-year terms; New Mexico elects for an eight-year term; and West Virginia elects for a twelve-year term).

21 Id. (explaining that Alabama, New Mexico, Pennsylvania, Texas, and West Virginia elect supreme court judges by partisan, statewide election, while Illinois and Louisiana elect justices by partisan election within districts).


23 See Methods of Judicial Selection, supra note 16 (explaining that justices in South Carolina and Virginia are initially selected by direct legislative election, while justices in Connecticut are chosen through gubernatorial selection of nominees recommended by a judicial selection commission and subsequent legislative appointment).

24 S.C. CONST. art. V, § 3 (LEXIS through 2016 session).

25 VA. CONST. art. VI, § 7 (LEXIS through 2016 Regular Session of the General Assembly).

26 Deja, supra note 22, at 904–06.


28 See generally id.
a judicial nominating or selection commission. Of these twenty-two states, six require their state senate to confirm or consent to a gubernatorial appointee or nominee. Connecticut and Rhode Island require both chambers of the legislature to appoint or confirm gubernatorial nominees forwarded by a nominating commission. In New Hampshire, the governor nominates justices to the supreme court from a list of selection commission recommendations; thereafter, a constitutionally authorized executive council must vote to appoint the governor’s nominee. In thirteen states, a governor’s appointment of a nominee named by a judicial nominating or selection commission benches that nominee on the state supreme court.

In four states, gubernatorial appointment of supreme court justices need not consider a list of nominating or selection commission recommendations. Yet, in all four of these states, checks on gubernatorial appointive selection exist. For example, in California, a commission on judicial appointments must confirm gubernatorial appointments to the state supreme court. In Massachusetts, an executive council must approve gubernatorial appointees to the state’s supreme court. Finally, in Maine and New Jersey, although nominees to the supreme court need not come from a list of candidates, the state senate must confirm gubernatorial appointees.

Sixteen of the twenty-six states that use gubernatorial appointment or gubernatorial nomination for initial supreme court selection use retention elections for judicial reselection. Scholars call judicial selection by gubernatorial appointment followed by retention election the “Missouri Plan.” In these sixteen “Missouri Plan” states, initial terms-of-service prior to retention election range from “until next general election at least thirty days [after selection]” to twelve years. Subsequent terms-of-service for a supreme court justice retained by the electorate range from six years to twelve years.

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30 Id. (Delaware, Hawaii, Maryland, New York, Utah, and Vermont).
31 Id.
32 Id. Members of New Hampshire’s constitutionally authorized executive council are partisan and popularly elected each biennium. Id. (emphasis added).
33 Id. (Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, and Wyoming).
34 Id. (California, Maine, Massachusetts, and New Jersey).
35 Id.
36 Id.
37 Id.
38 Id.
39 Id. (Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming).
40 See Deja, supra note 22, at 905.
41 See Methods of Judicial Selection, supra note 16 (Tennessee and California, respectively).
42 Id. (explaining that subsequent terms-of-service for justices in Arizona, Florida, Kansas, Nebraska, Oklahoma, and Vermont are six years, but twelve years in California.).
gubernatorial appointment to select its supreme court justices, empowers the state legislature to retain supreme court incumbents. Hawaii uses the same nominating commission that provided its governor with supreme court nominees to retain incumbents for subsequent supreme court service. Four states—Delaware, Maine, New Jersey, and New York—replicate their appointive selection procedure to retain incumbents for subsequent judicial service. Finally, three states that use gubernatorial appointment or nomination for initial supreme court selection use no retention procedure, because initially selected supreme court justices serve for life or until some statutorily-specified age.

II. WHY THE GENERAL ASSEMBLY PROPOSED ELECTIVE SELECTION

"[A]fter all, the removal of the state judiciary from elective politics had been a goal of many since the 1940s." Identifying the judicial selection method used in Kentucky proves easier than understanding exactly why Kentucky chose the selection system it uses today. Indeed, although primary and secondary sources reviewing the passage of the 1974 Judicial Article exist, they offer limited insight into the legislative intent that informs the Judicial Article. Legislative Research Commission Library research, for example, produced legislative materials detailing the floor passage of the Judicial Article in March 1974. Those resources, however, do not report committee markup of, or floor debate on, the Article. In fact, the Final Interim Reports, which catalogue the minutes of the Joint Interim Committee meetings that occur between biannual legislative sessions, do not predate 1974. Committee debate and testimony from the 1972–1973 Joint Interim Judiciary Committee—the winter interim that preceded the Judicial Article’s passage, during which Committee

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43 Id.
44 Id.
45 Id.
46 Id. (stating justices serve until age 70 in Massachusetts and New Hampshire, while justices in Rhode Island serve life terms).
47 Metzmeier, supra note 8, at 32.
49 On file in the Legislative Research Commission Library, the 1974–1975 Final Interim Reports are Volume 1 in the Final Interim Reports series. See Peggy King Legislative Reference Library, KY. LEGIS., http://www.lrc.ky.gov/lrc/library.htm [https://perma.cc/rdz4-9wwH] (last visited Jan. 17, 2017). Since Kentucky constitutionally amended the legislative calendar in 2000, the General Assembly now meets annually for as many as thirty legislative days in odd-numbered years and as many as forty-five legislative days in even-numbered years. See KY. CONST. § 36 (LEXIS through the 2016 Legislative Session).
members would have considered legislation pre-filed for the 1974 biannual session—is unreported. Here, answering why Kentucky proposed nonpartisan elective selection relies primarily on (1) the history of judicial selection in Kentucky and (2) secondary source authority and the recollections of a Judicial Article co-sponsor.

A. History of Judicial Selection in Kentucky

To appreciate why Kentucky proposed and arrived at nonpartisan elective selection of its Supreme Court justices, one must consider where it had been prior to passage of the Judicial Article. Kentucky's first constitution provided for gubernatorial appointment of state judges, including the three justices of the Kentucky Court of Appeals, which was then Kentucky's highest appellate court. Lifetime appointive selection to the state's highest court survived until 1850. Legislative records reveal that Kentuckians so disfavored lifetime appointive selection that a Constitutional Convention was assembled to frame the state's third constitution. Under the third constitution, four Court of Appeals justices stood for partisan election to eight-year terms. Partisan election persisted until the Judicial Article restructured the Kentucky Court of Justice.

Reforming an overworked state judiciary inspired Kentucky's 1966 draft Constitution. Notably, the 1966 draft restructured the Kentucky Court of Justice into a four-tiered judiciary, atop of which a Supreme Court of appointed justices sat. The 1966 draft Constitution also proposed that after three years' service on the Kentucky Supreme Court, justices would account for their "record of performance" in a retention election in which voters might reject or retain the incumbent. "Weighed down by many unpopular provisions," voters soundly
defeated the 1966 draft Constitution at the polls. The Judicial Article’s subsequent reformation efforts tellingly omitted the 1966 draft’s “Missouri Plan.”

Since ratification of its first constitution, Kentucky has selected its Supreme Court justices either by gubernatorial appointment or popular election. Constitutional revision exercises proposed “Missouri Plan” select as an alternative—appointment followed by retention election. The voters rejected it. In November 1975, nonpartisan elective selection won the day, which Kentucky has since used to fill its Supreme Court. For 167 of its 225 years, then, Kentucky has elected the justices of its highest court.

B. Secondary Sources and “Recollections”

Where Kentucky has been on judicial selection, though, does not exactly answer why it preserved elective selection in the Judicial Article. Without appreciable guidance from legislative history, answering why Kentucky proposed elective selection in the Judicial Article instead relies on the recollections of those involved with the Judicial Article’s drafting, such as former state Senator and United States Representative Carroll Hubbard, Jr.

Initially, the draft Judicial Article did not prefer nonpartisan elective selection. Following the electoral failure of the 1966 draft Constitution, nonprofit Kentucky Citizens for Judicial Improvement (“KCJI”) incorporated to more systematically advocate for judicial reform. It set out to propose legislation that could pass the General Assembly. Funding granted to KCJI paid for polling commissioned to measure the public’s interest in and enthusiasm for judicial reform. Specifically, poll results found that 65% of Kentuckians preferred elective selection of state judges. Informed by public opinion and convinced by its pollster that provisions opposed by 65% of the electorate would doom constitutional reform, KCJI amended its draft Judicial Article to provide for elective selection of supreme court justices. Although reformers did not initially prefer elective selection of supreme court justices, their commitment to reform acquiesced to overwhelming public preference for elective judicial selection. It seems that political calculation partly

60 Metzmeier, supra note 8, at 29. For example, Metzmeier mentions the unpopular inclusion in the draft of a provision “abolishing many of [Kentucky’s] 120 counties (and their respective county officials).” Id. He notes, “While supporters of the new constitution had to convince voters to accept all of its provisions, opponents only had to raise doubts about any single provision to secure a ‘no’ vote.” Id.

61 See Metzmeier, supra note 8, at 29; see also Legislative Research Comm’n, supra note 52, at 59–62.

62 See, e.g., Metzmeier, supra note 8, at 33–40; see also Telephone Interview with the Honorable Carroll Hubbard, Jr., former state Senator and United States Congressman from Kentucky (Nov. 13, 2015) (interview notes on file with author) [hereinafter Hubbard Interview].

63 See Metzmeier, supra note 8, at 31.

64 Id.

65 Id.

66 Id. at 32.

67 Id.

68 Id. (calling the KCJI’s amendment to the draft article a “bow to public opinion”).
answers why the Judicial Article proposed elective selection of Kentucky's Supreme Court justices. 69

Legislative opposition to the KCJI's reforms organized when the General Assembly took up the Judicial Article in January 1974. 70 Co-sponsored in the Kentucky Senate in part by Carroll Hubbard as Senate Bill 183, the Judicial Article proposed a four-tiered Kentucky Court of Justice headed by an elected, nonpartisan supreme court. 71 The chamber narrowly captured the three-fifths majority required for constitutional amendments; it passed 24–13. 72 Senator Hubbard remembers the General Assembly preferring to preserve the electorate's involvement in judicial selection. 73 He recalled that at that time, "Kentucky's western judicial district would have elected a Democrat, while its south-central judicial district would have elected a Republican." 74 Hubbard believed that rather than a candidate's political affiliation, "justices of the Supreme Court should be chosen for their qualifications, regardless of their political party." 75 On the prospect of gubernatorial appointive selection, Hubbard remembers worrying about political patronage. 76 "I feared that appointment to the Supreme Court would reflect the Governor's appointments to boards and commissions—[appointment of] those who contributed the maximum to his campaign, his friends." 77

On March 15, 1974, Senate Bill 183 passed the Kentucky House of Representatives by a vote of 79–4. 78 Governor Wendell Ford signed the bill into law later that month. 79 The electorate ratified it as an amendment to the Kentucky Constitution in November 1975. 80

These supplemental sources and Carroll Hubbard's recollections reveal two answers as to why Kentucky proposed elective selection of its supreme court justices: (1) polling showed overwhelming public support for elective selection, and (2) appointive selection risked partisan division and political patronage. These themes—consideration of the electorate and politicization—also answer what Part IV addresses: why Kentucky should retain the system it adopted more than forty years ago.

69 An editorial run in Louisville Courier-Journal in January 1974 called "diluted" reform better than none. Id. at 32–33 (citation omitted).
70 Id. at 34.
71 Legis. Rec. vol. 11, no. 51, at 19 (1974) (Ky.) (Regular Session, Friday, April 12, 1974).
72 Id.
73 Hubbard Interview, supra note 62.
74 Id.
75 Id.
76 Id.
77 Id.
78 Legis. Rec. vol. 11, no. 51, at 19 (1974) (Ky.) (Regular Session, Friday, April 12, 1974).
79 Metzmeier, supra note 8, at 34.
80 Id. at 37–38.
III. WHETHER NONPARTISAN ELECTIVE SELECTION WORKS EFFICACIOUSLY IN KENTUCKY

"I have had many conversations with appellate judges from other states about their method of judicial selection . . . [T]hose judges have asserted that their system is best; that only in their state has the perfect system of judicial selection been found. I must confess that I share the view of my colleagues across this nation. In Kentucky, we have the least flawed system of judicial selection."

Section A of Part III sets the criteria for measuring the efficacy of nonpartisan elective selection. Section B establishes identifiers of over-politicization of nonpartisan elective selection. Section C discusses the regulatory framework and institutional controls that protect against over-politicization of Kentucky's Supreme Court elections.

A. Measuring Efficacy

Oftentimes, particularly with respect to politics, what works efficaciously proves a subjective inquiry. For instance, whether an election works the way that it should work might depend on the relatedness of the party affiliations of the elected and the person asked; whether an election becomes over-politicized might depend on what factors one subjectively deems relevant to apply. So, whether nonpartisan election works in Kentucky as an efficacious judicial selection method of supreme court justices can depend entirely upon one's measurement of "efficacy."

Accordingly, to measure the efficacy of nonpartisan elective selection as a judicial selection method of Kentucky Supreme Court justices, criteria are required. Many jurists and scholars consider an independent, impartial bench the goal of judicial selection. The United States Supreme Court, for example, "want[s] judges
to be impartial." Influenced and persuaded by these authorities, this scholarship ties the efficacy of nonpartisan elective selection to its promotion of independent, impartial Kentucky Supreme Court justices.

**B. Politicization and Its Effect on Efficacy**

While all judicial elections are inherently political, over-politicization of a judicial election can affect its efficacy in promoting an impartial, independent bench. For example, according to Justice O'Connor, "contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds . . . . [R]elying on campaign donations may leave judges feeling indebted to certain parties or interest groups." Also, money from non-party interest groups, notably television advertisement expenditures, politicizes judicial elections, and "[t]he rising tide of money in judicial elections can undermine judges' independence by forcing them to seek campaign dollars." Finally, according to former Supreme Court Justice John Paul Stevens, campaigning singularly on issues likely to come before the court or committing to judicial decision prior to election compromises impartiality, too. He suggests:

Persons who undertake the task of administering justice impartially should not be required . . . to finance campaigns or to curry favor of voters by making predictions of promises about how they will decide cases before they have heard any evidence or

("Judicial independence has been called 'the backbone of the American democracy', the 'bulwark of the Constitution,' and 'an indispensable element of our constitutional framework and its commitment to freedom.'") (footnotes and citations omitted); O'Connor, supra note 2, at 479-80, 486-88 (identifying the ensuring of judicial impartiality and guarding of judicial independence as goals of judicial selection); see also Bronson D. Bills, A Penny for the Court's Thoughts? The High Price of Judicial Elections, 3 NW. J. L. & SOC. POL'Y 29, 29 (2008) ("I have always thought, from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent judiciary.") (footnotes and citations omitted).


See Tanfani, supra note 86.

argument. A campaign promise to be ['']tough on crime' or to
['']enforce the death penalty' is evidence of bias that should
disqualify a candidate from sitting in criminal cases.  

As justices of the United States Supreme Court and judicial election commentary
note, at a point, the politics inherent in judicial elective selection can compromise
the impartiality and independence of the bench.  

Over-politicization of nonpartisan elective selection is readily identifiable. Four
identifiers are: (1) multi-million-dollar spending; (2) participation by third-party
special interest groups; (3) television advertisements, particularly if negative; and
(4) singularized or inordinate focus on a contentious, "litmus test" legal or political
issue, such as abortion, capital punishment, characterization of a candidate as "soft
on crime," or the like.  None of the identifiers alone especially politicizes a judicial
election. However, together, and in inordinate amounts, a judicial election may
become over-politicized.

Observers and the United States Supreme Court have pointed to these four
identifiers as indicators of over-politicization of elective judicial selection. For
example, Los Angeles Times reporter Joseph Tanfani points to multi-million-
dollar spending by third-party groups organized to affect judicial elections. Tanfani
cites a study that counted $14 million spent on television advertisements by judicial
campaigns in 2014. Noteworthy, he mentions a particularly "rough" attack advertisement aired against an incumbent justice in North Carolina.

The retention election involving Tennessee Supreme Court Justice Penny J.
White highlights over-politicization by issue campaigning. In the months before
her retention election, Justice White cast a concurring vote to affirm the
convictions of but overturn the death penalty sentence for a rapist-murderer
criminal defendant. A third-party special interest group, Tennessee Conservative
Union, orchestrated a no-vote campaign against Justice White. The message
broadcast by the Union suggested, "[The criminal defendant] won't be getting the
punishment he deserves. Thanks to Penny White." The Union further claimed,
"[White] felt the crime wasn't heinous enough for the death penalty, so she struck

90 Id.
91 Id. See generally O'Connor, supra note 2.
92 This Article need not provide a laundry list of the "litmus test" issues that might overly politicize
a judicial election. Whether a particular legal or political issue qualifies as a "litmus test" issue in a
judicial election exceeds the narrow focus of this scholarship.
93 See generally Republican Party of Minn. v. White, 536 U.S. 765 (2002) (litmus test, namely
abortion); Tanfani, supra note 86 (multi-million-dollar spending and litmus test campaigning).
94 See Tanfani, supra note 86.
95 Id.
96 Id.
97 See Bills, supra note 84, at 44-45; McCarthy, supra note 89.
98 See Bills, supra note 84, at 45; McCarthy, supra note 89.
99 See McCarthy, supra note 89 (internal quotations omitted).
it down.”[^100] On the basis of a single . . . decision,” the Tennessee electorate voted not to retain Justice White.[^101] Singularized focus on capital punishment as a litmus test for Justice White’s retention to the Tennessee Supreme Court overly politicized the election.

Finally, *Republican Party of Minnesota v. White* involved a candidate for state supreme court who, while campaigning, distributed literature “criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion.”[^102] Finding that candidate’s campaign literature “touched on disputed legal or political issues,” the Court focused on a particular few printed criticisms, including one of “a decision requiring public financing of abortions for poor women as ‘unprecedented’ and a ‘pro-abortion stance.’”[^103] Inordinately issue campaigning against abortion as a litmus test for qualification might also over-politicize a judicial election.

In sum, over-politicization of judicial election can impair an elected justice’s impartiality and compromise his or her independence. Certain identifiers, particularly in inordinate amounts, indicate over-politicization: multi-million-dollar spending; campaign participation by third-party special interest groups; use of television advertisements, particularly if negative; and singularized focus on contentious, litmus test legal or political issues.

**C. Kentucky’s Regulatory Framework and Controls on Politicization**

The framework that regulates nonpartisan elective selection of the Kentucky Supreme Court controls over-politicization. Specifically, (1) constitutional enumerations, (2) state statutory provisions, and (3) administrative oversight promote impartiality and independence and ensure that selection by nonpartisan selection works efficaciously.

i. Constitutional Enumerations Regulating Kentucky Supreme Court Elections

The Kentucky Constitution effectively controls over-politicization of nonpartisan elective selection. It controls over-politicization by (1) conditioning candidate qualification; (2) restricting voters’ electoral and political influence; and (3) prohibiting political party office holding.

First, the Kentucky Constitution preconditions supreme court justice qualification. To qualify, a candidate must have United States citizenship; at least two years’ residence in the district for which he or she hopes to qualify; and must be licensed to practice law in Kentucky and have at least eight years’ bar licensure.

[^100]: *Id.* (internal quotations omitted).
[^101]: Bills, *supra* note 84, at 45.
[^103]: *Id.* at 771.
altogether. 104 These qualification regulations remove, in part, potential politicization of a candidate's fitness for service.

Second, the Kentucky Constitution restricts the electorate's influence by providing for limited, district-specific supreme court elections. 105 Rather than standing statewide, candidates for Kentucky Supreme Court stand in one of seven districts. 106 Only voters qualified to vote in a district may vote for that district's candidate(s). District-specific elections limit the political participation and influence of citizens residing outside the district.

Third, and perhaps most important, according to the Kentucky Constitution, candidates for supreme court run on a non-partisan basis. 107 Elsewhere, the state Constitution prohibits Kentucky Supreme Court justices from "hold[ing] any office in a political party or organization." 108 These enumerations inoculate official political party association both at the ballot box and away from the bench.

The constitutional framework for filing vacancies on the Kentucky Supreme Court promotes impartiality and independence of the bench, too. When a vacancy on the Kentucky Supreme Court arises, the state Constitution empowers the governor to fill the vacancy by "appointment . . . from a list of three names presented to him by the appropriate judicial nominating commission." 109 However, "[i]f the Governor fails to make an appointment from the list within sixty days from the date it is presented to him, the appointment shall be made from the same list by the chief justice of the Supreme Court." 110 The membership of the "judicial nominating commission for the Supreme Court" protects against over-politicization. 111

[The] commission shall consist of seven members, one of whom shall be the chief justice of the Supreme Court, who shall be chairman. Two members of each commission shall be members of the bar, who shall be elected by their fellow members. The other four members shall be appointed by the Governor from among persons not members of the bar, and these four shall include at least two members of each of the two political parties of the Commonwealth having the largest number of voters . . . . No person shall be elected or appointed a member of a judicial nominating commission who holds any other public office or any office in a political party or organization. 112

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104 KY. CONST. § 122 (LEXIS through the 2016 Legislative Session).
105 See id. §§ 110(4), 117.
106 Id.
107 Id. § 117.
108 Id. § 123.
109 Id. § 118(1).
110 Id.
111 See id. § 118(2).
112 Id.
What the Polls Produce: Nonpartisan Elective Selection

The vacancy procedure promotes the impartiality and independence of the Kentucky Supreme Court. It appropriately checks the governor's participation in selecting temporary justices, using a politically diverse nominating commission to screen candidates, chaired by the Kentucky Supreme Court Chief Justice, to whom a Code of Judicial Conduct applies. The governor cannot stack the Commission either totally with his or her patrons or disproportionately with political associates because both political parties must have representation on the Commission. And still, the electorate, albeit inclusive only of district bar members, plays a role by selecting two of the seven commissioners.

ii. Statutory Provisions Regulating Kentucky Supreme Court Elections

The General Assembly promulgated candidate-behavior prohibitions and general judicial election regulations. Specifically, Kentucky law (1) caps individual contributions to judicial candidates, limiting the hard money that filters into nonpartisan elective selection; (2) requires judicial candidates to self-report financial interests and disclose conflicts of interest; and (3) enables the Kentucky Supreme Court to promulgate self-regulating controls on judicial selection.

First, a statutory contributions cap protects against the influx of hard money into supreme court elections, protecting against over-politicization. "No candidate, slate of candidates, campaign committee, political issues committee, nor anyone acting on their behalf, shall accept a contribution of more than one thousand dollars ($1,000) from any person, permanent committee, or contributing organization in any one (1) election." Conversely, "[n]o person, permanent committee, or contributing organization shall contribute more than one thousand dollars ($1,000) to any one (1) candidate, campaign committee, political issues committee, nor anyone acting on their behalf, in any one (1) election." Canon 5 of the Kentucky Judicial Code prohibits candidates from personally soliciting contributions as well as limits authorized fundraising to the 180-day period before an election. When paired together, the individual contribution cap and fundraising window control hard-money politicization of supreme court elections by limiting fundraising to a defined period and a maximum of $1,000 increments.

113 See generally KY. SUP. CT. R. 4.300.
114 KY. CONST. § 118(2) (LEXIS through the 2016 Regular Session). The electorate's involvement reflects the General Assembly's 1974 emphasis on including voters in judicial selection.
115 See generally KY. SUP. CT. R. 4.300.
116 See KY. REV. STAT. ANN. §§ 61.740(1)(a)–(c), 121.150(6) (Lexis 2016); KY. SUP. CT. R. 1.010.
117 KY. REV. STAT. ANN. § 121.150(6) (Lexis 2016).
118 Id. The statutory language "in any one election" permits a contributor to max-out his or her donation in both a primary election and a general election. A candidate could, then, accept $2,000 from any one contributor as a primary and subsequent general election candidate. See id. at § 121.015(2) (Lexis 2016).
119 KY. SUP. CT. R. 4.300, Canon 5(B)(2).
Second, Kentucky law requires judicial candidates to self-report financial and other conflicting interests.\textsuperscript{120} Candidates for Kentucky Supreme Court justice must self-report certain financial and fiduciary information: financial interests worth more than $1,000 and those of his or her spouse, dependents, and employer; his or her fiduciary obligations and employment and those of his or her spouse and dependents, regardless of income received; and all entities to which the candidate, or his or her employer, furnished services worth more than $1,000.\textsuperscript{121} Kentucky law makes all candidate disclosures public record for inspection.\textsuperscript{122} Non-filing of required disclosures can disqualify a candidate and void his or her candidacy.\textsuperscript{123} These regulations regarding fiduciary duties and all conflicts of interest, designed to ensure the efficacy of nonpartisan elective selection, enable the electorate to inspect and evaluate a candidate’s capacity for impartiality and independence.

Third, the Kentucky General Assembly not only promulgates its own statutory restrictions of supreme court elections, but it also empowers the Kentucky Court of Justice to self-regulate. Indeed, the administrative and policy-making authority of the Kentucky Court of Justice vests in its supreme court.\textsuperscript{124} The Kentucky Supreme Court Rules impose a general obligation on judges to “actively participate in establishing, maintaining and enforcing high standards of conduct, and . . . observe those standards so that the integrity and independence of the judiciary will be preserved.”\textsuperscript{125} Incumbent justices, whether or not campaigning, must “respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”\textsuperscript{126} Moreover, “[a] judge shall not allow . . . political or other relationships to impair the judge’s objectivity. . . . nor . . . convey or permit others to convey the impression that they are in a special position to influence the judge.”\textsuperscript{127}

The Kentucky Supreme Court Rules specifically regulate how judges and judicial candidates may engage in political activity. For instance, judges and judicial candidates “shall maintain the dignity appropriate to judicial office, and shall encourage members of the candidate’s family to adhere to the same standards of political conduct.”\textsuperscript{128} With respect to raising campaign contributions, the Rules state:

A judge or a candidate for judicial office shall not personally solicit campaign funds, but may establish committees of responsible persons to secure and manage the expenditure of

\textsuperscript{120} See id. at Canon 4(H); see also KY. REV. STAT. ANN. §§ 61.710(1), 61.740 (Lexis 2016).
\textsuperscript{121} § 61.740(1)(a)–(c).
\textsuperscript{122} Id. § 61.750.
\textsuperscript{123} Id. § 61.770.
\textsuperscript{124} KY. SUP. CT. R. 1.010.
\textsuperscript{125} KY. SUP. CT. R. 4.300, Canon 1. Also, the inclusion of this Canon in the Kentucky Supreme Court Rules corroborates the judicial selection’s goal of judicial “independence.”
\textsuperscript{126} Id. Canon 2(A).
\textsuperscript{127} Id. Canon 2(D).
\textsuperscript{128} Id. Canon 5(B)(1)(a).
funds for the campaign and to obtain public statements of support for the candidacy. A candidate’s committees may not solicit funds for the campaign earlier than 180 days before a primary election. A candidate’s committees may not solicit funds after a general election.\(^{129}\)

Unfortunately, other Rules regulating judicial candidates’ political activity have suffered under recent federal court jurisprudence.\(^{130}\) For example, \textit{Winter v. Wolnitzek} undermines Kentucky’s protections against over-politicization of nonpartisan elective selections. Applying First Amendment political speech analysis, \textit{Winter} invalidated several provisions of the Canons in the Kentucky Supreme Court Rules for unconstitutional vagueness.\(^{131}\) Provisions declared unconstitutional, in whole or in part, include Canon 5(A)(1) and Canon 5(B)(1).\(^{132}\) This Article, however, need not discuss the merits of the court’s reasoning in \textit{Winter} because the decision leaves room for restoring the Canons’ safeguards against over-politicization of nonpartisan elective selection of Kentucky’s Supreme Court. Indeed, although \textit{Winter} destabilizes the current scheme for regulating politicization of Kentucky Supreme Court elections, it does not entirely preclude the Kentucky Court of Justice’s regulation of judges and judicial candidates’ political conduct and speech. So long as re-imagined regulations narrowly advance a compelling government interest, and in the case of political speech, restrictions constrain no more speech than necessary, the Kentucky Supreme Court can continue to use self-regulatory rulemaking to guard against over-politicization of its elections.\(^{133}\)

\(^{129}\) \textit{Id.} Canon 5(B)(2). \textit{Carey v. Wolnitzek} invalidated an earlier version of Canon 5’s solicitation clause for over-broadly proscribing "solicitation of campaign funds." 614 F.3d 189, 204-07 (6th Cir. 2010). The revised and narrowed solicitation clause in Canon 5 contemplates fundraising by committees established by the judicial candidate. See KY. SUP. CT. R. 4.300, Canon 5(B)(2). The narrowed solicitation clause in Canon 5 was "revised in accordance with \textit{Williams-Yulee v. The Florida Bar, No. 13-1499, [135 S. Ct. 1656] (2015).}" Commentary to KY. SUP. CT. R. 4.300, Canon 5(B)(2) (Lexis 2016). Decided in April 2015, \textit{Williams-Yulee} held that a solicitation clause that prohibited personal solicitation by judicial candidates but permitted fundraising by their established committees did not violate the First Amendment. Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1672 (2015). Canon 5(B)(2) follows closely the language of the clause at issue in \textit{Williams-Yulee. Compare KY. SUP. CT. R. 4.300, Canon 5(B)(2), with Williams-Yulee, 135 S. Ct. at 1663.}


\(^{132}\) \textit{Id.} at *70.

\(^{133}\) \textit{Id.} at *19--21 ("If the only thing [Canon 5(A)(1)(a)] forbid was a candidate saying that he is a party’s official nominee, then it would likely be constitutional."). \textit{Winter} explicitly recognizes diminishing the reliance on political parties in judicial selection, promoting nonpartisan elections, and preventing judges and judicial candidates from lying as compelling interests. \textit{Id.} at *20--21, *21 n.5.
Thankfully, the text of Winter guides reconstruction of the invalidated Canons toward constitutionality, and the Kentucky Supreme Court would be wise to follow Winter in its redrafting. Winter declared Canon 5(A)(1)(a) “unconstitutionally vague.” Under Canon 5(A)(1)(a), neither a judge nor a candidate for judge may campaign as a member of a political organization. The prohibition works to remove a candidate’s political party association from the campaign stump. Winter took issue primarily with the Kentucky Supreme Court’s interpretation of the prohibition, an interpretation to which the federal court had an obligation to give effect. The Kentucky Supreme Court has interpreted the Canon 5(A)(1)(a) to mean, “[A judicial] candidate shall not portray himself, either directly or by implication, as the official nominee of a political party.” According to Winter, while “most of the Canon is completely unobjectionable . . . . [t]he problem lies in the three words: ‘or by implication.’” “[T]he problem is that those words are too vague” because they “fail[] to give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited.” The federal district court opined, “If the only thing [Canon 5(A)(1)(a)] forbid was a candidate saying that he is a party’s official nominee, then it would likely be constitutional.” Even after Winter, the Kentucky Supreme Court may prohibit judicial candidates from directly identifying themselves as official party nominees, a laudable safeguard against the direct and official association between judicial candidates and political parties. To protect against over-politicization of Kentucky Supreme Court elections, revision of Canon 5(A)(1)(a) should consider the drafting note from Winter.

Although challenged for its constitutionality in Winter, the Eastern District of Kentucky upheld Canon 5(A)(1)(b). The provision prohibits judges and judicial candidates from “act[ing] as a leader or hold[ing] any office in a political organization.” Canon 5(A)(1)(b) guards against the commandeering of judgeships and nonpartisan judicial campaigns by active political party officials. Winter also upheld a protection against over-politicization in Canon 5(A)(1)(c). This provision prohibits judges and judicial candidates from “publicly endors[ing] or oppos[ing] a candidate for public office.” While the Canon may not bar a judge or judicial candidate “from making speeches for or against” a

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134 See id. at *22–23 (“The problem lies in the three words: ‘or by implication.’”).
135 Id. at *24–27.
138 Id. at *23.
139 Id.
140 Id. at *24–27.
141 Id. at *23 (citations omitted).
142 Id. at *21.
143 See id. at *23–27 (“The problem lies in the three words: ‘or by implication.’ Specifically, the problem is that those words are too vague.”).
144 Id. at *45, *70.
146 Winter, 2016 U.S. Dist. LEXIS 64044, at *37.
police party, it may preclude him or her “from publicly endorsing a candidate for political office.”147 As Winter reminds, an endorsement is a powerful political tool, commonly “exchanged between political actors on a quid pro quo basis . . . to affect a separate political campaign, or . . . assume a role as a political powerbroker.”148 The rule against endorsement “addresses a judge’s entry into the political arena on behalf of his partisan comrades.”149 Without such a rule, public confidence in the judiciary might suffer.150 Winter, by upholding the endorsement rule in Canon 5(A)(1)(c), preserves an important safeguard against overt-polarization of Kentucky Supreme Court elections, precluding judges and judicial candidates from using the endorsement “to secure their elections (or help others get elected) as part of a partisan political machine.”151

In addition to the identification clause in Canon 5(A)(1)(a), Winter also invalidated important safeguards in Canon 5(B)(1)(c).152 Under the provision, a judge or judicial candidate:

[S]hall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office; and shall not knowingly, or with reckless disregard for the truth, misrepresent any candidate's identity, qualifications, present position, or make any other false or misleading statement.153

The federal district court deemed part of the “pledges, promises, or commitments” clause unconstitutional.154 According to the court, while “[t]he state surely may

147 Winter, 2016 U.S. Dist. LEXIS 64044, at *37 (quotations and internal citations omitted).
148 Id. at *33 (quoting Siefert v. Alexander, 608 F.3d 974, 984 (7th Cir. 2010)).
149 Id. at *34 (quoting Siefert v. Alexander, 608 F.3d 974, 984 (7th Cir. 2010)).
150 See id. at *33–34.
151 Id. at *34–35.
152 Id. at *53–55.
153 KY. SUP. CT. R. 4.300, Canon 5(B)(1)(c). With respect to the Kentucky Supreme Court's discretion to regulate judicial campaigning, at least three cases are worth mentioning. First, J.C.J.D. v. R.J.C.R. held that a Kentucky Supreme Court Rule that "prohibits all discussion of a judicial candidate's views on disputed legal or political issues . . . violates fundamental state and federal constitutional free speech rights . . . ." 803 S.W.2d 953, 956 (Ky. 1991). Second, Carey v. Wolnitzek invalidated a provision of Kentucky Supreme Court Rule 4.300, Canon 5 that prohibited a judicial candidate from disclosing his or her party affiliation "in any form of advertising, or when speaking to a gathering," 614 F.3d 189, 201, 204 (6th Cir. 2010) (citation omitted). The Kentucky Supreme Court subsequently redrafted Canon 5 to comply with Carey. See Commentary to KY. SUP. CT. R. 4.300, Canon 5(1)(a) (stating a judicial candidate "may publicly affiliate with a political organization but may not campaign as a member of a political organization"). Third, in Republican Party of Minnesota v. White, the United States Supreme Court held that a supreme court canon "prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment." 536 U.S. 765, 788 (2002). White informed the Kentucky Supreme Court's decision in Carey. See Carey, 614 F.3d at 194.
prohibit a judge [or judicial candidate] from making a pledge in connection with a 'case or controversy,' it may not prevent him or her from making a promise with respect to 'issues.' While Winter risks over-politicization of elections involving particular issues to which judges and judicial candidates may show bias, the decision reinforces the Kentucky Supreme Court's power to regulate public impartiality as to actual cases and controversies, "in favor or against litigants."

In a decision with unclear implications, the Sixth Circuit Court of Appeals restored the "commitments clause" of Canon 5, commending Kentucky's efforts to revise and narrow its application to judges and judicial candidates' political speech. The Canon's commentary seems to save it, excluding from the clause's coverage judges and judicial candidates' commitments on issues not inconsistent with impartiality. Albeit a reversal of the district court's findings on the commitments clause of Canon 5, the Sixth Circuit's decision came with instructions that the Kentucky Supreme Court adopt a construction of the clause that "yields greater certainty—and firmer constitutionality," and "resolve[s] the open questions [on the issues covered by the Canon] in a way that honors candidates' rights under the [F]irst [A]mendment." The Kentucky Supreme Court would be wise to heed the Sixth Circuit's instructions.

Winter also facially preserved the prohibition against false speech in Canon 5(B)(1)(c). The district court accepted as compelling Kentucky's interest in keeping unscrupulous, dishonest judges off the bench, "imagining a large number of false statements that Kentucky would be entitled to forbid." The rule against false speech ensures that neither judges nor judicial candidates knowingly or recklessly use false speech to over-politicize nonpartisan elective selection.

Kentucky Supreme Court Rules appropriately regulate judicial elections and the political behavior of judges and judicial candidates. They broadly impose judicial duties of impartiality, independence, and integrity, which help ensure nonpartisan elective selection works efficaciously by producing impartial, independent jurists. Specific prohibitions against official political party involvement, personal

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155 Id. at *54.
156 Id.
157 Id.
158 See Winter v. Wolnitzek, 834 F.3d 681, 694 (6th Cir. 2016).
159 See id. (citing Commentary to Ky. Sup. Ct. R. 4.300, Canon 5(B)(1)(c)).
160 Id. at 695 (citation omitted).
161 See Winter, 2016 U.S. Dist. LEXIS 64044, at *58–59. The federal district court found the plaintiffs' as-applied challenge unripe. Id. at *63–64. On appeal, however, the Sixth Circuit concluded that the ban against false speech, as it applied to the plaintiff, "outstrips the Commonwealth's interest in ensuring candidates don't tell knowing lies and thus fails to give candidates the 'breathing space' necessary to free debate." Winter, 834 F.3d at 693 (citing Brown v. Hartlage, 456 U.S. 45, 60–61 (1982)).
solicitation of contributions, public endorsement of candidates, and false speech also protect against over-politicization of nonpartisan judicial selection.

Although most of Kentucky's statutory controls safeguard against over-politicization, the Kentucky Supreme Court must work to revise some of its Rules undermined by recent federal jurisprudence. If it fails to plug the holes left by Winter, it risks the elective selection of its justices becoming "more and more partisan." Those revising the Rules must be "surgically precise" in drafting rules that constrain judges and judicial candidates' political activity so to ensure the Rules survive First Amendment strict scrutiny. As such, the Kentucky Supreme Court would be wise to follow directions from Winter.

iii. Administrative Oversight of Kentucky Supreme Court Elections

Administrative oversight protects against over-politicization. Kentucky law establishes the Judicial Conduct Commission, empowered to penalize judicial behavior violative of the Judicial Code of Conduct. The power of the Commission to discipline supreme court justice candidates promotes accountability for judicial impartiality and independence. The membership of the Commission, which consists of four elected representatives—one each from the Kentucky Court of Appeals, Circuit Courts, District Courts, and Kentucky Bar Association—and two non-legal citizen representatives appointed by the governor, minimizes over-politicization. As with the Judicial Nominating Commission reviewed above, the governor cannot completely stack the Judicial Conduct Commission with his or her patrons. And still, the electorate, albeit indirectly through its elected judges, plays a role in naming three of the six commissioners.

Contributive to judicial accountability, the Judicial Conduct Commission publishes annual reports chronicling the complaints filed on, and any public actions levied against, justices and judicial candidates. For example, the Commission made public its Order of Public Reprimand against judicial candidate Dana M. Cohen, who, after becoming a judicial candidate, “liked” a Facebook post that publicly endorsed a political candidate and made a political contribution, in violation Kentucky Supreme Court Canon 5(A)(1)(c) and (d).

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163 See Stewart, supra note 130.
164 Winter, 2016 U.S. Dist. LEXIS 64044, at *69.
165 See generally KY. SUP. CT. R. 4.020.
Provisions in the Kentucky Constitution, statutory contribution caps and disclosure requirements, and disciplinary oversight of candidates form a framework that controls against over-politicization of Kentucky Supreme Court elections by promoting impartiality and independence. Stated differently, Kentucky law ensures the efficacy of judicial selection of Kentucky's Supreme Court justices.

IV. WHY KENTUCKY SHOULD RETAIN NONPARTISAN ELECTIVE SELECTION

"Kentucky ... has not faced any serious monetary threats to the independence and impartiality of its judiciary." 469

Section A of this Part applies the identifiers of over-politicization to Kentucky’s Supreme Court elections held from 2000–2015. Section B uses the results of Section A to describe why Kentucky should retain nonpartisan elective selection and not adopt two of the alternative selection methods proposed by scholars. Section C offers additional reasons for retaining nonpartisan elective selection as the method for selecting Kentucky’s Supreme Court justices.

A. Application of the Over-Politicization Identifiers to Nonpartisan Elective Selection in Kentucky

With an understanding of the framework that regulates nonpartisan elective selection in Kentucky, one can apply the identifiers of over-politicization to measure the efficacy of Kentucky’s Supreme Court elections held from 2000–2015. A joint study prepared by the Justice at Stake Campaign, the Brennan Center for Justice, and the National Institute on Money in State Politics (hereinafter, Brennan Center Study or Study) analyzes, among other things, Kentucky’s Supreme Court elections between 2000–2009. 470 The Study uses electoral reports and news articles to measure over-politicization of the Kentucky Supreme Court elections held after 2009. 471 Application of the identifiers demonstrates that recent elections have not become over-politicized to the point that the justices they produce compromise impartiality and independence, the hallmark indicators of efficacy.

i. 2000–2009: Brennan Center Study

The Brennan Center Study charts “growing challenge[s] to the impartiality of [the United States’] courts.” 472 According to the Study, trends of a compromised national judiciary include: the astronomical influx of money into state supreme

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469 Hardy, supra note 5, at 400.
471 See generally id.
472 Id. at 1.
court elections; the influx of negative and costly television ads; and the emergence of special-interest groups organized to affect judicial electoral outcomes.\footnote{See generally id.} The Brennan Center Study’s trends of growing challenges to judicial impartiality support what this Article adopts as the four identifiers of over-politicization of nonpartisan elective selection.

\textit{a. Multimillion-Dollar Spending}

According to the Brennan Center Study, twenty-nine contested state supreme court elections spent nearly $175 million from 2000–2009.\footnote{Id. at 11.} The Study seems to focus on the top ten states for supreme court election spending, in which Kentucky does not appear.\footnote{Id. at 6, 12. Eight of the top ten fundraising states use partisan elections to select their supreme court justices. See id. at 17, 20.} In fact, among the twenty-six states measured in the study, Kentucky’s Supreme Court election fundraising ranks fifteenth.\footnote{See id. at 6. Tenth among the “Top 10” fundraising states, West Virginia’s fifteen judicial candidates raised more than two times what Kentucky’s nineteen judicial candidates raised. \textit{Id.}} From 2000–2009, nineteen Kentucky Supreme Court candidates raised just over $3.5 million in the aggregate.\footnote{Id. at 6.} When extrapolated across eleven supreme court elections held between 2000–2009, each race raised an average of $318,571, well below the multimillion dollar spending identifier that indicates over-politicization of nonpartisan elective selection. Even if one removes from the calculation the four uncontested supreme court elections held in Kentucky between 2000–2009,\footnote{Uncontested races were held in 2002, 2006, and 2008. \textit{Election Results}, ELECT.KY.GOV, http://elect.ky.gov/results/2000-2009/Pages/default.aspx \url{https://perma.cc/H2T8-EB3B} (last visited Jan. 20, 2017) (providing links for each individual in which election results are available for every supreme court election held between 2000 and 2009).} each of the seven remaining contested supreme court elections raised, on average, $500,612.\footnote{See id. (showing uncontested races were held in 2002, 2006, and 2008). The $500,612 figure seems reasonable considering the Brennan Center Study showed a combined fundraising total of $515,711 for the four Kentucky Supreme Court justice candidates on the ballot in 2008. See \textit{SAMPLE ET AL.}, supra note 170, at 20.} Whether or not accounting for actual electoral contest, the hard money raised in Kentucky’s 2000–2009 supreme court elections does not reach the multimillion-dollar threshold that indicates over-politicization.

\textit{b. Participation by Third-Party Special Interest Groups}

The Brennan Center Study only partially accounts for third-party interest group participation in Kentucky Supreme Court elections between 2000–2009. For example, of the total television advertisement spending in the eleven Kentucky Supreme Court elections from 2000–2009, non-candidate groups accounted for $0
in spending.\textsuperscript{180} The Study does not catalogue non-television participation by interest groups. Third-party interest groups tend to focus their resources on television advertising expenditures.\textsuperscript{181} It seems inconsequential whether third-party groups that did not participate in television advertising between 2000–2009 alternatively participated in Kentucky’s Supreme Court elections.\textsuperscript{182} From what limited data is available, Kentucky’s Supreme Court elections from 2000–2009 did not reflect over-politicization from participation by third-party special interest groups.

c. Television Advertisements, Particularly if Negative

From 2000–2009, nineteen candidates for Kentucky Supreme Court justice ran 2,895 total television advertisements,\textsuperscript{183} an average of 152 airings per candidate. The number of total advertisements ranks Kentucky tenth among twenty states whose high-court candidates ran television advertisements.\textsuperscript{184} In analyzing the Kentucky Supreme Court elections from 2008, the Brennan Center Study found a total of 334 television advertisements occurred; none of the ads were negative and none of them were sponsored by third-party interest groups.\textsuperscript{185} Whether 152 airings per candidate during a months-long election period over-politicizes nonpartisan elective selection might divide reasonable people. But three of Kentucky’s eleven supreme court elections (and two of seven contested elections) included no negative television advertising, which might tilt toward the elections held from 2000–2009 not becoming over-politicized. Television advertisements, as a sole identifier, do not clearly characterize the 2000–2009 Kentucky Supreme Court elections as either over-politicized or not over-politicized.

d. “Litmus Test” Issue Campaigning

The Brennan Center Study measures “litmus test” issue campaigning according to television advertisements aired in the three Kentucky Supreme Court elections held in 2008.\textsuperscript{186} Of the 334 television airings in those elections, none focused

\textsuperscript{180} SAMPLE ET AL., \textit{supra} note 170, at 27. Only the candidates incurred costs associated with television advertisements; “Group” and “Party” contributors spent $0 in the three Kentucky Supreme Court elections held in 2008. \textit{Id.} at 29.

\textsuperscript{181} Non-candidate groups accounted for 40% of all television advertising from 2000–2009. \textit{Id.} at 2.

\textsuperscript{182} Even if a third-party organization chose to invest in non-television advertisements, the framework that regulates nonpartisan elective selection statutorily caps what a judicial candidate may accept from contributing organization. \textit{See} KY. REV. STAT. ANN. \textsection 121.150(6) (LEXIS through the 2016 Legislative Session). Over-politicization from $1000 non-television-advertisement expenditures seems unlikely.

\textsuperscript{183} SAMPLE ET AL., \textit{supra} note 170, at 27.

\textsuperscript{184} \textit{See id.}

\textsuperscript{185} \textit{See id.} at 87. The author acknowledges the limitations of the Brennan Center Study’s data. Where appropriate, this Article uses data analyzing three Kentucky Supreme Court elections in 2008 as an indicator of over-politicization of all eleven Kentucky Supreme Court elections held from 2000–2009.

\textsuperscript{186} \textit{See generally id.}
singly or inordinately on a contentious, litmus test legal or political issue. Of those airings, 111 addressed criminal justice, criticism of decisions, and family values; the other 223 airings were "traditional" in nature and tenor. The Brennan Center Study ranks all 334 airings as "promot[ing]" the subject of the advertisement and not attacking the subject's opponent. An absence of litmus test issue campaigning from three of eleven Kentucky Supreme Court elections held from 2000–2009 might tilt toward the elections not becoming over-politicized.

With respect to multimillion dollar campaign spending and participation by third-party special interest groups, Kentucky Supreme Court elections held from 2000–2009 did not become over-politicized. With respect to two other identifiers of over-politicization—television advertising, particularly if negative, and litmus test issue campaigning—available data indicates that the three Kentucky Supreme Court elections held in 2008 did not become over-politicized. Especially considering the protections against over-politicization enumerated in the framework that regulates nonpartisan elective selection, in sum, the Brennan Center Study seems to show that from 2000–2009, nonpartisan election selection preserved impartiality and independence and worked efficaciously as a method for selecting Kentucky Supreme Court justices.

ii. 2010–Present

Since 2009, Kentucky has held seven elections for a seat on the Kentucky Supreme Court, four of them contested. Using available electoral reports and news articles, this Subsection measures the efficacy of nonpartisan elective selection in those three contested elections.

a. Multimillion-Dollar Spending

In their 2012 campaigns for election to Kentucky's 7th Supreme Court District, candidates Will T. Scott and Janet Stumbo reported raising $303,440 and

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189 This conclusion especially considers the statutory rules that regulate judicial candidates' political activity, including their representations of an opponent's qualifications and positions. See KY. SUP. CT. R. 4.300, Canon 5(B)(1)(a), (c).
190 See supra text accompanying notes 183–190.
191 See Election Results, supra note 178 (providing links to official election results compiled by the Kentucky State Board of Elections reveals Kentucky Supreme Court elections held from 2010 to November 2015).
193 Information related to the 2016 election was not readily available at the time this article went to print.
$111,360, respectively. Data from the Brennan Center does not report any spending by third-party special interest groups in the 2012 Scott-Stumbo election. In 2014, candidates Michelle Keller and Teresa Cunningham reported raising $99,797 and $13,767, respectively. Finally, Kentucky Registry of Election Finance records show that candidates Stumbo and Samuel Wright, in their 2015 campaigns, raised $171,969.63 and $119,596.00, respectively. Since 2009, none of the candidates' fundraising has approached the multimillion-dollar spending threshold that indicates over-politicization of nonpartisan elective selection.

b. Participation by Third-Party Special Interest Groups

For the 2012 election, the Brennan Center Study reports no television advertisement spending by third-party interest groups, where a third-party special interest group would generally focus its judicial election resources. Records of participation by third-party groups in the 2014, 2015, and 2016 contested elections are not available. Overall, available data is insufficient to measure whether, from 2010 to 2015, participation by third-party interest groups in Kentucky's contested Supreme Court elections over-politicized the nonpartisan elective selection system. The over-politicization identifier cuts neither for nor against the efficacy of nonpartisan elective selection as a method for selecting Kentucky Supreme Court justices.


197 Kentucky Registry of Election Finance, Candidate Search (by election date), KYREF.STATE.KY.US, http://www.kyref.state.ky.us/krefsearch/ [https://perma.cc/PU9S-SZFB] (follow hyperlink for Candidate Search "By Election date"; select "11/03/2015" as date of election; select "Supreme Court Judge" as office sought) (last visited Jan. 20, 2017).


According to the Brennan Center, in 2012, candidates Scott and Stumbo ran 275 airings of ten different television advertisements—six by Stumbo, including three critical of Scott; and four by Scott, including three advertisements attacking or criticizing Stumbo. Of note, Stumbo likened Scott’s television advertising to a “media assault” of negative ads. Brennan Center records of television advertisements run in the 2014 contested election are not available. Finally, the Brennan Center identifies two television advertisements run in the 2015 election—both by Stumbo, neither negative. Also, in 2015, candidate Wright apparently ran a recycled criticism of Stumbo, stating she “sided with criminals nearly 60 percent of the time.”

In summary, since 2010, television advertising has appeared in at least two of Kentucky’s three contested supreme court elections. Three candidates in the two contested elections used negative television advertisements. The winners of both contested races ran advertisements attacking or criticizing their opponents. The data identifies the three contested Kentucky Supreme Court elections held since 2009 as over-politicized.

d. “Litmus Test” Issue Campaigning

Justice Scott’s television advertisements in 2012 indicate issue campaigning. Scott's television advertisements painted his opponent as “liberal and soft on crime.” Particularly, advertisements criticized opponent Stumbo for “sid[ing] with criminals 59 percent of the time.” Because “soft on crime” attacks dominate 75 percent of the television advertisements run by Scott against Stumbo, this scholarship can comfortably call Scott’s focus on a contentious, litmus test legal or political issue inordinate.

According to the Cincinnati Enquirer, the 2014 contested election “stretched the limits” of nonpartisan elective selection. “The Boone County Republican Party . . . [ran] an anti-abortion newspaper ad against Keller on Cunningham’s
behalf." The anti-abortion messaging against Keller signaled not only participation by a non-candidate group, but also campaigning on a contentious, litmus test legal or political issue. The *Enquirer* calls the Boone County Republican Party’s activity “unprecedented,” and this scholarship feels comfortable categorizing the 2014 issue campaigning against Keller inordinate, if not singularized.

The “soft on crime” issue campaigning from 2012 reemerged against Stumbo in 2015. However, data does not demonstrate singularized or inordinate focus on the contentious, litmus test issue. Generally, however, contested campaigns for Kentucky Supreme Court justice inordinately focused on contentious, litmus test legal or political issues from 2010–2015.

In sum, two identifiers indicate that the three contested Kentucky Supreme Court elections held after 2009 became over-politicized, while one identifier suggests the elections did not become over-politicized. The fourth identifier is inconclusive. The disparity of the results might suggest that, after 2009, nonpartisan elective selection began to compromise the impartiality and independence of justices elected to the Kentucky Supreme Court, thus working inefficaciously.


Available data shows neither the efficacy nor inefficacy of nonpartisan elective selection as a method for promoting impartiality and independence. Since 2000, it might seem that nonpartisan elective selection has trended toward over-politicization. Admittedly, issue campaigning and negative television advertising have become more prevalent in contested elections for the Kentucky Supreme Court. However, the fatal effectiveness of issue campaigning seen in Justice Penny White’s electoral rejection to the Tennessee Supreme Court has not yet mired to Kentucky. For example, in 2014 Justice Keller withstood an unprecedented, politically organized, litmus test assault. Also, since 2000, fundraising by Kentucky Supreme Court candidates and non-participation by third-party special interest groups in those elections have remained relatively constant and under the multimillion dollar threshold.

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208 Id.
To more conclusively answer whether nonpartisan elective selection works efficaciously in Kentucky, the Judicial Conduct Commission's annual reports prove informative. Between fiscal years 2010 and 2015, the Judicial Conduct Commission received 1,519 complaints. Of these, at least 51 alleged political or campaign conduct impropriety by judicial candidates or justices. Of course, these figures represent complaints against all candidates and judges, not particularized to the Kentucky Supreme Court justice candidates of interest here. In Fiscal Year 2015 alone, at least five complaints related to campaign misconduct or political impropriety resulted in discipline. The infrequency of campaign misconduct and political impropriety supports at least two conclusions: (1) relatively little election behavior moves the Judicial Conduct Commission to question the impartiality and independence of elected judges; and (2) in practice, the constitutional and statutory framework that regulates nonpartisan elective selection effectively discourages or protects against behavior that over-politicizes Kentucky Supreme Court elections. In sum, perceived over-politicization of nonpartisan elective selection actually resulted in minimal conduct violative of the framework that regulates judicial selection of the Kentucky Supreme Court.

The Kentucky Supreme Court elections surely have trended toward over-politicization, particularly because of negative television advertising and issue campaigning. Apparent from annual reports published by the Judicial Conduct Commission, though, it seems that the framework that regulates nonpartisan elective selection in Kentucky and administrative oversight of judicial candidates preserve the impartiality and independence of the Kentucky Supreme Court. Application of the identifiers of over-politicization to Kentucky's Supreme Court elections since 2000 indicates that nonpartisan elective selection, even if recently marginally over-politicized, works efficaciously as a method for selecting impartial, independent justices.

B. Kentucky Need Not Reject Nonpartisan Elective Selection for Proposed Alternative Selection Methods

Critics of nonpartisan elective selection as an efficacious method for selecting Kentucky Supreme Court justices prefer alternative selection methods. For
example, Benjamin Hardy proposes two alternatives to nonpartisan elective selection.\textsuperscript{214} Hardy prefers merit selection "[m]inus [r]etention [e]lections."\textsuperscript{215} If Kentucky must retain nonpartisan elective selection, Hardy supports a public financing scheme.\textsuperscript{216} Neither of Hardy's alternative selection systems promotes impartiality and independence better than nonpartisan elective selection. Thus, neither proves a more efficacious selection method.

i. Merit Selection Minus Retention Elections

To adequately disprove Hardy's "merit minus" selection system as a more efficacious alternative to nonpartisan elective selection, one must break down the system into its two components: merit selection and reselection using something other than retention elections.

The first component of merit selection would use a judicial nominating commission, whose members the governor appoints, to name and present candidates for gubernatorial appointment to the Kentucky Supreme Court.\textsuperscript{217} Under merit selection, a governor gets two stabs at political patronage—first in his or her appointments of members to the nominating commission and second in his or her appointment of one of the commission's recommended candidates.\textsuperscript{218} In Kentucky, for example, the governor appoints a controlling majority of the Supreme Court Judicial Nominating Commission.\textsuperscript{219} An idealist might mock attribution of corruption to Kentucky's governorship; a realist might responsively direct him to a 2014 Harvard University study that identified "Kentucky's state

\textsuperscript{214} See Hardy, supra note 5, at 400–03.
\textsuperscript{215} Id. at 400–02.
\textsuperscript{216} Id. at 402–03.
\textsuperscript{217} See Deja, supra note 22, at 904, 907.
\textsuperscript{218} See id.
\textsuperscript{219} KY. CONST. § 118(2) (LEXIS through the 2016 Legislative Session).
government . . . among the most [politically] corrupt in the country," and, notably, ranked Kentucky's executive branch "among the five worst," according to "hundreds of news and investigative reporters covering state politics." Anecdotally, the Republican Party of Kentucky boldly charged Democratic Governor Steve Beshear with "selling" appointments to state boards and commissions, particularly public universities' boards of trustees. Perhaps more fundamentally, proposing merit selection by the governor ignores one of the concerns that inspired Senator Carroll Hubbard to propose nonpartisan elective selection in 1974. Merit selection, because it involves politically calculative executives' appointments to nominating commissions and, thereafter, to state supreme courts, does not clearly protect against over-politicization of judicial selection.

The second component of Hardy's "merit minus" alternative suggests that rather than retention elections, Kentucky should use a judicial nominating commission or its General Assembly for reselection for service on the supreme court. Abolishing retention elections admittedly removes the risk of electoral over-politicization, but reselection by a judicial nominating commission or the General Assembly still threatens impartiality and independence. The same risks of political patronage that attend initial appointive selection to the Kentucky Supreme Court would attend the nominating commission's decisions on retention. Kentucky's governor appoints a controlling majority of the Supreme Court Judicial Nominating Commission. Empowering a judicial nominating commission with decisions on whom to retain does not eradicate politicization of selecting Kentucky Supreme Court justices.

A decision on retention inside the General Assembly does not obviously avoid over-politicization either. "Legislative selection does not offer any obvious

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222 See Hubbard Interview, supra note 62.
223 Hardy, supra note 5, at 401.
224 Over-politicization of judicial selection does not indiscriminately bypass retention elections. Retention elections: (1) require judicial candidates to fundraise as well as campaign on the issues and on their records; (2) can involve television advertising; and (3) may cause candidates to open their doors to third-party interest groups, including negative campaigning. See id. ("[S]pecial interest groups have realized that they can have a big impact on whether a judge facing retention election is able to maintain his seat."). Lambert, supra note 81, at 4 ("[I]n recent years, a new phenomenon has descended on retention election politics in the form of single-issue interest groups and their ability to spend substantial sums of money to attack a sitting judge on the basis of a single decision or line of decisions."). As an example, the Brennan Center points to Pennsylvania, an elective selection state that uses retention elections for subsequent supreme court service. SAMPLE ET AL., supra note 170, at 20. Also, one cannot overlook the aforementioned Justice Penny White summary, another example of over-politicization of a retention election. See Bills, supra note 84, at 44–45; McCarthy, supra note 90.
225 KY. CONST. § 118(2) (LEXIS through the 2016 Legislative Session).
advantages over other systems." Just as Kentucky's governor might measure politics in deciding whom to appoint to the supreme court, "[p]olitical considerations are likely to operate just as vigorously on legislators" in deciding which justices to retain. For instance, "the final decision [whether to retain a justice] would likely be strongly affected by legislative alliances, traditional voting blocs, and the power of the leadership in each house to force a particular choice."

Both components of Hardy's "merit minus" alternative to nonpartisan election instill politicization into the selection of Kentucky Supreme Court justices. This alternative does not promote impartiality and independence of justices any better than nonpartisan elective selection. Additionally, the "merit minus" alternative proves most disagreeable because it entirely strips Kentucky voters of a right to decide the makeup of their supreme court. Either in partisan or nonpartisan elections, Kentuckians have enjoyed the right to decide the justices of the state's highest court for 165 years. Stripping Kentuckians of their electoral right to select supreme court justices ignores the weight the General Assembly accorded public opinion when it proposed nonpartisan elective selection in 1974. To deprive the electorate of a voting right constitutionally conferred in 1850 offends the democratic process. These reasons answer why Kentucky should retain nonpartisan elective selection and reject the "merit minus" alternative proposed by Hardy.

ii. Public Financing for Nonpartisan Elective Selection

Hardy's second proposed alternative to nonpartisan elective selection also attracts criticism. Hardy proposes public financing for all nonpartisan judicial elections in Kentucky from a Clean Judicial Election Fund grown by income tax refund check-offs, unspent campaign contributions from previous campaigns, and state bar association contributions. Public financing for status quo nonpartisan elective selection does little to better promote impartiality and independence. In

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227 Id.
228 Id.
229 See Metzmeier, supra note 8, at 22–23.
230 Adopting any alternative to nonpartisan elective selection requires amending Kentucky's Constitution. See KY. CONST. § 256 (LEXIS through the 2016 Legislative Session). Similar efforts were met with electoral doom. See Lambert, supra note 81, at 7 ("Citizens firmly refuse to give up their right to elect their judges.").
231 See Bert Brandenburg & Roy A. Schotland, Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns, 21 GEO. J. LEGAL ETHICS 1229, 1229 (2008) ("There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court.") (quoting Stretton v. Disciplinary Bd. of the Supreme Court of Penn., 944 F.2d 137, 145 (3d Cir. 1991)).
232 See Hardy, supra note 5, at 399–400, 402.

Public financing would not promote the impartiality and independence of the Kentucky Supreme Court any better than nonpartisan elective selection. For instance, Hardy's public financing scheme would not entirely eliminate a judicial candidate's need to fundraise and spend—an identifier of over-politicization—which compromises impartiality and independence. Even where partial public financing is available, judicial candidates "must continue to raise significant sums of money from lawyers and organizations with an interest in the outcomes of cases the judges will be deciding."\footnote{Id. at 1479.} Also, public financing does not restrict fundraising or expenditures by third-party special interest groups, another identifier of over-politicization. Finally, public financing does not proscribe candidates' and special interests' abilities to issue-campaign on litmus test legal and political issues. In fact, public financing might contribute to over-politicization by making available funds so that candidates can organize and carry out a judicial campaign, perhaps engaging in the over-politicization that available campaign funds enable. According to Geyh:

To the extent that the availability of public money makes running for elective office more attractive, publicly financed judicial elections will tend to increase competition for judicial office . . . . \footnote{Id. at 1480. Roy Schotland, invoking Deborah Goldberg of the Brennan Center, spins the argument. See Brandenburg & Schotland, \textit{supra} note 231, at 1256 ("Although we generally believe that more competition is better, we should not so easily leap to that conclusion in proposing structures to regulate judicial elections. In jurisdictions that have already managed to secure a diverse and qualified bench, we may in fact want to discourage competition.").} Increased competition may undermine ongoing efforts to cool judicial campaign rhetoric and dissuade candidates and the electorate from compromising judicial independence by turning elections into referenda on the popularity of incumbent judges' isolated decisions.\footnote{"Although we generally believe that more competition is better, we should not so easily leap to that conclusion in proposing structures to regulate judicial elections. In jurisdictions that have already managed to secure a diverse and qualified bench, we may in fact want to discourage competition."} While it might bring more candidates into the judicial electoral arena, public financing does little to promote impartiality and independence any better than traditional, privately financed, nonpartisan elective selection. Even if public financing were able to better ensure impartiality and independence, Hardy's proposal acknowledges its own shortcomings: dire economic obligations, a lack of political enthusiasm, and opposition by taxpayers.
effectively kill its political likelihood. Moreover, some scholars attack public financing schemes for coercing political speech.

In support of his proposed alternatives, Hardy miscalculates the infusion of money into Kentucky Supreme Court elections. Rather than focusing on election-specific dollars, Hardy points to aggregated Kentucky Supreme Court fundraising to support his claim that “Kentucky’s Nonpartisan Judicial Elections Fail to Guarantee the Perception of Impartiality and Independence.” Having had only a handful of contested supreme court races since 2000, and comparatively modest fundraising by candidates in its contested elections, Kentucky simply has not suffered the threats to impartiality and independence that Hardy attributes to the infusion of money into state supreme court elections.

In sum, neither selection method proposed by Hardy proves a more efficacious method for selecting justices to the Kentucky Supreme Court. Neither alternative promotes impartiality and independence any better than nonpartisan elective selection. In fact, merit selection and retention by a nominating commission or the General Assembly risk over-politicization of decisions on who joins and stays on the Kentucky Supreme Court. Public financing might contribute to over-politicization, too, by making funding available that enables campaign activity that compromises impartiality and independence. Thus, Kentucky should retain nonpartisan elective selection of its supreme court justices.

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26 See Hardy, supra note 5, at 399; see also Geyh, supra note 233, at 1480–81. (“Public financing proposals raise a variety of issues . . . but the most critical among them is whether the political will can be found to commit the public funds necessary to make public financing systems solvent and workable.”); Lambert, supra note 81, at 6–7 (“We have all heard the mantra of opposition: public financing of political campaigns is ‘welfare for politicians.’ I am confident that phrase would be changed to ‘welfare for judges.’”).

27 See Hardy, supra note 5, at 399; see also David Wilson, Comment, North Carolina’s Public Funding of State Judicial Races: Innovative Wave of the Future or Band-Aid for a Fatally Flawed System?, 2 CHARLOTTE L. REV. 13, 14 (2010) (“The question with regard to public financing systems always comes down to whether the system essentially coerces candidates to participate.”).

28 See Hardy, supra note 5, at 393–95. Hardy uses a 2004 $9.3 million election to the Illinois Supreme Court anecdotally. See id. at 393. As Section V.A., infra, shows, since 2000, no contested election for Kentucky Supreme Court justice has exceeded $450,000 in combined fundraising by candidates.

29 Hardy recognizes that “Kentucky has been spared the financial arms race that typifies the funding of judicial election campaigns in many other states.” Id. at 395 (quoting Paul J. De Muniz & Philip Schradle, A Modest Proposal for Selection of Oregon Judges, 75 ALA. L. REV. 1753, 1754 (2012)). He posits, though, that “Kentucky should [not] sit back and [should] consider reforming its current method of judicial selection,” as state neighbors suffer “exorbitant spending, the involvement of national special interest groups, and a blizzard of misleading attack ads that mask true interests of the sponsors [in their judicial elections].” Id. at 395–96 (quoting Paul J. De Muniz & Philip Schradle, A Modest Proposal for Selection of Oregon Judges, 75 ALA. L. REV. 1753, 1754 (2012)). Hardy’s urge that Kentucky redesign supreme court selection at the expense of nonpartisan election and shelter from some impending storm before seeing the lightening conflates other states’ nonpartisan elective selection woes with judicial selection of the Kentucky Supreme Court. Id. at 396. He misunderstands that meteorologists occasionally miss.
C. Other Reasons Why Kentucky Should Retain Nonpartisan Elective Selection

Outside efficacy, other reasons support Kentucky's retention of nonpartisan elective selection. First, the selection system has persisted for more than forty years, which suggests an absent political appetite for redesigning judicial selection. Since ratification of the Judicial Article in November 1975, nonpartisan elective selection of Kentucky Supreme Court justices has survived without amendment; no fundamental provision of the Judicial Article has been altered. Reminiscent of an age-old adage, Kentucky should keep what few consider broken.

Second, and fully worth considering beyond the space afforded here, Kentucky should retain nonpartisan elective selection because voters deserve a direct say in the representatives whom effectuate public policy. Of course, a state supreme court *interprets* and not enumerates law, but the limited "balls and strikes" function of courts fails to persuade. As can any high court simple majority, the Kentucky Supreme Court can affirm or nullify public policy, and such power deserves electoral input. Especially because it has enjoyed direct decision for 165 years, the Kentucky electorate should retain the right to evaluate who qualifies to decide public policy, and, thereafter, whether a justice's public policy decisions align with the voters' priorities and values. Not entirely untouched, the theory that the electorate deserves a direct say in state judicial selection informs the Eighth Circuit Court of Appeals' decision in *Republican Party of Minnesota v. White*. It held:

Yet, there is obvious merit in a state's deciding to elect its judges, especially those judges who serve on its appellate courts. It is a common notion that while the legislative and executive branches under our system of separated powers make and enforce public policy, it is the unique role of the judicial branch to *interpret*, and be quite apart from making that policy.

But the reality is that "[t]he policymaking nature of appellate courts is clear." Courts must often fill gaps created by legislation.

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241 See Metzmeier, supra note 8, at 34–39.
242 The adage reminds of Winston Churchill's words: "[I]t has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time." WINSTON CHURCHILL, *Speech in the House of Commons* (Nov. 11, 1947), in WINSTON S. CHURCHILL: HIS COMPLETE SPEACHES, 1897–1963, 7563, 7566 (Robert Rhodes James ed., 1974). The scholarship does not contend that nonpartisan elective selection is "perfect or all-wise," only that it is, for Kentucky, better than "all those other forms [of judicial selection] that have been tried from time to time." Id.
244 Of course, this argument begs the question, "Should, then, as federal public policymakers, the nine justices of the United States Supreme Court stand for election, or the district and appellate justices of the federal judiciary?", which the author neither intends to answer nor commits to answering here.
And in particular, by virtue of what state appellate courts are called upon to do in the scheme of state government, they find themselves as a matter of course in a position to establish policy for the state and her citizens. "At the [state] appellate level, common-law functions such as the adoption of a comparative fault standard, or the determination of a forced spousal share of intestate property distribution, require a judiciary that is sensitive to the views of state citizens." The courts' policy-making power is, of course, ever subject to the power of the legislature to enact statutes that override such policy. But that in no way diminishes the reality that courts are involved in the policy process to an extent that makes election of judges a reasonable alternative to appointment.245

In addition to efficacy, these reasons answer why Kentucky should retain nonpartisan elective selection of its Supreme Court justices.

CONCLUSION

"We are not getting rid of contestable elections. It is understandable that when people call for it, we get endless bills and endless editorials, but it is not only a wheelspin, it is not only a waste of time, it is injurious because it deflects energy from what we can do."246

The efficacy of judicial selection depends on its ability to promote an impartial and independent judiciary. For forty years in Kentucky, nonpartisan elective selection has survived as an efficacious method for selecting the justices of the state's highest court. What the Kentucky General Assembly preferred in 1974—direct electoral selection on a nonpartisan basis—proves appropriate today. Despite forty years' efficacy, nonpartisan elective selection has not escaped critics. Misplaced advocacy for alternative selection systems at the expense of nonpartisan elective selection has appeared in legal scholarship nationwide. But what informs opponents' attacks against nonpartisan elective selection—over-politicization by multimillion dollar campaigns, negative television advertising by candidates and third-party special interest groups, and litmus test issue-campaigning—simply has not, at least to date, compromised judicial selection in Kentucky the way it might have compromised nonpartisan elective selection in other states. Moreover, alternatives proposed to replace nonpartisan elective selection do not obviously work more efficaciously as a method for selecting the justices of the Kentucky

245 Republican Party of Minn. v. White, 416 F.3d 738, 747 (8th Cir. 2005) (citations omitted).
246 See Lambert, supra note 81, at 7 (quoting Roy Schotland, Keynote Address at the National Symposium on Judicial Speech—Post-White (Feb. 24, 2005)).
Supreme Court. Additionally, a comprehensive regulatory scheme controls over-politicization of Kentucky Supreme Court elections.

The political environment might deteriorate such that revisions to the framework regulating nonpartisan elective selection prove necessary. Recent court precedent has already caused an imbalance, and to continue to efficaciously protect against the over-politicization of nonpartisan elective selection, the Kentucky Supreme Court certainly must respond. Importantly, critical pieces of the framework regulating nonpartisan elective selection in Kentucky persist. Moreover, enumerated authority to revise self-regulating rules suggests that Kentucky can dam nonpartisan elective selection without abolishing the selection system entirely. So long as the framework protecting against over-politicization survives and the Kentucky Supreme Court remains responsive to attacks on judicial political speech laws, Kentucky's nonpartisan elective selection scheme can produce impartial, independent supreme court justices.