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## COMMENT ON PAPER BY CHEEK AND CHAMPAGNE: THE JUDICIARY AS A “REPUBLICAN” INSTITUTION

LUKE BIERMAN\*

Thank you for inviting me to participate in this Symposium. It addresses a timely topic and I have enjoyed listening to the news and views. Let me begin by noting that I work for the American Bar Association, and I must advise that my remarks do not necessarily reflect the policy of the Association. Although I am proud of the work that the ABA has done over the past several years on judicial independence generally and judicial selection specifically, I am not here to discuss that work. I, of course, would be happy to answer any questions that you might have about the ABA's activities in those areas, however, I am here to comment on the paper prepared by Professors Cheek and Champagne.<sup>1</sup> In that regard, let me also note that I have not had the opportunity to review Professor Schotland's paper,<sup>2</sup> so I will not comment on that material. This is unfortunate, since Roy Schotland has been quite engaged in the work on judicial independence and judicial selection in the past few years, and he always has something interesting to contribute. I look forward, as I'm sure you all do, to hearing what Roy has to say, even though he won't be saying it in person.

I find the Cheek paper troubling. It is troubling to me for one particular reason; but before I address that, let me point out some aspects of the paper that I could but will not discuss. First, I could find fault with the variables chosen. Political scientists always are vulnerable to criticism based on the particular variables chosen for analysis

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1. See generally Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons from a Bellwether State*, this issue at 1357.

2. See generally Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, this issue at 1397 (Professor Schotland was unable to attend the Symposium. His paper was presented by Willamette Law Review Note and Comment Editor, Christopher S.P. Gregory).

and that paper is no different. Certainly we can identify other appropriate variables, or challenge the appropriateness of the variables utilized. This criticism is of a type quite often employed by political scientists in critiquing a paper, but in this case, it is a mere trifle. The variables employed are certainly appropriate based on the theory being assessed, so I won't discuss this critique any further.

Next, I could find fault with the documentation of the anecdotal and descriptive parts of the paper. There are some cites missing from some of the stories, and that could be criticized. Again, though, this criticism is a mere trifle. I'm sure that the missing attribution could be provided, as I'm sure it will be as the paper goes through further updating, editing, and review. So there is little point in pursuing this critique.

I could also criticize the general methodology used in the paper. The reliance on quantitative approaches to challenge and assess what are basically political—and human—activities is a reflection of the discipline of political science and of one subfield, public law, that places more emphasis on the science rather than the political or legal. The use of analytical techniques such as scaling, regression analysis, and other quantitative tools in political science is not a trifling matter, but instead goes to the heart of the discipline. It may even lead one to wonder whether political scientists prefer science to politics. That is not Professor Cheek's problem, though, and that is not why we are here. That concern is part of a much bigger issue that is at play among those active in the political science world. It would therefore be unfair to Professor Cheek to pursue this line of critique. Clearly, the Cheek paper makes an important contribution to the literature of public law as a field of political science using mainstream political science. It looks at an issue that is of increasing interest, the manner in which state judicial elections are conducted, by using an important state, Texas, which has become a bit of a bellwether for mainstream judicial election research.

No, those are not the real reasons that the paper is troubling to me. The paper is troubling because it reflects a developing trend that I think is harmful to the way we conceive of the judiciary. Cheek's paper investigates whether judicial elections provide accountability in the same way that legislative and executive elections provide accountability. It concludes that partisan judicial elections like those held in Texas offer a cue to voters, much like partisan elections provide a cue to voters in legislative and executive elections. That find-

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ing about judicial elections, while certainly not surprising considering what we know about electoral behavior generally, reflects a sea-change in our traditional approach to the judiciary.

The paper proceeds from a perspective that assumes the judiciary is operating like one of the political branches, designed to be responsive to the whims of transitory interest groups or factions. In short, the judiciary is treated like a political branch of government. That treatment, from my perspective, is unwise, as it undermines the institutional role that the judiciary plays in the American tradition of democratic republican government.

Now, don't misunderstand me. I think politics is good. Indeed, we heard Professor Hazard expound on this topic at lunch earlier today. Politics is essential, as it is the process by which we govern ourselves, and the judiciary plays an essential role in that process. But politics, and the process of governing, is not one dimensional. Politics covers a whole range of norms, roles, and functions that differ from institution to institution. There can be no mistaking that the judiciary is involved in politics, as it is part of our governing system. But that fact does not mandate that the judiciary be treated like the political branches, to be probed and analyzed just like the legislature or the executive. That the legal realists might have won the battle in defining how the law is developed does not mean that we must treat judges as mere politicians.

Make no mistake about it—the judiciary is different. It has a role different from the legislature and executive. It has different functions, different purposes, and different norms. The judiciary may be involved in politics, but not the same kind of politics that engulfs the legislature and the executive. We should therefore resist the path that leads us to equate judges with legislators and executives.

Let me be clear about what I see from where I sit. There are nefarious forces at play to diminish and undermine the uniquely independent American judiciary. I suggest that we must resist those impulses in the strongest fashion. Over the past few years, we have seen numerous examples of this development, with the denigrating effects of partisanship and money infiltrating judicial campaigns. You also have seen examples today in the video clips shown and the stories related, and those are just the tip of the iceberg. In response, numerous efforts to improve judicial elections have been undertaken in the past few years. To my way of thinking, those developments can be neatly characterized by the title of a recent article by Charlie Geyh—"Why

Judicial Elections Stink.”<sup>3</sup> I would argue that they more than stink. Let me explain why I think so, and why the Cheek paper is troubling in this regard.

The story of the Texas election process, and the interesting analysis of it, proceeds from several angles. Think about the context that Cheek relates regarding how judicial elections are conducted. The story is much about money and the political environment in which it is raised and spent. The story requires us to be aware of things, such as, from where money is raised; how much money is spent; the importance of ballot position; the impact of name recognition. Those matters are straightforward issues of campaign conduct and electoral behavior. They are the kinds of issues that we recognize as essential in elections for the legislature and the executive. Indeed, the outcomes of those elections turn on these sorts of things. But let's delve a bit deeper into the Cheek paper. First, there are examples of *ex parte* communications, which can be characterized as lobbying and which are strictly regulated (and usually prohibited) in the judicial process.<sup>4</sup> Additionally, Cheek characterizes the issues that underlie the Texas judicial campaigns in social and political terms, rather than as legal issues. Thus, we are told about tort reform, rather than due process.<sup>5</sup> Finally, the parties who are particularly interested in the outcome of Texas judicial elections are characterized as typical political constituencies, such as business or medical or insurance interests, or as racial and ethnic groups. Yet we don't hear much about the issue of access to justice, a concern that typically characterizes those who use the courts.

The list of constituencies mentioned in the Cheek paper can be expanded simply by examining events from around the country. As to issues that are raised in judicial elections, we have seen school funding, water rights, and the death penalty take center stage as social or economic matters, but not as state constitutional or due process issues. Increasingly we see third parties and independent spending play an influential role in the judicial campaigns, just like in legislative or executive races. There are reports that judicial candidates, just like any legislative or executive candidate, are being sent questionnaires inquiring about policy preferences on issues ranging from guns

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3. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003) (Mr. Geyh is a Professor of Law at the Indiana University School of Law at Bloomington.).

4. See, e.g., MODEL CODE OF JUDICIAL CONDUCT, Canon 3 (B) (7) (1991).

5. See Cheek & Champagne, *supra* note 1, at Section II.

to abortion. The pressure to respond to these questionnaires is evident after the rulings in *Republican Party of Minnesota v. White*,<sup>6</sup> and more recent decisions like *Weaver v. Bonner*<sup>7</sup> and *Spargo v. New York State Commission on Judicial Conduct*.<sup>8</sup> Negative advertising, like that portrayed in the videos shown earlier, also has become much more prevalent.

These examples reflect an election process that looks less like what we might expect for the judiciary, and more like the process we see in legislative and executive arenas. They appear more like what we see when candidates seek to represent particular interests and develop particular policy. This state of affairs reflects more closely the selection of elected representatives with political constituencies developing public policy. It does not reflect how judges, resolving legal disputes in an adversarial legal system, should be selected. I think this is a crucial institutional distinction that too frequently gets lost in the rhetoric about elections and campaigns. Judges may be involved in a political governing process, but judicial behavior, as traditionally understood, does not comport with the rank electioneering of politicians who seek to serve as representatives in policy making.

In contrast to the Texas judicial election scenario presented by the Cheek paper, think about how we typically conceive of the appellate judiciary. The judiciary is institutionally distinct from the legislature and executive. We think the judiciary is characterized by legal arguments with set rules of conduct in a collegial setting, and decisions are reached in conferences conducted in private. Submissions are made in accordance with established process, through writings or oral argument, with notice to the other side and an opportunity to respond, unlike the often secretive role of lobbying in the policy making of the legislature and executive. Judicial opinions typically are written with reasons explicitly provided for the decisions. The influence of precedent and legal principles on the judicial decision-making process stands in marked contrast to the way in which legislators and executives develop policy. There is an expectation of impartiality in the judicial decision making process, unlike the near-certainty of influence that characterizes the representative branches of government.

These distinctions were neatly captured recently by Tony Mauro,

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6. 536 U.S. 765 (2002).

7. 309 F.3d 1312 (11th Cir. 2002).

8. 244 F. Supp. 2d 72 (N.D.N.Y. 2003).

writing about the argument in the IOLTA case before the Supreme Court of the United States.<sup>9</sup> The legal challenges, stemming from programs in Washington and Texas, have been quite controversial, turning on whether there is an unconstitutional taking of private property through the Interest on Lawyer Trust Accounts. There are strong ideological underpinnings to these cases, as you might imagine with regard to takings cases. Mauro's article noted those philosophical differences, but pointed out that during the argument before the Court there was little if any hint of the ideological gulf between the parties and their positions.<sup>10</sup> Rather, the arguments proceeded as legal arguments, in the context of constitutional precedent and legal principles advanced during the appellate process.

Even the Spargo opinion, which recently invalidated many parts of the New York Code of Judicial Conduct and left many people wondering just how much of judicial code restrictions are left, expressly declined to opine on whether the challenged conduct brings disrespect to the judiciary.<sup>11</sup> Imagine that—before the judge went through the required legal analysis, he felt compelled to make some mention of respect for the judiciary. The judge, even in striking down restrictions on political conduct in the context of judicial campaigns, still was concerned about the impact of the decision on the public trust and confidence of the judiciary.

These examples reflect the differences between the judiciary and the legislature and the executive. The judiciary is different, providing a unique institutional role with unique institutional norms in unique institutional settings. These differences require us to resist the nefarious forces that I suggest are at play to undermine the unique role of the American judiciary. The effective role played by the judiciary, in maintaining the principles underlying the separation of powers, cannot be diminished without doing serious damage to the American experiment in self-government. We must refocus on this institutional role, on the institutional legitimacy of the judiciary as an independent branch.

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9. See Tony Mauro, *Supreme Advocacy: A Matter of Trusts*, 25 THE AM. LAW., Feb. 2003, at 55 (commenting on *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003)).

10. *Id.* (“[T]he ideological energy that has fueled the [IOLTA] issue for more than a decade was nowhere to be felt or heard.”).

11. See *Spargo*, 244 F. Supp. 2d at 79 (“No opinion is offered as to whether the alleged activity of Spargo, if true, would bring disrespect to the judiciary.”).

In the debate over whether we prefer partisan elected judges, nonpartisan judges, or appointed judges, we have forgotten about the institutional legitimacy of the judicial branch. This is what so troubles me about the Cheek paper and its conclusions regarding cues in judicial elections. It proceeds from an understanding that partisan judicial elections can promote accountability without fully appreciating what that sort of accountability can do to the institutional legitimacy of the judiciary. Any selection method, regardless of its characteristics, will be political because a judgeship is an important actor in our system of governance, and that necessarily involves politics. Likewise, the debate over judicial qualifications seems to me a bit of a red herring. The literature is clear—there is no more merit in merit-selected judges than in elected judges.<sup>12</sup> There are good judges and there are bad judges under both methodologies, and the vast majority of judges are up to the tasks we ask them to perform. Proceeding from this thesis, institutional legitimacy becomes a more important concern than any qualification matrix.

Similarly, the suggestion to use recusal practices more widely to ameliorate the effects of fund raising and other practices that might have an impact on impartiality—perceived or otherwise—seems to me a bit excessive. Certainly, recusal has an important role in the judicial system and can be effective on a case-by-case basis. To be sure, the ABA recently amended the Model Code of Judicial Conduct to enhance recusal opportunities,<sup>13</sup> but I think this is more of a band aid addressing particular instances of potential or perceived impropriety, rather than an institutional approach to an institutional problem. Likewise, I think public financing of judicial campaigns, for all of the good that it can do in removing many negative aspects of campaign fundraising, does not address fully the difficult challenges posed by independent campaign spending. I do think applying public financing to the judicial campaign arena is a great innovation, and the enactment of a full public financing law in North Carolina provides us with a laboratory in which to learn more about the ramifications of this reform.<sup>14</sup> But as long as private interests can undertake independent

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12. See generally Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729 (2002).

13. See American Bar Association, House of Delegates 1999 Annual Meeting: Summary of Recommendations, *Report to the House of Delegates*, available at <http://www.abanet.org/leadership/99annrecs/123.html> (last visited Jul. 4, 2003).

14. See Judicial Campaign Reform Act of 2002, S.L. 2002-158, § 1 (codified at N.C. GEN. STAT. §§ 163-278.61 to 163-278.70).

campaign spending, we still will have difficulties.

Thus, these approaches do not offer institutional solutions to the problems associated with judicial elections that we are here discussing, and that I think the Cheek paper represents. I do think, then, that we need to think creatively to reestablish the institutional legitimacy of the independent judiciary through institutional parameters, including the judicial selection process. To accomplish this, let me suggest that we return to basics and reestablish that institutional legitimacy. We need to think creatively to find new approaches and doctrine to support the uniquely independent American judiciary. It seems to me that the approaches we have used over the last century, including merit selection, are just running out of steam. So, let me further suggest that judicial elections don't just stink, but that they are unconstitutional as incompatible with Article IV, Section 4 of the United States Constitution, which guarantees to every state a "Republican Form of Government."<sup>15</sup> In this regard, I second the opening remarks made by President David Frohnmayer, who addressed this matter with clarity and persuasiveness. Let me expand a bit on my views on this topic.

Republican government in the American tradition contemplates individual sovereignty exercised through representatives in government. This of course was the breakthrough of the Constitutional Convention. We the people, with whom sovereignty resides in the constitutional scheme, delegate the capacity to govern to our representatives in government. These representatives are organized in the three branches pursuant to the three functions of government. These branches may share power as delegated from the people, but they concomitantly are necessarily separated. Indeed, the separation is reflected not only by their distinct functions, but by their different means of selection and different terms of office. It was this organizational scheme that permitted the Framers to take the prevailing view of the time, that republican governments were feasible only across small geographic jurisdictions, and stand it on its head by applying the view to the large expanse of America. Through separate institutions on the national level, the Founders applied republican principles across the nation. This separation of powers, which is how we have come to characterize this first principle of constitutional organization,

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15. See U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government").

contemplates an independent judiciary to check and balance the other branches and to ensure that transient majorities, the factions of such concern to the Framers, are limited and that political minorities are protected.

Through the Guarantee Clause, these principles are applicable to the states. Indeed, Peter Shane has written about the essential character of separation of powers within the states and the use of judicial independence as one of the necessary attributes of separation of powers.<sup>16</sup> That many states have explicit constitutional provisions requiring separation of powers only strengthens the institutional integrity and legitimacy of an independent judiciary in the states. To be effective and to fulfill that organizing constitutional mandate, the independent judiciary must operate with impartiality, which is what distinguishes the judicial role from that of the legislature and the executive. Whereas a legislator and executive must announce their policy preferences to garner support, a judge, to retain legitimacy, must be clear that decisions are based on the facts of a particular case, as properly presented. In this way, the distinct nature of the judiciary is apparent. Its legitimacy, in contrast to that of the legislature or executive, which requires popular support, depends on remaining true to the judicial process and all that it envisions. From this perspective, impartiality, as required for the American tradition of judicial independence, is not possible in an electoral system where favor must be curried to attain and retain office. This, to my way of thinking, is the crux of Justice O'Connor's concurrence in the *White* case.<sup>17</sup> Elections are conducted to choose those we prefer to do our bidding in the making of public policy. That is not the role of the judiciary in the American tradition of republican government, and to the extent that judicial elections have turned in that direction, as seems apparent in light of the evidence discussed here today and in other forums around the country, they are antithetical to a republican form of government as guaranteed to the states by the United States Constitution.

Now, I'm nothing if not a realist, and I realize that there are some problems with approaching judicial elections from the prism of

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16. See, e.g., Peter M. Shane, *Judicial Independence and Accountability: Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21 (Summer 1998).

17. See *Republican Party of Minnesota v. White*, 563 U.S. 765, 788 (2002) (O'Connor, J., concurring) ("I am concerned that . . . the very practice of electing judges undermines this interest [in an impartial judiciary].").

republican government. For example, it is quite unclear whether the Guarantee Clause is justiciable in federal court. We do know that traditional jurisprudence holds that Guarantee Clause claims are not justiciable as political questions.<sup>18</sup> More recent Supreme Court decisions, however, indicate that there may be some life to the Guarantee Clause<sup>19</sup> and, in any event, state courts have been receptive to resolving claims under the Guarantee Clause.<sup>20</sup> So this may not be as much an obstacle as appears at first glance.

We also do not have the benefit of a definitional section in the Constitution, so the precise meaning of “Republican Form of Government” remains unclear. Does it include concepts of separation of powers or judicial independence as I have argued here? While providing a precise definition of a republican government may be challenging, we have been able to provide parameters for other constitutional terms and concepts. Obscenity, for example, may not be subject to precise definition but we certainly have proceeded under the assumption that we know it when we see it.<sup>21</sup> It may also be that while the parameters of republican government cannot be stated with clarity, the boundaries can be sufficiently marked so that we can say what does not fall within the confines of the Guarantee Clause. Considering the evidence presented, judicial elections may fall on the outskirts.

Additional definitional problems arise in trying to precisely specify the parameters of judicial independence. This is another term that does not appear in the Constitution but has become a fundamental aspect of our constitutional system, with roots in constitutional language, Supreme Court precedent, and principles of governance. In the absence of precise definition, it seems possible, after more than two hundred years of experience, to identify the characteristics contributing to the judiciary’s unique role in the American experiment in

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18. See, e.g., *Colegrove v. Green*, 328 U.S. 549 (1946) (plurality opinion); *Luther v. Border*, 48 U.S. (7 How.) 1 (1849).

19. See, e.g., *New York v. United States*, 505 U.S. 144 (1992).

20. See generally Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 70-78 (1988); WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION* 287-89, 300 (1972).

21. See, e.g., *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

self-government. Closely related to this question is the role of impartiality as a function of judicial independence. Notwithstanding Justice Scalia's efforts to suggest definitional context to the scope of impartiality in *White*,<sup>22</sup> and ABA efforts to revise the Model Code of Judicial Conduct to capture the nature of impartiality in this context,<sup>23</sup> impartiality remains a somewhat slippery concept. Nonetheless, the ability to distinguish the roles of the judiciary, the legislature and the executive depends on drawing distinctions in functional approaches such as that played by impartiality.

For me, then, the Cheek paper is not troubling because of what it finds but because we care about that finding in the first place. It is troubling because we are accommodating aspects of elections where they do not belong. Elections should have no place in the selection of judges in our system of democratic republicanism.

In 1944, Evan Haynes wrote what became the bible of judicial selection for a generation. He observed, almost sixty years ago,

[I]t seems safe to say that the solution [to state judicial selection] which was adopted in the United States a century ago was arrived at almost completely without regard for the particular considerations of policy and principle which arise out of the nature and functions of the judicial arm of the government.<sup>24</sup>

Haynes got it right. And at the beginning of a new century of concern about the effectiveness of state judiciaries, we have the opportunity to think in more clear terms and give due regard to the "nature and functions" of the judiciary.<sup>25</sup> If we do so now, if we approach this problem from the perspective of legitimizing the role of the judiciary, then I think that the path points toward serious consideration of whether judicial elections are compatible with the Guarantee Clause.

Thank you for your attention and for having me participate in this Symposium on a timely topic.

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22. See generally *White*, 563 U.S. at 765-88.

23. See American Bar Association, *supra* note 14. At its 2003 Annual Meeting in August, the ABA House of Delegates will be considering proposals to amend the Model Code of Judicial Conduct and provide definition and context to the concept of judicial impartiality.

24. EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 100-01 (1944).

25. *Id.* at 101.