DAILY REPORT

AT ISSUE

Those who would like the governor to make his mark on the appellate courts should set their sights one level lower. Comparison to other states would easily justify tripling the size of the Court of Appeals.

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Partisan election counters rule of law

GEORGIA needs more judges, but at a step below the Supreme Court of Georgia bench

PROPOSALS FOR JUDICIAL selection reform should be evaluated in light of the inherent tension between democracy and the rule of law. That tension was elegantly described by University of Arkansas law professor Michael Mullane for National Public Radio's "This I Believe" series. "The law," he said, "is wonderfully strong and terribly fragile." He argued that the rule of law is subject to "the Tinkerbell effect." It exists only so long as we believe in it.

Until 2002 fealty to the idea of the rule of law was mandatory for judges and judicial candidates. Legally enforceable canons of judicial ethics constrained them from promising to decide cases in accordance with political platforms or personal predispositions. But in 2002 the U.S. Supreme Court decided *Minnesota v. White* and struck down such constraints on First Amendment grounds.

Contrary to some advocates of politicized judicial elections, however, *White* does not endorse judicial candidates who disavow the rule of law. As Justice Anthony M. Kennedy's pivotal concurring opinion makes clear, *White* is no more an endorsement of such candidates than the flag-burning case is an endorsement of flag burning.

The tension between democracy and the rule of law does not manifest only in judicial elections. It also plays out in the tension between the judicial branch and the other two branches of government.

"Bouts of court-directed animus have come and gone at generational intervals since the founding of the nation," argues Indiana University Law Professor Charles Gardner Geyh In his recent book, "When Courts and Congress Collide: The Struggle for Control of America's Judicial System." According to Geyh, these bouts of animus coincide with shifts in political power. New executive and legislative officials clash with holdovers in the judicial branch. The first such bout of animus occurred when the Jeffersonian Republicans defeated John Adams and the Federalists. Another culminated in Franklin D. Roosevelt's attempt to pack the Supreme Court.

Most of the proposals mentioned in Shannon L. Goessling's op-ed ("Judicial elections should be partisan," Nov. 17) are best understood as in that light. Their primary, if not exclusive, objective appears to be consolidation and expansion of recent Republican victories. In this, the Republican Party is simply doing what political parties do: It is trying to accumulate more power. There is little reason to imagine that the Democratic Party would behave any less aggressively if the circumstances were reversed.

The remainder of this op-ed focuses on two of the proposals Ms. Goessling mentions. Partisan judicial elections are a terrible idea. They are antithetical to the rule of law. Expanding the Georgia Supreme Court, on the other hand, is not a terrible idea; it just isn't a good idea. More precisely, it is a misguided proposal that overlooks a real problem and a real opportunity for the majority party to have a constructive impact on the judicial system.

I condemn partisan judicial elections with some reluctance. I grew up participating in effectively partisan judicial elections. My father was a judge in Ohio, where judicial elections are only nominally nonpartisan. He was appointed in return for paying his dues to the Republican Party; among other things, he carried the party's banner in a hopeless challenge against a well-qualified and well-established incumbent judge. As a child I helped him campaign, passing out campaign materials at church picnics and the like. I'm predisposed to the idea that partisan elections are a good way to select judges.

But they are not. Ms. Goessling holds up Texas as an example of a state where

partisan judicial elections are held and "the judicial sky has not fallen." But in Dallas the sky did fall for all 42 incumbent judges in the last election. Those 42 soon-to-be-former judges are Republicans; they were swept out in the Democratic victory. Party affiliation is not a good reason to remove an incumbent judge who is doing a good job.

Ms. Goessling argues that party affiliation would provide voters "at least some basis" for making their decisions. It is true that voters have a difficult time learning about candidates for judicial office. But the problem is the inherent difficulty of measuring the qualities most essential to a good judge: fairness and impartiality.

It is true that all judges—no matter how dedicated to the ideals of fairness and impartiality—have predispositions that affect their decisions. So information about judicial candidates' predispositions would be useful to voters. And party affiliation can serve as a shorthand for certain predispositions.

But it is one thing for a judge to be influenced by predispositions. It is quite another for a judicial candidate to campaign on those predispositions. In the post-*White* era, it is all too easy for political platforms to supplant the rule of law.

Partisan judicial elections have presented Alabama, another state Ms. Goessling holds up as an example, with a former chief justice who created a national spectacle by defying federal law, and a current sitting justice who wrote an op-ed excoriating his colleagues for following binding U.S. Supreme Court precedent. That state's newly elected chief justice, who won what may be the second-most expensive judicial election in U.S. history, is advocating a switch to nonpartisan elections.

Expanding the Georgia Supreme Court, on the other hand, would probably do no lasting harm. But it would do little good. Because the Supreme Court makes its decisions as a whole court, it is not at all clear that two additional justices would increase the court's judging power. There would be two more justices to draft majority opinions, but there would also be two more justices to draft dissenting opinions and to be consulted in efforts to reach a consensus.

Nor does our Supreme Court need more judging power. There are no indications that it is having any difficulty managing its caseload or that its caseload is excessive in comparison to other state supreme courts.

Those who would like the governor to make his mark on the Georgia appellate courts should set their sights one level lower. Comparison to other states would easily justify tripling the size of the Court of Appeals. Florida has 62 appeals court judges. The District Court of Appeals for the single county containing Cleveland has the same number of judges as Georgia's statewide Court of Appeals.

The Court of Appeals has lost most of the ground it gained in 1999 when its membership was increased to 12. It can once again make a credible claim to the highest caseload per judge of any state appellate court in the country. The membership of the Court of Appeals should be expanded and should continue to expand along with the number of trial judges around the state.

Expansion of the Court of Appeals would address real caseload pressures. The Court of Appeals has never missed the constitutional deadline by which it must decide its cases. It has responded to caseload pressures by becoming more and more efficient.

But efficiency comes at a cost. The cost is that more and more of the responsibility for each case rests with the assigned judge—and within each judge's chambers with the assigned staff attorney. The pressure of getting their own opinions written undermines the judges' the ability to serve as checks and balances upon one another.

The Court of Appeals is not as glamorous as the Supreme Court. Its decisions can be reversed by the Supreme Court, and it does not have jurisdiction over constitutional issues. But it is the keystone of the Georgia justice system. It is the institution primarily responsible for enforcing the trial courts' duty to follow the law.

The Georgia Court of Appeals should be expanded and its size should be a tied to the size of the trial bench. If the present majority party did that, it would have an immediate, lasting, and genuinely constructive impact on Georgia's justice system. And it would strengthen the rule of law. DR