

FINDERS KEEPERS: SELECTING AND RETAINING STATE JUDICIAL CANDIDATES

by
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The recent public debate about judicial selection in the United States has focused primarily on the negative effects of electing our judges, yet most states continue to use some form of elections as part of their judicial selection or retention model. Critics of judicial elections point to the unfortunate influence that politics can have on judicial decision making, the unseemliness the political process imparts on the judicial institution, and the fact that voters are often unequipped to make informed decisions about judicial candidates at the ballot box. On the other hand, proponents of judicial elections focus on the important check elections place on the powerful judicial branch, and they emphasize the democratic benefit of electing the judges who make decisions that directly affect the public.

This Comment dives into the debate. First, the Comment examines how states choose their judges, to reveal that, in practice, the distinction between elections and appointments is not as stark as it appears on first glance. Important to this discussion is the role elections play in the various retention models. Next the Comment asks the complex question: what qualities to we want from a judge? The Comment then describes how voters select judicial candidates, pointing out how voters' selection of judicial candidates differs from their selection of political candidates. Next, the Comment explores the role that money plays in judicial elections, with a review of post-Buckley campaign-finance decisions. The Comment then lays out the policy considerations attached to the various selection and retention models and reviews existing scholarship advocating for each model. It concludes by suggesting a new approach to judicial selection and retention.

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INTRODUCTION

Critics of a system of popular election of judges have pointed to the influence politics has over judicial decision making, the unseemliness politics brings to the venerable institution of the courts, and the ability of the public to make the best decision. Those who support the system urge that the public needs a democratic system for electing the people who decide their and their communities' legal fates and point to a lack of empirical evidence of improved judicial performance via an appointment system. This Comment will look closer at the distinction between elections versus appointments (to discover that often the distinction is not as stark, with states adopting some combination of merits selection and election, or even that elections actually function as appointments), add post-*Buckley* campaign-finance laws to the discussion of the role money plays in electing judges, and consider whether broad judicial deference justifies some form of election if judges are essentially serving a quasi-legislative role.

I. BACKGROUND

The origin of the judicial selection models of the states can be traced to the founding of the United States and the influence of seeking independence from England. The founders were skeptical of a model where the King appeared to have judges in his pocket.¹ Hence, Article III of the

¹ See THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776) (“[The King] has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.”); see also THE FEDERALIST NO. 78, at 526–27 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (espousing view on importance of an independent judiciary).

United States Constitution established lifetime appointments for federal judges to insulate them from the pressure to make certain decisions in order to keep their positions.² The first states also modeled their systems on lifetime appointments without using elections as an initial selection method.³ The political accountability of judges emerged as a value in the early 1800s, with three states initially allowing elections of local judges.⁴ Mississippi was the first state to mandate election of all state-court judges when it amended its constitution in 1832,⁵ while 19 states constitutionalized judicial elections in the antebellum period.⁶ This movement toward state-constitutionalized judicial elections arose alongside the growth of popular democracy; a continuing distrust not only of the King, but of government generally;⁷ and a desire by some for judges to have political accountability.⁸

A. *Options for Initial Selection of Judges*

Generally, states select their judges by election, merit selection, appointment, or some combination of these approaches. Though each state approaches judicial selection and retention from its own angle, 39 states use some form of election in selecting, approving, or retaining judges.⁹ Twenty-two states use elections for their initial selection of state judges.¹⁰ Of these states, eight use partisan elections and fourteen use non-partisan elections.¹¹ Four states appoint judges either through the state's legislature or the state's governor.¹² Fourteen states and the District of

² See U.S. CONST. art. III, § 1.

³ Matthew J. Streb, *The Study of Judicial Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 1, 8–9 (Matthew J. Streb ed., 2007).

⁴ *Id.* at 9.

⁵ *Id.*; Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 45 HISTORIAN 337, 337 (1983).

⁶ Hall, *supra* note 5, at 337.

⁷ Many of the states incorporating judicial elections into their constitutions were seeking statehood and had previously been subject to federal government control, including federal judges. *Id.* at 339–41. The states were not involved in the appointment of these judges and had no apparent way to control or check their actions.

⁸ See Streb, *supra* note 3, at 9. See generally Hall, *supra* note 5. There were still critics of popular elections during this time. Streb, *supra* note 3, at 8 (noting Hamilton's opposition to judicial elections); Hall, *supra* note 5, at 341 (describing the concern of the Democratic party that judicial elections would result in judicial decisions based on what was popular rather than what the law was).

⁹ AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2013), http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

Columbia select judges through a merit-selection process.¹³ Nine states use some combination of merit selection and other appointment methods for their initial selection of judges.¹⁴

1. Election in Name, Appointment in Practice

Oregon's initial judicial-selection method is, officially, through election.¹⁵ However, approximately 85% of the judges in Oregon were appointed rather than elected to their position.¹⁶ The reason for this apparent inconsistency is because when there is a vacancy before the end of a judge's term, the governor appoints a judge.¹⁷ Further, when Oregon does hold elections, these elections are frequently for uncontested seats.¹⁸ When combined, Oregon's approach demonstrates how elections conflate voter choice because, while Oregon uses elections in name and occasionally in practice, most judges are not selected at the ballot box, and those that are "elected" often run unopposed.

Originally Oregon's constitution called for partisan elections.¹⁹ Presently, there are only eight states using a partisan approach to elections, and Oregon is not among them.²⁰ The drafters of Oregon's constitution did not question whether to have partisan elections, but insulating the judge from political pressure once on the bench was widely debated.²¹ Oregon switched to nonpartisan elections in 1931²² and has maintained this system despite periodic efforts to modify the selection method.²³ Partisan elections increase the chance that an election will be contested.²⁴ Contested elections allow voters more choice over uncontested elections, but, as will be discussed, the electorate may be uninformed about judicial candidates²⁵ or may have knowledge based on politicized attack ads with misleading information.²⁶

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See OR. CONST. art. VII (amended), § 1.

¹⁶ *Judicial Selection in the States: Oregon*, NAT'L CTR. FOR ST. CTS. (2015), http://www.judicialselection.us/judicial_selection/index.cfm?state=OR.

¹⁷ *Id.*

¹⁸ Pete Shepherd, *One Hundred Fifty Years of Electing Judges in Oregon: Will There Be Fifty More?*, 87 OR. L. REV. 907, 926–27 (2008).

¹⁹ David B. Frohnmayer, *Who's to Judge?: Oregon-Style Judicial Independence Could Be Headed for Rough Sailing*, OR. ST. B. BULL., Nov. 1997, at 9, 10.

²⁰ AM. JUDICATURE SOC'Y, *supra* note 9.

²¹ Frohnmayer, *supra* note 19, at 10.

²² 1931 Or. Laws 607.

²³ See Frohnmayer, *supra* note 19, at 11–14.

²⁴ See CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 104 (2009).

²⁵ See *infra* Part I.D.

²⁶ See *infra* text accompanying notes 102–105.

2. *Appointments and Merit Selection*

States that do not use elections for the initial selection of their judges either appoint judges (through the governor or legislature) or a commission selects judges based on their qualifications. In practice, states often combine these approaches through official or unofficial mechanisms.

Alaska initially selects its judges through a merit-based system with gubernatorial appointment. The governor appoints a judge based on the recommendations of the state's judicial council.²⁷ The council consists of seven members: three state-bar-appointed attorney members, three governor-appointed non-attorney members, and the state's chief justice.²⁸ The council evaluates applicants based on their competence, experience, judgment, integrity, fairness, and temperament.²⁹ These merit-selection factors have not been constitutionalized—only basic and minimal judicial requirements are in Alaska's constitution.³⁰

California uses gubernatorial appointments to initially select its judges at the appellate level and elections at the trial court level, but there is both an unofficial merit-selection component to the governor's selection and a commission which decides whether to confirm the governor's selection. The governor of California appoints judges to the state's courts of appeal and supreme court.³¹ The commission on judicial appointments confirms the governor's selection.³² To qualify as an appellate-level judge, the judicial appointee must have ten years of either state-bar membership or service as a judge.³³ Recently, Governor Jerry Brown's office has an application form for attorneys interested in a judicial appointment.³⁴ Every application is considered and evaluated based on the

²⁷ ALASKA CONST. art. IV, § 5; see also *Frequently Asked Questions About Selection*, ALASKA JUD. COUNCIL, <http://www.ajc.state.ak.us/selection/selectmain.html>.

²⁸ ALASKA CONST. art. IV, § 8; see also *Frequently Asked Questions About Selection*, *supra* note 27.

²⁹ *Frequently Asked Questions About Selection*, *supra* note 27.

³⁰ See ALASKA CONST. art. IV, § 4 ("Supreme court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing any additional qualifications prescribed by law. Judges of other courts shall be selected in a manner, for terms, and with qualifications prescribed by law."). Alaska's statutes impose a few additional requirements. ALASKA STAT. § 22.05.070 (2014) (qualification requirements for supreme court justices); *id.* § 22.07.040 (appellate court judges); *id.* § 22.10.090 (superior court judges); *id.* § 22.15.160 (district judges and magistrates).

³¹ JUDICIAL COUNCIL OF CAL., FACT SHEET: CALIFORNIA JUDICIAL BRANCH 1–2 (Jan. 2015), http://www.courts.ca.gov/documents/Calif_Judicial_Branch.pdf. The trial court judges are elected in nonpartisan judicial elections. *Id.* at 3.

³² *Id.* at 1–2.

³³ CAL. CONST. art. VI, § 15; JUDICIAL COUNCIL OF CAL., *supra* note 31, at 1–2.

³⁴ See Application for Appellate Court Appointment, State of Cal., Office of Governor Edmund G. Brown Jr. (Mar. 2015), <http://www.gov.ca.gov/docs/AppellateCtAttyApp.pdf>.

needs of the court.³⁵ The 12-page application seeks information relating to work history, extracurricular activities while in college and law school, the number of depositions either taken or defended, citations for any letters to the editor or other op-ed pieces, current and past political party affiliation, “any aspects of [the applicant’s] personal, educational, business or professional conduct or background which may reflect adversely on [the applicant] or the Governor,” and a self-description of the applicant’s personality, among other questions.³⁶ While ostensibly all appointments involve some consideration of the qualifications of the candidate (beyond those constitutionally or statutorily required), California’s current approach with Governor Brown’s application resembles the selection process used by merit-selection committees.

Governor Brown’s first three appointments since his return to the governor seat in 2011 were less-than-conventional choices. Governor Brown “was looking for people who you could say were ‘learned in the law.’”³⁷ He consulted with United States Supreme Court Justices before making his selection.³⁸ All three appointees went to Yale Law School, and all were under 45 years old when appointed.³⁹ Two were law professors. The other, Leondra Kruger, lived in Washington, D.C. and never practiced law in California,⁴⁰ though Justice Kruger was admitted to the California State Bar in 2002 and thus met the constitutional requirement of ten years of state bar membership.⁴¹ It was not reported whether these justices submitted Governor Brown’s application. The commission on judicial appointment approved all three of these candidates.⁴²

Florida’s initial judicial selection model uses both an appointment and merit-selection process for its appellate-level judges. A judicial nominating commission uses a merit-based selection process to select nominees.⁴³ Florida’s constitution requires that judges for appellate courts have been a member of the Florida bar for at least ten years, live in the

³⁵ Governor Brown’s website for judicial appointments states: “Each application is given thorough and careful consideration. We ask for your patience while we consider the unique skills, experiences, and qualifications of each applicant, and the needs of the court.” *Judicial Appointment Application*, OFF. GOVERNOR EDMUND G. BROWN JR., http://gov.ca.gov/s_judicialappointments.php.

³⁶ *Application for Appellate Court Appointment*, *supra* note 34, at 3–5, 7, 10.

³⁷ Adam Nagourney, *Jerry Brown, Governor of California, Takes Second Chance to Shape Court*, N.Y. TIMES (Dec. 25, 2014), <http://www.nytimes.com/2014/12/26/us/politics/jerry-brown-governor-of-california-takes-second-chance-to-shape-court.html> (quoting Governor Brown).

³⁸ *Id.* He refused to name names.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Attorney Search*, ST. B. CAL., <http://members.calbar.ca.gov/fal/MemberSearch/QuickSearch?FreeText=Leondra+R+Kruger>.

⁴² Nagourney, *supra* note 37.

⁴³ See FLA. CONST. art. V, § 11(d).

court's jurisdiction, and be younger than 70-years old.⁴⁴ Like California's governor, Governor Rick Scott's office provides an application form for candidates.⁴⁵ Governor Scott requests information about the applicant's hobbies and interests, the organizations with which the applicant has been involved post law school, and the applicant's financial information from the past three years, including the applicant's current net worth.⁴⁶ When there is a vacancy, the judicial nomination commission is convened and solicits applications.⁴⁷ Each judicial nominating commission consists of nine members: three Florida lawyers appointed by the state bar, three residents appointed by the governor, and three non-attorney residents appointed by the other six members of the commission.⁴⁸ The commission selects three to six candidates for the judicial vacancy.⁴⁹ The governor then appoints the judge or justice from this nomination pool.⁵⁰ The governor's office provides the application for the candidates—allowing the governor to control the type of candidate information he wants the commission to consider—and the governor can request that

⁴⁴ *Id.* § 8.

⁴⁵ Application for Nomination, [http://www.flgov.com/wp-content/uploads/pdfs/REVISED_JNC_App_6-14_\(3\).doc](http://www.flgov.com/wp-content/uploads/pdfs/REVISED_JNC_App_6-14_(3).doc); *Judicial and Judicial Nominating Commission Information*, RICK SCOTT: 45TH GOVERNOR OF FLA., <http://www.flgov.com/judicial-and-judicial-nominating-commission-information>.

⁴⁶ Application for Nomination, *supra* note 45, at 11, 14–21.

⁴⁷ *Judicial and Judicial Nominating Commission Information*, *supra* note 45. For an example of the process of a recent vacancy on the appellate court, see Letter from Judge Jacqueline R. Griffin, Fla. Dist. Court of Appeal, to Governor Rick Scott (Jan. 9, 2014), http://www.flgov.com/wp-content/uploads/pdfs/5th_dca_governor_notified_of_vacancy.pdf (announcing retirement from the bench); Letter from Peter Antonacci, General Counsel, Fla. Office of the Governor, to Michael Marder, Chair, Fifth Dist. Court of Appeal Judicial Nominating Comm'n (Jan. 21, 2014), http://www.flgov.com/wp-content/uploads/pdfs/5th_dca_jnc_request_to_convene.pdf (requesting the commission convene to provide nominations to the governor); Announcement, Fifth Dist. Court of Appeal Judicial Nominating Comm'n, Notice of Accepting Applications, <http://www.flgov.com/wp-content/uploads/pdfs/5th-dca-announcement.pdf> (soliciting applications for the vacancy); Announcement, Fifth Dist. Court of Appeal Judicial Nominating Comm'n, Notice of Receipt of Applications, http://www.flgov.com/wp-content/uploads/pdfs/5th_dca_announcement.pdf (listing applicants selected for interviews and providing notice of interviews); and Letter from Michael E. Marder, Chairman, Fifth Dist. Court of Appeal Judicial Nominating Comm'n, to Governor Rick Scott (Mar. 18, 2014), http://www.flgov.com/wp-content/uploads/pdfs/5th_dca_griffin_certified_list_of_nominees.pdf (providing Governor Scott the list of the commission's nominees).

⁴⁸ FLA. CONST. art. V, § 20(5). No judges are allowed on the commission. *Id.* § 20(6).

⁴⁹ See, e.g., Letter from Peter Antonacci, *supra* note 47. This requirement will be constitutionalized if voters approve the state legislature's amendments. See S.J. Res. 1188, 2014 Sess. (Fla. 2014) (enrolled), *amending* FLA. CONST. art. V, § 11(a).

⁵⁰ See FLA. CONST. art. V, § 11(a).

the commission provide the maximum number of candidates,⁵¹ which provides the governor with wide leeway to select judges who conform to his judicial ideals.⁵²

B. Retention Methods

After initial selection, states choose whether to keep existing judges primarily through merit evaluations and elections.⁵³ Life tenure is no longer a popular judicial retention method.⁵⁴ However, Rhode Island adopts life tenure for its judges, and removal of judges is similar to an impeachment process where gross misconduct is necessary for removal.⁵⁵ States that use a merit-based approach for initial selection and an election to decide whether to retain judges are using the “Missouri Plan,” which is a combination many states use.⁵⁶ This approach asks voters only whether they want to keep the judge; it is a “yes” or “no” vote as opposed to an election with the judge running *against* another candidate.⁵⁷ In California, judges are subject to a yes–no vote at the election following their appointment and at the end of their 12-year terms.⁵⁸ Judges may also be subject to reelection via contested elections, but as illustrated in the Oregon example, these elections are often uncontested.⁵⁹

After the initial selections of judges, Alaska uses a retention election to determine whether judges stay on the bench.⁶⁰ These retention elections must first take place at least three years after a judicial appointment, and then every six years for superior court judges and ten years for supreme court justices.⁶¹ The judicial council reviews the retention candidates and makes recommendations based on their performance.⁶²

⁵¹ See Letter from Peter Antonacci, *supra* note 47 (requesting the commission provide the maximum number of candidates).

⁵² Although this does not allow the governor to choose a specific individual, it does allow the governor to choose someone who most closely matches the governor’s judicial ideals.

⁵³ AM. JUDICATURE SOC’Y, *supra* note 9.

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *id.*; James Sample, *Retention Elections 2.010*, 46 U.S.F. L. REV. 383, 397–99 (2011).

⁵⁷ Sample, *supra* note 56, at 398.

⁵⁸ JUDICIAL COUNCIL OF CAL., *supra* note 31, at 1.

⁵⁹ See *supra* Part I.A.1.

⁶⁰ ALASKA CONST. art. IV, § 6; see also *Frequently Asked Questions About Selection*, *supra* note 27.

⁶¹ ALASKA CONST. art. IV, § 6; see also *Frequently Asked Questions About Selection*, *supra* note 27.

⁶² See, e.g., Revised Press Release, Alaska Judicial Council (June 23, 2014), <http://www.ajc.state.ak.us/retention/retent2014/pr2recommend.pdf> (providing recommendations to voters).

In a recent election, Alaska's Judicial Council recommended a "no" vote on 1 of the 14 judges up for retention election.⁶³ The conduct at issue behind the "no" recommendation was Judge Estelle's signing of pay affidavits incorrectly representing that he did not have any matters outstanding by six months or more.⁶⁴ Though separate from the council's decision on whether or not to recommend the judge, the Alaska Supreme Court found that a relatively minor sanction (a 45-day suspension without pay) was appropriate.⁶⁵ Despite the "no" recommendation, 54.29% of the voters elected to retain Judge Estelle.⁶⁶

In Iowa's 2010 judicial-retention election, the voters decided not to retain the Iowa Supreme Court justices who were facing retention elections.⁶⁷ The voters' decision was in response to a recent Iowa Supreme Court case invalidating the state's restriction on same-sex marriages.⁶⁸ After the case, a vigorous campaign funded largely by out-of-state interests ensued, urging Iowans to vote "no" for the three judges in the retention election.⁶⁹ The out-of-state interests also used the same-sex marriage decision as a vehicle to argue against a merit-selection system, which is Iowa's current method of initial judicial selection.⁷⁰ The justices did not actively campaign in support of their retention, believing that the judiciary should be kept out of the political fracas.⁷¹ The justices lost.⁷²

C. *What Qualities Do We Want from Judges?*

Consideration of what makes a judge "good" or "better" is necessary to evaluate what is the "best" way to select judges. Judges violating judicial ethics is one possible metric,⁷³ but the rate of judicial reprimand is so low that it does not play a part in most judges', lawyers', or parties' legal experiences. Others have studied the relative efficiency of judges through the number of opinions a judge writes, but the statistics predictably flip

⁶³ *Id.*

⁶⁴ See Summary of Performance Evaluation: Judge William L. Estelle, Alaska Judicial Council (2014), <http://www.ajc.state.ak.us/retention/retent2014/estelle.pdf>.

⁶⁵ See *In re Estelle*, 336 P.3d 692, 693 (Alaska 2014).

⁶⁶ 2014 General Election November 4, 2014: Official Results, ALASKA DIV. ELECTIONS (Nov. 25, 2014), <http://www.elections.alaska.gov/results/14GENR/data/results.pdf>; see also *Alaska Judges*, ALASKA CT. SYS., <http://www.courts.alaska.gov/ak-judges.htm#palmer>.

⁶⁷ Sample, *supra* note 56, at 411–14.

⁶⁸ See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

⁶⁹ Sample, *supra* note 56, at 411–13.

⁷⁰ *Id.* at 409–17.

⁷¹ *Id.* at 414.

⁷² *Id.*

⁷³ See MALIA REDDICK, AM. JUDICATURE SOC'Y, JUDGING THE QUALITY OF JUDICIAL SELECTION METHODS: MERIT SELECTION, ELECTIONS, AND JUDICIAL DISCIPLINE 2, http://www.judicialselection.us/uploads/documents/Judging_the_Quality_of_Judicial_Sel_8EF0DC3806ED8.pdf.

when looking at number of opinions versus quality of opinions.⁷⁴ Another metric is the rate at which a particular judge is reversed.⁷⁵ This metric also seems shallow—there must be more to good judges than their scorecards—and it does not apply to the states' highest courts.

Justice Sandra Day O'Connor provided a list of qualities the public should seek from its judges. These qualities (which she identifies as "core values") are: "fairness and impartiality";⁷⁶ "competence";⁷⁷ "judicial philosophy";⁷⁸ "productivity and efficiency";⁷⁹ "clarity"; "demeanor and temperament"; "community"; and "separation of politics from adjudication."⁸⁰ These qualities are more in line with what states using merit-selection plans consider in judicial candidates.⁸¹ Even on the surface, these qualities appear more difficult to measure than case load, reversals, or instances of judicial ethics violations. But these factors, as recognized by O'Connor, and similar factors used by states with merit-selection plans, provide a general framework for the judicial mold⁸² that states should be attempting to fill through initial judicial-selection methods.

D. *How Do Voters Vote for Judges?*

The voter generally receives less information on judicial elections than on other, high-profile elections.⁸³ Once voters decide to vote in a high-profile election, however, some who would otherwise abstain from voting for judicial candidates will do so when presented with the option on the ballot.⁸⁴ As a result, many voters make their decisions on judges

⁷⁴ *See id.*

⁷⁵ *See, e.g.,* Charles J. Cooper, Tribute, *Tribute to Judge Mark R. Kravitz*, 18 LEWIS & CLARK L. REV. 697, 700 (2014) (relying on Judge Kravitz's low reversal rate as evidence of his prowess as a judge).

⁷⁶ SANDRA DAY O'CONNOR & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., THE O'CONNOR JUDICIAL SELECTION PLAN 2 (June 2014) [hereinafter O'CONNOR PLAN], <http://iaals.du.edu/images/wygwam/documents/publications/OConnorPlan.pdf>. This factor includes open-mindedness, even-handedness, and avoiding bias and the appearance of bias. *Id.*

⁷⁷ This factor includes legal knowledge and analytical ability. *Id.*

⁷⁸ O'Connor considers ability to follow precedent while not being closed off to change, intellectual curiosity, and decisional independence as factors to demonstrate a good judicial philosophy. *Id.*

⁷⁹ This factor includes docket management and a strong work ethic. *Id.*

⁸⁰ *Id.* at 3.

⁸¹ *See supra* Part I.A.2.

⁸² This mold maintains its independence and ability to change. *See* O'CONNOR PLAN, *supra* note 76, at 2–3.

⁸³ Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 19 (2003); *see also* State Bar of Ariz., *Finish the Ballot*, YOUTUBE (Sept. 11, 2014), <https://www.youtube.com/watch?v=A6r1eQNzT58> (encouraging voters to vote the "whole" ballot and providing information on where to access judicial performance reviews).

⁸⁴ Baum, *supra* note 83, at 19–20.

based on little information, as demonstrated by voters' inability to recall the names of the candidates, or who demonstrated little to no knowledge about the candidate.⁸⁵ This pool of voters will make their decision based on what is stated on the ballot: party affiliation if included; the incumbent if included; or sometimes just the candidates' names.⁸⁶

More voters vote on judicial candidates rather than abstaining from that part of the ballot when judicial party affiliation is included on the ballot.⁸⁷ Some states allow voting based on a "party ticket" so that the voter only needs to indicate that they wish to vote for all candidates associated with the voter's desired political party.⁸⁸ Even if the voter does not or is not able to vote a party ticket, the majority of voters will have good or bad opinions of the candidate based on the political association.⁸⁹ If party affiliation is not included on the ballot, it may still impact voter choice to the extent that the affiliation is known or presumed.⁹⁰

Voters are more likely to reelect an incumbent candidate than a candidate who is not a judge likely because there is a voter bias in favor of the incumbent and incumbents have broader support. While judges have lower name recognition than other, higher-profile candidates, incumbents are more likely to have name recognition than their opponents.⁹¹ Incumbents are also likely to have more financial resources and a greater ability to raise campaign funds, leading to more spending which further raises the incumbent candidate's name recognition.⁹² The local bar associations are also more likely to support an incumbent candidate.⁹³ In yes–

⁸⁵ *Id.* at 20 (relying on surveys from Ohio Supreme Court contests).

⁸⁶ *Id.* at 21–26. Candidate names also provide clues as to the candidates' ethnicities and genders, which influence voter behavior. *Id.* at 22–23. For a couple of anecdotal accounts on the effect of the candidate's gender, see ToledoXJ, Post to *How Do You Vote for Local Judges?*, AR15.COM (Nov. 5, 2014), <http://www.ar15.com/archive/topic.html?b=1&f=5&t=1683510> ("Maybe this is stupid but we had a few family court judges. I always voted for the guy VS the woman. The inequity of divorce rulings made me do it."), and Assaultdog03516, Post to *How Do You Vote for Local Judges?*, *supra* ("I look around for articles on things they did wrong, prior service and if she's hot I assume she is a [b****] and vote for the other person.").

⁸⁷ Baum, *supra* note 83, at 24–26.

⁸⁸ *Id.* at 21 n.35.

⁸⁹ *Id.* at 24.

⁹⁰ *Id.* at 25. For an anecdotal account, see Justa_TXguy, Post to *How Do You Vote for Local Judges?*, *supra* note 86 ("Straight R[epublican] unless I have a reason not to."); ASUsax, Post to *How Do You Vote for Local Judges?*, *supra* note 86 ("I check the various online voters guides. I figure if someone shows up on a right-wing and a left-wing 'throw them out' guide, it's worth throwing them out."); and Peachy_Carnahan, Post to *How Do You Vote for Local Judges?*, *supra* note 86 ("For state judges I sit in front of the computer with the ballot and look each one up. If a Dem[ocrat] appointed them, they're out if a Rep[ublican] appointed them they're in.").

⁹¹ Baum, *supra* note 83, at 26.

⁹² *See id.* at 26.

⁹³ *Id.* at 27 & n.62.

no retention elections, incumbent judges get the benefit of a voter bias in favor of voting “yes.”⁹⁴

Candidate names allow voters to assume (whether purposefully or not) a candidate’s gender and ethnicity and make voting decisions on that basis. Judicial elections result in fewer minority and women judges than do merit-selection methods.⁹⁵ Voters may assume that women judicial candidates are liberal, which, depending on the voter’s ideology, may cause a voter to vote for or against the candidate.⁹⁶ Voters may also be more likely to vote for candidates with ancestry similar to their own.⁹⁷ Research in other areas of elections demonstrates that voters have a bias in favor of first-named candidates on the ballot.⁹⁸

In addition to the uninformed-but-voting voters, there are also voters who are informed as to the judicial candidates. There are also resources for learning about a candidate’s fit for office.⁹⁹ Generic voter guides may also provide information on a candidate beyond what appears on the ballot.¹⁰⁰ Another approach familiar to many members of the bar is having voters ask practicing lawyers for advice on judicial candidates.¹⁰¹

⁹⁴ *Id.* at 27; B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1429–31 (2001). But see, anecdotally, the original question posted to the AR15.com message board asking whether readers vote out all judges as a matter of course. SemperFo, *How Do You Vote for Local Judges?*, *supra* note 86.

⁹⁵ See, e.g., KEVIN M. ESTERLING & SETH S. ANDERSEN, DIVERSITY AND THE JUDICIAL MERIT SELECTION PROCESS: A STATISTICAL REPORT 8 (1999), http://www.judicialselection.us/uploads/documents/Diversity_and_the_Judicial_Merit_Se_9C4863118945B.pdf; Malia Reddick et al., *Racial and Gender Diversity on State Courts: An AJS Study*, JUDGES’ J., Summer 2009, at 28–29.

⁹⁶ See Baum, *supra* note 83, at 22–23 & n.41.

⁹⁷ See *id.* at 23 & n.44.

⁹⁸ Joanne M. Miller & Jon A. Krosnick, *The Impact of Candidate Name Order on Election Outcomes*, 62 PUB. OPINION Q. 291, 295–97 (1998); see also Laura Miller, Note, *Election by Lottery: Ballot Order, Equal Protection, and the Irrational Voter*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 373, 389 & n.85 (2010).

⁹⁹ E.g., Revised Press Release, *supra* note 62 (providing recommendation to voters); State Bar of Ariz., *supra* note 83.

¹⁰⁰ E.g., CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 4, 2014: OFFICIAL VOTER INFORMATION GUIDE, <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf>.

¹⁰¹ E.g., Beach Blogger, *Judging Wannabe Judges*, PENSACOLA BEACH BLOG (Aug. 26, 2006), <http://pbirla.blogspot.com/2006/08/judging-wannabe-judges.html> (“Check with local lawyer or judge friends to see what they think of your preliminary impressions.”); Brian Frank, *How to Judge a Judge*, KCET: BALLOT BRIEF (Apr. 18, 2012), <http://www.kcet.org/news/ballotbrief/candidates/how-to-judge-a-judge.html> (suggesting that readers ask lawyers they know for advice, among several other suggestions for evaluating judges); Scott Key, *Why Appellate Judges Should Be Appointed and Not Elected*, GA. CRIM. APP. L. BLOG (Sept. 10, 2010), <http://www.georgiacriminalappellatelawblog.com/news/why-appellate-judges-shouldnt-be-appointed-and-not-elected/> (relaying, anecdotally, that the lawyer-blogger’s family and friends will “[o]ften . . . ask me whom I would recommend for appellate seats and choices for other contested judicial elections”). In an unofficial, and not representative, survey

Politically charged ads also provide information to voters, though the information may be incomplete or misleading.¹⁰² Spending on judicial elections has increased in recent years.¹⁰³ Even if not based on party affiliation, attack ads target decisions made by judges. Some of these decisions are inflammatory to voters (e.g., Judge X voted to reverse the conviction of five rapists) even though the decisions may be based on sound legal judgment and clear precedent (e.g., Judge X was applying new United States Supreme Court precedent to a procedural issue).¹⁰⁴ Special interest groups have also infiltrated judicial campaigns, and these groups' contributions are significant.¹⁰⁵ Public perception of judges being "for sale" undermines the strength of the judicial system.¹⁰⁶

II. CONSIDERATION OF JUDICIAL CAMPAIGN FINANCE

The United States Supreme Court recently decided *Williams-Yulee v. Florida Bar*, a case which addressed free-speech rights of judicial candidates to solicit funds.¹⁰⁷ In *Williams-Yulee*, the petitioner was an attorney

from AR15.com (a firearm website), several members posted replies stating they asked attorneys they knew for recommendations on judicial candidates. *E.g.*, twistedLV, Post to *How Do You Vote for Local Judges?*, *supra* note 86 ("We have some lawyer friends who steer us clear of the [s***bags]. If I don't know about a candidate, I leave it blank."); wturn, Post to *How Do You Vote for Local Judges?*, *supra* note 86 ("Talk to a public defender and see which ones they like. Talk to an assistant district attorney and see which ones they like. Vote for the ones the public defender likes."); klutz347, Post to *How Do You Vote for Local Judges?*, *supra* note 86 ("I just ask my wife. She's an attorney and I ask her who she would rather be in front of during a case.").

¹⁰² See Baum, *supra* note 83, at 16–17; see also, e.g., FairCourtsPage, *Justice for All NC Ad Airs Ahead of Primary*, YOUTUBE (Apr. 28, 2014), <https://www.youtube.com/watch?v=s1gJLCrWJZk>.

¹⁰³ See, e.g., Chris W. Bonneau, *The Dynamics of Campaign Spending in State Supreme Court Elections*, in *RUNNING FOR JUDGE*, *supra* note 3, at 59, 63–68; Sample, *supra* note 56, at 408–09; *Judicial Campaigns and Elections*, NAT'L CTR. FOR ST. CTS. (2015), http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state.

¹⁰⁴ See Bonneau, *supra* note 103, at 59–61.

¹⁰⁵ Deborah Goldberg, *Interest Group Participation in Judicial Elections*, in *RUNNING FOR JUDGE*, *supra* note 3, at 73, 73–96.

¹⁰⁶ See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (stating that the public perception of judicial integrity is "a state interest of the highest order" (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring))); *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). It follows that public perception of judicial integrity is "a state interest of the highest order." *Id.*; see also Memorandum from GBA Strategies to Nat'l Center for State Courts (Dec. 4, 2014), <http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/2014-State-of-State-Courts-Survey-12042014.ashx> (providing an analysis of a national survey of registered voters on attitudes toward the government).

¹⁰⁷ *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

running for election as a trial judge.¹⁰⁸ Williams-Yulee signed and sent out letters requesting campaign donations.¹⁰⁹ Florida's Code of Judicial Conduct prohibited personally soliciting campaign contributions.¹¹⁰ The state bar found that Williams-Yulee violated the canon; Williams-Yulee challenged the disciplinary decision on, inter alia, the basis of the First Amendment and the Florida Supreme Court affirmed.¹¹¹ The sole question presented to the United States Supreme Court was: "Whether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment."¹¹² The Supreme Court affirmed, holding that the state had a legitimate interest in prohibiting judicial candidates from engaging in direct personal solicitation of campaign funds.¹¹³

The Court had previously acknowledged that speech is protected during judicial election campaigns.¹¹⁴ In *Republican Party of Minnesota v. White*, the issue before the Court was whether a judicial ethics rule that prohibited candidates for a judicial position from "announcing" their views or taking positions in particular circumstances violated the First Amendment.¹¹⁵ The Court applied strict scrutiny to the ethics rule because the regulated speech was both content-based and core speech (concerning the qualifications of a candidate for office).¹¹⁶ Thus, the State had to show both that there was a compelling state interest and that the restriction was narrowly tailored to achieve this interest.¹¹⁷ The Court held that the rule was not sufficiently narrowly tailored to serve the gov-

¹⁰⁸ Brief for Petitioner at 4, *Williams-Yulee*, 135 S. Ct. 1656.

¹⁰⁹ *Id.* at 5.

¹¹⁰ FLA. CODE JUDICIAL CONDUCT Canon 7C(1) ("A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates *shall not personally solicit campaign funds, or solicit attorneys for publicly stated support*, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or members of the candidate's family." (emphasis added)).

¹¹¹ Fla. Bar v. Williams-Yulee, 138 So. 3d 379, 381 (Fla. 2014), *aff'd*, 135 S. Ct. 1656.

¹¹² Petition for a Writ of Certiorari at i, *Williams-Yulee*, 135 S. Ct. 1656.

¹¹³ *Williams-Yulee*, 135 S. Ct. at 1662.

¹¹⁴ See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002); *id.* at 796 (Kennedy, J., concurring) ("The State may not regulate the content of candidate speech merely because the speakers are candidates."). However, the question whether a state may regulate "the speech of judges because they are judges" was not presented in *White*. *Id.* at 796 (Kennedy, J., concurring).

¹¹⁵ 536 U.S. at 768 (majority opinion).

¹¹⁶ *Id.* at 774.

¹¹⁷ *Id.* at 774–75.

ernmental interest in protecting judicial impartiality, reasoning that if states did want to prevent the selection of judges based on the judges' beliefs, they could opt for a non-election method of judicial selection.¹¹⁸ In a subsequent decision, the Court recognized that there is a "vital" state interest in the public confidence of the fairness and integrity of the states' judges.¹¹⁹

In the context of political campaign contributions, the Court in *Buckley v. Valeo* recognized that the government has a compelling interest in preventing quid pro quo corruption or the appearance of quid pro quo corruption.¹²⁰ The Court distinguished campaign contributions from core political speech (deserving the highest level of scrutiny) but still determined that a "rigorous standard of review" applied.¹²¹ While the *Buckley* Court did not use the phrase "strict scrutiny," subsequent decisions have interpreted the standard this way.¹²² The Court held that limits on campaign contributions were narrowly tailored to achieve this interest, but that the limits on campaign expenditures were not.¹²³ In a post-*Buckley* case, the Supreme Court refused to recognize a "governmental interest in preventing 'the corrosive and distorting effects of immense aggregations of [corporate] wealth . . . that have little or no correlation to the public's support for the corporation's political ideas,'"¹²⁴ thus providing political-speech protection to entities other than natural persons.

Returning to *Williams-Yulee*, the arguments advanced by the state bar appeared to fit within the framework set forth in the foregoing cases. The bar argued that the canon at issue, prohibiting judicial candidates from the personal solicitation of campaign funds, was designed and necessary to serve the state interest in preventing quid pro quo corruption or the appearance thereof, and that the canon was narrowly tailored to achieve that end.¹²⁵ The bar made the distinction between personal solicitation, the type of solicitation banned by the canon, and indirect solicitation of campaign funds.¹²⁶ For quid pro quo corruption, the bar argued that having "money flow[] through independent actors to a candidate . . . [causes] the chain of attribution [to] grow[] longer, and any credit [for the campaign contribution] must be shared among the various actors along the way."¹²⁷ The bar was relying on *McCutcheon* for this part of its argument; however, the *McCutcheon* Court addressed contributions to entities

¹¹⁸ *Id.* at 788.

¹¹⁹ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009).

¹²⁰ 424 U.S. 1, 26–27 (1976) (per curiam).

¹²¹ *Id.* at 29, 44–45; *see also* *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014).

¹²² *See, e.g., White*, 536 U.S. at 774.

¹²³ *Buckley*, 424 U.S. at 25–27, 47–48.

¹²⁴ *Citizens United v. FEC*, 558 U.S. 310, 348 (2010) (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

¹²⁵ Brief for Respondent at 1, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

¹²⁶ *Id.* at 10–16.

¹²⁷ *Id.* at 10–11 (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014)).

such as Political Action Committees which had (nearly) complete control over whether and how to distribute the money.¹²⁸ In contrast to the situation described in *McCutcheon*, prohibiting personal solicitation of campaign contributions does not prevent the direction of money to the officeholder. As counsel for the petitioner put it:

I guess the question is what's the difference between [a letter like the one sent by petitioner] and the following letter that's signed by the members of the committee, which is totally permissible under Florida law:

Dear Joe,

*As an attorney frequently appearing before the county court, we're sure you're concerned with the quality of the judiciary. Judge Jones personally asked us to serve on his campaign committee, and we're writing to ask you to contribute to his reelection. As you know, Florida law permits Judge Jones to thank contributors.*¹²⁹

Additionally, a judicial candidate is not prevented from sending thank-you notes to those who contributed to the campaign.¹³⁰ At oral argument, Justice Scalia took issue with the bar's argument that the link between the candidate and the contribution is sufficiently separated, à la *McCutcheon*, when a candidate is allowed to send a thank-you note directly thanking the particular donor.¹³¹ Rather, the bar's argument should have focused on the other end of the transaction—that there was no one soliciting contributions such that there could be no expectation of favors in return for donations—but this argument suffers from a similar flaw because this still does not prevent the judicial candidate's campaign from soliciting contributions.

At oral argument, the petitioner acknowledged three governmental interests.¹³² The first, as discussed above, was the interest in preventing quid pro quo corruption (or the appearance thereof). Another state interest was that the prohibition on personal solicitation of campaign con-

¹²⁸ See *id.*; *McCutcheon*, 134 S. Ct. at 1452.

¹²⁹ Transcript of Oral Argument at 13–14, *Williams-Yulee*, 135 S. Ct. 1656 (emphasis added); see also *id.* at 37–38 (Justice Alito summarizing what the petitioner could have done without violating an ethics canon). But see *id.* at 39 (Justice Breyer posing whether the following is fair: “To send a thank-you note is a form of politeness that creates knowledge, but does not to the same degree put pressure on the person to contribute.”).

¹³⁰ See, e.g., JUDICIAL ETHICS ADVISORY COMM., AN AID TO UNDERSTANDING CANON 7: GUIDELINES TO ASSIST JUDICIAL CANDIDATES IN CAMPAIGN AND POLITICAL ACTIVITIES 58 (June 2015), <http://www.flcourts.org/core/fileparse.php/304/urlt/canon7update.pdf>; Brief for Petitioner, *supra* note 108, at 9; Transcript of Oral Argument, *supra* note 129, at 31.

¹³¹ Transcript of Oral Argument, *supra* note 129, at 25–26.

¹³² *Id.* at 8.

tributions promoted impartiality while preventing bias.¹³³ Finally, an additional governmental interest was the protection of solicited persons from coercion.¹³⁴

What was not argued, ostensibly in light of *White*, was that the ethics rule advanced a state interest in preserving judicial dignity.¹³⁵ The petitioner acknowledged that there is a state interest, but that the interest primarily arises in the government-employee free-speech context, and only serves a lesser interest in a judicial-campaign context.¹³⁶ In response to a question from Justice Ginsburg, the petitioner further moved away from this interest, relying on *White* in acknowledging that if the state has an interest in keeping judges above or out of the “political fray,” then it may adopt a method of judicial selection that does not rely on the political environment of running for election.¹³⁷ However, the petitioner ceded that judicial elections may be treated differently than elections for the legislative and executive branches because of the potential for coercive effects when it is a judge personally soliciting the contributions.¹³⁸

The issue divided the Supreme Court. Justice Roberts wrote for the majority of the Court and opened by acknowledging that “[j]udges are not politicians, even when they come to the bench by way of the ballot.”¹³⁹ The Court held that “Canon 7C(1) advances the State’s compelling interest in preserving public confidence in the integrity of the judiciary.”¹⁴⁰ The Court went on to explain:

Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. This principle dates back at least

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring); see also Transcript of Oral Argument, *supra* note 129, at 8–9. Justice Scalia asked whether there was a state “interest in judicial dignity”; the petitioner acknowledged that interest, but contended that the interest did not support the ethics rule. *Id.*

¹³⁶ Transcript of Oral Argument, *supra* note 129, at 8–9; see *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (providing balancing test for free-speech restrictions of government employees). In the case below, the Florida Supreme Court acknowledged both judicial integrity and public confidence in an impartial judiciary as compelling state interests justifying the canon. *Fla. Bar v. Williams-Yulee*, 138 So. 3d 379, 381 (Fla. 2014), *aff’d*, 135 S. Ct. 1656 (2015). The Florida Supreme Court decision did not mention *White*. See *id.*

¹³⁷ Transcript of Oral Argument, *supra* note 129, at 10–11.

¹³⁸ *Id.* at 10–11, 14–15.

¹³⁹ *Williams-Yulee*, 135 S. Ct. at 1662.

¹⁴⁰ *Id.* at 1666.

eight centuries to Magna Carta, which proclaimed, “To no one will we sell, to no one will we refuse or delay, right or justice.”¹⁴¹

Judicial elections do not need to be treated like elections for the legislative or executive branch “because the role of judges differs from the role of politicians.”¹⁴² Justice Ginsburg joined the majority opinion except for the part determining the level of scrutiny to apply—there was no majority opinion for the level of scrutiny to apply to a judicial candidate’s campaign speech.¹⁴³ Despite uncertainty as to the level of scrutiny, the majority opinion recognized that the identity of the speaker who is seeking campaign contributions matters, and that “States with elected judges have determined that drawing a line between personal solicitation by candidates and solicitation by committees is necessary to preserve public confidence in the integrity of the judiciary.”¹⁴⁴

Justice Scalia wrote one of the dissents. Justice Scalia noted, as was noted in *White*, that states are free to choose a method of judicial selection that does not involve elections.¹⁴⁵ He pointed out that in *White*, “hazy concerns about judicial impartiality in justification of an ethics rule” were insufficient to sustain the rule, whereas “Florida’s invocation of an ill-defined interest in ‘public confidence in judicial integrity’” was sufficient for the Court in this case.¹⁴⁶ Scalia predicts that this “sleight of hand” will unravel First Amendment protections around judicial campaign speech.¹⁴⁷

III. THE FALLOUT: POLICY CONSIDERATIONS

A. Elections

In light of judicial discretion and the ability of judges to “make law,” and thus serve in a major quasi-legislative role, some minimal political checks proportionate to a judge’s vast quasi-legislative role seem appropriate. The highest court of each state has a powerful ability to go beyond resolving the limited controversy in front of it by actually making law.¹⁴⁸

¹⁴¹ *Id.* (quoting MAGNA CARTA cl. 40 (1215), reprinted in WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 395 (James MacLehose & Sons 2d ed., 1914)).

¹⁴² *Id.* at 1667.

¹⁴³ See *id.* at 1664–65 (plurality opinion).

¹⁴⁴ *Id.* at 1671 (majority opinion) (“These considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance . . .”).

¹⁴⁵ *Id.* at 1677 (Scalia, J., dissenting).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1678.

¹⁴⁸ See JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (finding that in the nation’s highest court, justices’ private attitudes *become* the law); Paul Brace et al., Field Comment, *Placing*

With a quasi-legislative power should come a quasi-legislative responsibility.¹⁴⁹

Judicial discretion is at least cabined at the trial-court level through the outer bounds of what the judge may or may not do and appellate review of some decisions;¹⁵⁰ however, the same constraints do not necessarily apply to states' highest courts.¹⁵¹ Not all decisions of a trial court are appealable, and those based on rules saturated in language denoting discretion are less likely to be "wrong"—i.e., a clear misapplication of law to fact. As a result, appellate courts are less likely to reverse these discretion-laden decisions.¹⁵² Discretionary decisions are reviewed for abuse of discretion when the trial court properly has discretion, if they are reviewable at all.¹⁵³ A trial court makes many decisions that are not determinative of the outcome of the case that are entirely unreviewable.¹⁵⁴ Further, an appellate court, in its discretion, may not correct even those decisions which are "wrong."¹⁵⁵ The states' highest courts, on the other hand, are not checked by appellate-level review (for state-law issues) and are capable of "creating" the law.¹⁵⁶

Judicial elections create a direct link between the officials sitting in the court and the general population of voters. The voters, through the

State Supreme Courts in State Politics, 1 ST. POL. & POL'Y Q. 81 (2001); Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1237–53 (2012) (exploring whether elected state judges should approach statutory construction differently than federal judges because the elected state-court judges are politically accountable through the electorate); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (arguing that judges should interpret law dynamically, changing the interpretation as appropriate based on society's expectations at the time); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

¹⁴⁹ Cf. SPIDER-MAN (Marvel Enterprises 2002).

¹⁵⁰ Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624, 626–27 (1963); see also Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637–41 (1971).

¹⁵¹ See, e.g., SEGAL & SPAETH, *supra* note 148; Brace et al., *supra* note 148; Eskridge, *supra* note 148.

¹⁵² See, e.g., Dworkin, *supra* note 150, at 626–27; Rosenberg, *supra* note 150, at 637–41.

¹⁵³ See Rosenberg, *supra* note 150, at 637–41.

¹⁵⁴ For example, Rule 16 of the Federal Rules of Civil Procedure gives the trial judge control over setting a discovery schedule or deciding when to allow dispositive motions. FED. R. CIV. P. 16. See generally Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010).

¹⁵⁵ See, e.g., *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1991) ("In short, a trial court judge is given a 'limited right to be wrong,' so long as the result is not reached in an arbitrary or capricious manner."); see also Dworkin, *supra* note 150, at 626.

¹⁵⁶ See, e.g., SEGAL & SPAETH, *supra* note 148; Brace et al., *supra* note 148; Eskridge, *supra* note 148.

election box, have a means of voting for judges with whom they agree and not electing those with whom they disagree or whose performance was less than the voters' expectations. In this way, elections ensure judicial accountability. Even though states who have adopted "judicial elections" often have systems where more judges are actually appointed than elected¹⁵⁷ or where judges often run unopposed,¹⁵⁸ the system of elections still has the appearance of political accountability because voters have recourse against judges who make particularly problematic or unpopular decisions.¹⁵⁹

This "political check" at the trial-court level provides an additional "review" mechanism for even those decisions which are not appealable. Hence, there are states that call for the election of trial court judges while using non-election appointment methods for appellate-level courts.¹⁶⁰ This check also applies to state appellate-court judges, where voters may check a court's decision to "make law" by refusing to elect or retain those judges that created unpopular law.¹⁶¹ Unfortunately, this check may be used not only for when judges are serving as quasi-legislators in making law, but also when they are attempting to apply purely the existing law to the case in front of them.¹⁶² While "judge[s] represen[t] the Law,"¹⁶³ there is undeniably political pressure on elected judges who may be ousted for decisions that are politically unpopular.¹⁶⁴ This political pressure adds to the unseemliness of judges soliciting money and running campaign attack ads, which has the potential to cut away at the reputation of the courts.¹⁶⁵

Judicial elections are also often uncontested. So while there is a theoretical possibility that voters may express their political approval or disapproval of particular judicial candidates, the reelection statistics of judges is startling. Judges often run unopposed, with no meaningful elec-

¹⁵⁷ See *supra* Part I.A.1.

¹⁵⁸ See, e.g., BONNEAU & HALL, *supra* note 24, at 22.

¹⁵⁹ See, e.g., Sample, *supra* note 56, at 409–17.

¹⁶⁰ AM. JUDICATURE SOC'Y, *supra* note 9.

¹⁶¹ See Bruhl & Leib, *supra* note 148, at 1267.

¹⁶² See *id.* at 1268; see also FairCourtsPage, *supra* note 102.

¹⁶³ Republican Party of Minn. v. White, 536 U.S. 765, 803 (2002) (Ginsburg, J., dissenting) (alterations in original) (quoting Chisom v. Roemer, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting)).

¹⁶⁴ E.g., Sample, *supra* note 56, at 409–17; Joanna Shepherd & Michael S. Kang, Am. Constitution Soc'y, *Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices' Decisions in Criminal Cases* fig. 7 (2014), <http://skewedjustice.org> (showing that as televised campaign ads increase, pro-criminal-defendant decisions decrease); Debra Cassens Weiss, *Are Courts for Sale? Study Sees Influence of Judicial Campaign Ads in Criminal Appeals*, ABA J. (Oct. 28, 2014), http://www.abajournal.com/news/article/citizens_united_blamed_for_judicial_election_spending_records_study_sees_in; see also FairCourtsPage, *supra* note 102.

¹⁶⁵ E.g., ABA COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 1–67 (2003); see White, 536 U.S. at 788–90 (O'Connor, J., concurring).

toral competition.¹⁶⁶ Including those judges who run unopposed, the recent incumbent success rate is over 98%.¹⁶⁷ For recent yes–no retention elections, over 98% of these judges are retained, and the average “yes” vote for these judges is over 70%.¹⁶⁸ Thus, the current judicial election landscape cannot meaningfully provide the political accountability at the heart of the touted benefits of judicial elections.

B. *Appointment and Merit-Based Selection*

Selecting judges by appointment does not completely insulate the judge from political pressure, which may be a sufficient political check on judges’ quasi-legislative power. In an appointment system, judges are appointed by either the state’s governor or legislature, both of which are politically accountable to the electorate.¹⁶⁹ If a judge makes a politically unpopular decision, it will reflect negatively on the governor or legislature who appointed the judge.¹⁷⁰

As discussed above, merit selection (by design) and appointments (in practice) consider the qualifications of candidates for judicial office.¹⁷¹ Selecting candidates involves more than looking to their performance on the bench (which may not be possible if the candidate has not served as a judge), and allows commissions, legislatures, and/or governors the ability to look to the overall competency of the judge.¹⁷² However, executive judicial appointments may lead to partisan selections under a guise of “merit selection” because the selection process, at times, seeks information about a candidate’s political affiliations and op-ed contributions.¹⁷³ Merit-selection committees, though often stratified by statute in an attempt to be representative and less biased,¹⁷⁴ are more politically insulated because the positions are not filled directly by vote of the elec-

¹⁶⁶ E.g., BONNEAU & HALL, *supra* note 24, at 22; *Choose Your Judges: Incumbents in Judicial Elections*, <http://chooseyourjudges.org/facts-2/incumbents-in-judicial-elections/> (providing statistics on judicial incumbents in state supreme courts and appellate courts).

¹⁶⁷ Sample, *supra* note 56, at 399 n.77.

¹⁶⁸ BONNEAU & HALL, *supra* note 24, at 82–83. In contrast, presidential elections from the 1920s to present rarely had a popular election with a candidate receiving more than 60% of the popular vote. See Beverly Gage, *How Close Was This Election?*, SLATE (Nov. 9, 2012), http://www.slate.com/articles/news_and_politics/history/2012/11/how_close_was_this_election_very_close.html.

¹⁶⁹ See AM. JUDICATURE SOC’Y, *supra* note 9.

¹⁷⁰ Although, depending on the retention method, there may be a way to shift this negative back on the judicial candidate if the candidate is subject to retention elections.

¹⁷¹ *Supra* Part I.A.2.

¹⁷² See O’CONNOR PLAN, *supra* note 76, at 2–3; see also *supra* Part I.A.2.

¹⁷³ See *supra* Part I.A.2.

¹⁷⁴ See, e.g., ALASKA CONST. art. IV, § 5; FLA. CONST. art. V, § 11(d); see also JUDICIAL COUNCIL OF CAL., *supra* note 31, at 1–2.

torate, and the members are generally selected by different entities. This lack of political accountability allows the merit committees to evaluate candidates without fear of voter retaliation.¹⁷⁵ However, being politically insulated also means that the voters are less able to hold the committee accountable. Since the retention method for most appointment and merit-selection systems is through elections, the focus shifts from ensuring the committee does the best job it can in selecting judges who represent community ideals, to looking at the finished product (the appointed judge) in deciding only whether to accept or reject it.

Appointments and merit selection provide political insulation for judges in proportion to their quasi-legislative role without completely removing them from politics. However, regardless of the quality of the selected judge, pairing appointment or merit selection with retention elections eliminates the political protection in an unacceptable way because it allows voters to punish a judge for a correct, nondiscretionary opinion which happens to be politically unpopular and causes voters to focus only on the final product, rather than on tweaking the process that creates the judges and their decisions.

IV. POSSIBLE SOLUTIONS

The potential solutions to the selection of state-court judges are wide-ranging.¹⁷⁶ Ostensibly, each state has solved this dilemma in a way that best comports to that state's values, though their decisions are hardly static.¹⁷⁷ States may reconsider their approach to judicial selection, especially if the campaign context turns toxic or other undesirable results are reached.¹⁷⁸ Political scientists Chris Bonneau and Melinda Gann Hall opine that rather than moving away from elections, we should move toward not just elections, but *partisan* elections.¹⁷⁹ Retired United States Supreme Court Justice Sandra Day O'Connor has been an outspoken critic of judicial elections and issued her own proposal in conjunction with the

¹⁷⁵ The members may still, however, feel pressure from the governor or legislature that sent them to the commission.

¹⁷⁶ Compare, e.g., BONNEAU & HALL, *supra* note 24, at 104 (arguing the solution is to further politicize elections to create actual contested elections), with O'CONNOR PLAN, *supra* note 76 (arguing for merit-based selection with a yes-no retention election two to three years after a judge takes the bench).

¹⁷⁷ See, e.g., Sandra Day O'Connor, Opinion, *Take Justice Off the Ballot*, N.Y. TIMES (May 22, 2010), <http://www.nytimes.com/2010/05/23/opinion/23oconnor.html> (noting particular states which are reconsidering their judicial-selection methods); H.R.J. Res. 15, 78th Legis. Assemb., Reg. Sess. (Or. 2015) (pending legislation to adopt a merit-selection committee in Oregon).

¹⁷⁸ See, e.g., Frohnmayer, *supra* note 19 (describing history of debates in Oregon around judicial selection); see *supra* note 176.

¹⁷⁹ See generally BONNEAU & HALL, *supra* note 24.

Institute for the Advancement of the American Legal System.¹⁸⁰ O'Connor's plan calls for a commission to select nominees for gubernatorial appointment, followed by a review of the judge's performance by another commission after the judge has been in office for two to three years, then a retention election.¹⁸¹

Bonneau and Hall responded to the tendency of judicial elections to be uncontested and the incumbency advantage in judicial elections by suggesting that partisan judicial elections will result in a contested race and meaningful voter choice. They see judges as political actors, no matter how they are appointed.¹⁸² While they acknowledge that campaign attack ads and political spending on judicial elections are on the rise, Bonneau and Hall see no principled reason to treat judicial candidates differently than candidates for other government positions.¹⁸³ However, in light of the recent *Williams-Yulee* decision, the Supreme Court disagrees and has provided leeway for treating judicial candidates differently than other political candidates because "[j]udges are not politicians, even when they come to the bench by way of the ballot."¹⁸⁴ Further, the Bonneau and Hall approach does not insulate judges who make good, though unpopular, decisions, so it does not remedy the issue of providing some political insulation to judges.

The O'Connor plan addresses the core values necessary for an effective judicial system, but it does not sufficiently address the concerns of insulating judges from politics.¹⁸⁵ While the initial-selection approach provides necessary political insulation by enabling selection of judicial candidates based on qualifications, retention elections create the potential for politics to corrupt the process. Campaign-finance decisions and the unclear impact of judicial ethics on campaigning leave the potential for excessive campaign spending.¹⁸⁶ Even without an opposing candidate, special-interest groups who dislike a particular judge's decision will have incentives to enter the political foray. This situation will lead not only to ads which undermine the venerable judicial institution, but also to voters making decisions not based on the reasoned arguments of some "commission" (with which they may or may not be familiar), but on the unfiltered attack ads. While this may not be the case in every state, it is a possibility. In designing a system for judicial selection, possibilities like these must be addressed.

¹⁸⁰ O'CONNOR PLAN, *supra* note 76.

¹⁸¹ *Id.* at 6–8.

¹⁸² BONNEAU & HALL, *supra* note 24, at 138 (“[J]udges are political beings who make political decisions.”).

¹⁸³ *Id.* at 70–139.

¹⁸⁴ *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015).

¹⁸⁵ See O'CONNOR PLAN, *supra* note 76.

¹⁸⁶ See *Williams-Yulee*, 135 S. Ct. at 1670–72.

Avoiding politics may not be possible, and, considering that judges sometimes do actually “make the law,” complete political insulation should not be the goal, either. Thus, I propose that states give their legislature the power to decide whether to retain a judge. Similar to the O’Connor Plan, a neutral commission¹⁸⁷ should evaluate judicial performance after an initial period in office, like O’Connor’s two- to three-year period. The legislature would vote, based on this evaluation, on whether to remove a judge. Removal of the judge would take place only if a supermajority of the legislature were to vote for removal.

Combining a commission recommendation and supermajority requirement will effectively insulate the judges from removal based on an “unpopular” decision decided on the basis of existing law. Imagining this requirement in Iowa for the 2010 retention elections illustrates the possibility.¹⁸⁸ Members of the legislature would have been pressured by constituents who were unhappy about the Iowa Supreme Court’s decision that it was unconstitutional to deny marriage to same-sex couples. Ads by out-of-state special-interest groups may still have appeared, although without a specific election to target, the efficacy of the ads—and thus the cost-benefit analysis of choosing to create and run the ads—would have served to decrease the prevalence of attack ads.¹⁸⁹ Those legislators with constituents who were particularly upset would have been able to insulate themselves from political fallout by relying on the commission findings. The supermajority requirement would have helped account for those legislators who were still too influenced by fear of angry voters to focus on the qualifications of the judge in front of them.

CONCLUSION

Since its founding, the United States has sought to insulate judges from corrupting influences. Originally the concern was with the ability to control the salary of the judges or to remove a judge from office. The United States Constitution responded in Article III by prohibiting lowering judges’ salaries once in office and by conferring life tenure in good behavior. The states followed suit but soon began to experiment with their own methods of judicial selection and retention. In response to the populist movement calling for government officials to better respond to

¹⁸⁷ Such a commission would be similar to Alaska’s Judicial Council, except instead of reporting to the general electorate, this commission would report to the legislature. *See supra* Part I.A.2.

¹⁸⁸ *See supra* notes 67–72 and accompanying text.

¹⁸⁹ *Cf.* Rachel P. Caufield, *The Changing Tone of Judicial Election Campaigns as a Result of White*, in *RUNNING FOR JUDGE*, *supra* note 3, at 34, 49–55 (discussing factors affecting prevalence of attack ads). Less incendiary ads would also have prevented popular opinion from becoming as inflamed, which would have resulted in less pressure on the legislators.

the constituents they serve, states began adopting plans centered on electing judges. Since *Marbury v. Madison*,¹⁹⁰ the role of the judiciary has grown with respect to deciding what the law is.

Currently, most states use some form of elections as part of their judicial selection and retention model. The growth in political accountability can be justified by the increasing role courts play in making the law. But judges are not pure political actors and need some check against voters retaliating based solely on their dislike of a ruling when the judge followed clear law or precedent (as opposed to engaging in “making” law). Rather than holding judges politically accountable for all of their decisions, the focus of judicial selection and retention should be obtaining the best judges possible while allowing for some political consequences if a judge steps beyond what is politically possible in his or her law-making function.

What makes one judge better than another can be difficult to define. While statistics regarding a particular judge’s case load or reversal rate provide some useful information, these statistics do not provide other, less measurable insights into the judge’s demeanor, thought process, and approach to the litigants and attorneys appearing before him or her. Thus, allowing states to define the characteristics they seek in a judge enables judges to fit into a mold crafted by their own community while still retaining core judicial values, including independence, competency, and clarity.

When voters are voting on judicial candidates, having a mold in mind may aid their decision-making process. However, voters are less likely to be informed about judicial elections than they are for other, higher-profile elections, like for president or governor. Uninformed voters may be susceptible to biases favoring the incumbent, the first-listed candidate, political associations (whether declared or assumed), or gender or ethnic stereotypes or favoritism—that is, assuming there is an actual contested election.

Since many judicial elections are not contested, the populist purpose of allowing the electorate to select those who will rule over them is not served, and judges are de facto selected without voters considering a candidate’s merits. Other times, a state may have elections on paper but in practice select judges in the shadow of gubernatorial appointments. While states adopting a true gubernatorial appointment process have information available for candidates who wish to be considered, states using elections on paper but that are appointments in reality have less incentive to create a robust system to enable the state executive to select the “best” candidates.

In contrast, merit and appointment systems both incorporate some level of merit review and evaluation of candidates beyond the constitu-

¹⁹⁰ 5 U.S. (1 Cranch) 137 (1803).

tional minimum requirements to serve as a judge. While political forces are still at play, selection based on review of qualifications, where there are actually multiple candidates considered, will allow either the governor or legislature (if appointing) or merit-selection committee to choose candidates that best fit the community's judicial mold.

Combining judicial selection with recent United States Supreme Court cases further cautions against electing judges. Until its opinion in *Williams-Yulee v. Florida State Bar*,¹⁹¹ the Court had been moving judicial campaign finance in the same direction as its other campaign-finance cases: towards greater First Amendment protection for political speech, including money used to fund that speech. While *Williams-Yulee* was a step back for the Court from treating judicial elections like other elections, the Court was not able to reach a majority on the issue of the level of deference the states deserve for enacting ethical rules prohibiting or limiting certain types of speech. Going forward, it will not be clear what and how much a state will be able to regulate concerning candidates' speech. Returning to the Court's decision in *Republican Party of Minnesota v. White*,¹⁹² if the states do not want judges to behave like other political actors behave in elections, the states have the option to choose a different method of judicial selection.

While Justice O'Connor's proposal for judicial elections addresses many of the concerns raised in this Comment, having retention elections does not sufficiently protect against good judges being voted out because of a politically unpopular vote, even though that vote may be correct. Under Bonneau and Hall's approach, moving towards partisan elections may result in actual contests, but increasing politics in the judiciary may undermine public confidence by creating an appearance of bias or partiality.

Thus, this Comment suggests a new approach to judicial selection and retention. The combination of a commission recommendation for initial selection and legislative-supermajority requirement for removal provides for a political check that is proportionate to the quasi-legislative role judges play. By combining these selection and retention methods, states can focus on selecting the best judges, and judges can do their best judging without fear of undue political retaliation.

¹⁹¹ 135 S. Ct. 1656 (2015).

¹⁹² 536 U.S. 765 (2002).