

Do Retention Elections Work?

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During the twentieth century, judicial reformers attempting to depoliticize the selection of state court judges and increase respect for the courts advocated moving from competitive elections for judges to “merit selection” or – as it was initially known – the “Missouri Plan.” During the 1960s and 1970s, these reformers enjoyed considerable success. Whereas in 1960 only three states – Alaska, Kansas, and Missouri – employed merit selection to choose state supreme court justices, by 1980 eighteen did so.² Of course, adoption of merit selection did not altogether eliminate judicial elections, because judges appointed under merit selection are in most states obliged to run periodically in retention elections.³ Yet this requirement did not unduly concern judicial reformers, because they believed that retention elections differ fundamentally from partisan and non-partisan elections, in that they tend to banish partisanship and facilitate well-informed choices by voters.⁴ Moreover, reformers recognized that, even if incumbent judges were defeated, this would not elevate unqualified persons to the bench since the

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2. It should be noted that some states are not simply “merit” or “non-merit” states. Several employ different systems of selection for trial judges than they do for appellate judges. Others use different selection systems for trial judges in urban and rural areas. For data on the adoption of merit-selection plans, see Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1 app. A at 79-81 tbl.1 (1994). Information on current judicial selection systems in the various states is available at the web site of the American Judicature Society, www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf.

3. See American Judicature Society, *supra* note 2. Fifteen of the twenty-one states that employ commission-based appointment systems use retention elections to decide whether incumbents should or should not remain in office, while the other six states use a system of reappointment. According to one commentator, eighty-seven percent of state judges currently run for election or reelection. Roy A. Schotland, *Comment*, 61 LAW & CONTEMP. PROBS., Summer 1998, at 149, app. at 154. As of 2004, the eighty-seven percent who face elections was updated to eighty-nine percent by the National Center for State Courts. Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077 app. 2 at 1105 (2007).

4. See *infra* Part II.

nomination of their replacements would remain in the hands of non-partisan judicial selection commissions.

Whether merit selection in fact reduces the influence of politics in judicial selection and elevates the quality of the judiciary has been the subject of considerable debate – one where social scientists have played an increasingly prominent role.⁵ This Article contributes to that debate by assessing whether retention elections serve the purposes for which they were created. However, this inquiry is only one part of a comprehensive assessment of merit selection and retention elections. One must also consider whether the ends that merit selection seeks to foster are the appropriate aims for a system of judicial selection and whether the proponents of merit selection have a persuasive understanding of the problems facing the courts. To clarify this point, this Article begins by describing the political context out of which merit selection arose and the implications of that history for the present day.

I. THE ORIGINS OF MERIT SELECTION AND RETENTION ELECTIONS

During the early decades of the twentieth century, when merit selection was first proposed, American courts were under political attack. Progressives charged that judicial rulings betrayed a strong class bias, that judges regularly read their own social and economic philosophies into the law, and that judges willfully misconstrued the Fourteenth Amendment's Due Process Clause to strike down needed reforms and protect business interests.⁶ As one commentator put it, "[J]udges habitually think in the terms of the rich and the powerful. The training, sympathies, experiences, and general view of life of most judges have made this inevitable."⁷ The "absolute power of veto" they exercised via judicial review meant that they had become "political organs of the government" that "exercise definite political power without a corresponding political responsibility."⁸ To combat what they perceived as judicial usurpations, Progressives proposed a variety of reforms, including popular recall of judges, popular recall of specific judicial decisions, and a requirement of super-majorities on courts to invalidate legislation.⁹ Although none of these

5. For a survey of the early social science literature on merit selection, see Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509 (1978). For a summary and analysis of the pertinent literature through 2002, see Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729 (2002).

6. For an overview of these attacks on the courts, see WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994).

7. GILBERT E. ROE, *OUR JUDICIAL OLIGARCHY* 107 (1912).

8. W. F. DODD, *The Recall and the Political Responsibility of Judges*, 10 MICH. L. REV. 79, 85-86 (1911).

9. On popular recall of judges, see *id.*; George F. Pendleton, *The Recall of Judges*, 56 OHIO L. BULL. (1911); and – more generally – JOSEPH F. ZIMMERMAN, *THE*

proposals was adopted nationally, they did enjoy some success in the states. During the early twentieth century, seven states provided for the recall of judges. After a presidential veto had required the elimination of the recall of judges in Arizona's draft constitution, Arizona amended its constitution to reinstitute the judicial recall immediately after becoming a state.¹⁰ Colorado instituted the recall of judicial decisions via popular referendum, and three states – Nebraska, North Dakota, and Ohio – amended their constitutions to require super-majority votes of their supreme courts to invalidate statutes.¹¹

Conservatives agreed with the Progressives that the politicization of the judiciary was a concern, but their diagnosis of the problem and the remedy they prescribed were decidedly different. They attributed the problem of politicization not to judicial activism or class bias but to the processes by which judges were selected. In particular, they argued that the predominant modes of selection in the states – partisan election and non-partisan election – enmeshed the judiciary in politics, undermined respect for the courts, and discouraged the selection of highly qualified jurists. As Nebraska Governor Chester Aldrich put it in 1911, “Probably a whole lot of this trouble comes from the fact that in many instances these inferior courts are composed of lawyers who owe their position, not so much to legal attainment and profound learning, as they do to political services rendered.”¹² In his famous address to the American Bar Association in 1906, Roscoe Pound charged that “putting courts into politics, and compelling judges to become politicians in many jurisdictions . . . [had] almost destroyed the traditional respect for the bench.”¹³ Similarly, William Howard Taft, who as President had denounced the recall of judges as “legalized terrorism,”¹⁴ claimed that it was “disgraceful” for candidates for the bench to be campaigning, promising that their decisions would serve the interests of a particular social class.¹⁵ “[T]he People at the polls no more than kings upon the throne are fit to pass upon questions

RECALL: TRIBUNAL OF THE PEOPLE (1997). On the recall of judicial decisions, which was prominently championed by Theodore Roosevelt, see Stephen Stagner, *The Recall of Judicial Decisions and the Due Process Debate*, 24 AM. J. LEG. HIST. 257 (1980).

10. On the Arizona conflict over the recall of judges, see JOHN D. LESHY, *THE ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE* 17-18 (1993).

11. See Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS., Summer 1998, at 79, 94-95.

12. Quoted in ROE, *supra* note 7, at 14.

13. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUD. SOC'Y 178, 186 (1937), quoted in LARRY C. BERKSON & RACHEL CAUFIELD, *JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 2* (2004), www.ajs.org/selection/docs/Berkson.pdf.

14. Carrington, *supra* note 11, at 94 n.101.

15. BERKSON & CAUFIELD, *supra* note 13, at 2 (quoting William Howard Taft, *The Selection and Tenure of Judges*, Address at the Meeting of the American Bar Association (Sept. 1-3, 1913), in 38 A.B.A. REP. 418, (1913)).

involving the judicial interpretation of the law.”¹⁶ Conservatives believed that the way to rebuild popular support for judges and for the rule of law was to remove judges from politics and elevate more qualified persons to the bench.

Merit selection of judges was first proposed in the midst of this controversy over the courts, and it must be understood in that context.¹⁷ It was not an attempt to address the concerns identified by both progressive and conservative critics. Rather, it was designed to alleviate the problems afflicting the courts as understood by the conservatives. This is apparent both in the substance of the proposal and in the background of its originator, Albert Kales.

Kales was a law professor at Northwestern University School of Law, a co-founder with Roscoe Pound of the American Judicature Society (which was formed by leading members of the legal profession to promote judicial reform), and vice president of that organization. He was thus closely identified with the legal establishment of his day. He was also a severe critic of judicial elections, which he denounced as only nominally democratic. In fact, Kales claimed that party leaders – “politocrats” in his terminology – determined the nominee, and so “the voter only selects which of two or three appointing powers he prefers.”¹⁸ Non-partisan elections did not remedy the problem, both because party leaders might still influence outcomes and because voters lacked the knowledge to choose wisely among competing candidates. The solution, Kales argued, was to eliminate the input of political parties and the populace altogether in selecting judges, substituting a system of professional – and therefore, in his view, non-political – appointment.¹⁹ More specifically, he suggested that a commission drawn from the legal community screen potential judges and forward a list of qualified candidates to the state’s

16. *Quoted in* GEORGE E. MOWRY, *THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT* 171 (1946).

17. *See* Albert M. Kales, *Methods of Selecting and Retiring Judges*, 1914 MINN. S. B. ASSN. PROC. 85, and Albert M. Kales, *Methods of Selecting Judges*, 85 CENT. L.J. 425 (1917). On the development of merit selection and its endorsement, see Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure – Its Historical Development*, in *SELECTED READINGS: JUDICIAL SELECTION AND TENURE* 29 (Glenn R. Winters ed., rev. ed. 1973).

18. ALBERT M. KALES, *UNPOPULAR GOVERNMENT IN THE UNITED STATES* 226-27 (1914).

19. Kales’s solution for judicial bias or misconduct likewise relied on professional expertise:

The best protection against arbitrary and disagreeable actions by judges is a duly constituted body of fellow judges who hold a position of superior power and authority and to whom complaints as to the conduct of judges may be brought and who may investigate those complaints and exercise a corrective influence.

Id. at 247-48.

chief justice, who would appoint from that list.²⁰ In 1920 the American Judicature Society endorsed merit selection, and in 1937 the American Bar Association followed suit, providing powerful institutional support for reform efforts. In 1940 Missouri became the first state to institute merit selection for all its judges, albeit substituting the governor for the chief justice as the appointing authority.²¹

Kales did include a system of retention elections in his original proposal, but it was not a fundamental feature of the plan. Rather, as Glenn Winters, the long-time president of the American Judicature Society, acknowledged, “The device of tenure by non-competitive election . . . was originally offered only to quiet the fears of . . . devotees of the elective method.”²² One advocate of merit selection suggested that, in the short run, “the public is rarely in a position to know in advance how good a judicial candidate is, but if his record as a judge is outstandingly poor, the voters can ascertain the facts, and in the merit retention election they have a means of removing him.”²³ And, in the long run, it was expected that such elections could be eliminated altogether.²⁴

Fast forward to the present day, and what is striking is how closely the current debate over judicial selection and judicial performance mirrors the conflict of a century ago. The vocabulary of the current debate – “judicial activism” and “politicization” – may be new, but the complaints are not. Today, as they did then, some critics complain that judges are frustrating

20. *Id.* at 248-50.

21. Actually, the first victory for merit selection was in 1934, when California instituted merit selection for appellate judges and allowed counties to adopt the plan by local option for selection of trial judges of general jurisdiction. See Glenn R. Winters & Robert E. Allard, *Judicial Selection and Tenure in the United States*, in *THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* 146, 151 (Harry W. Jones ed., 1965). As the division between Progressives and conservatives might have led one to expect, merit selection was supported by the state Chamber of Commerce and the Republican Party but opposed by labor unions and the Democratic Party. See JOSEPH R. GRODIN, *IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE* 166 (1989).

22. Winters, *supra* note 17, at 41. As Michael Dimino notes,

The push for merit selection . . . rests . . . on the determination that public input is bad for the judicial system and must be tolerated only as a political compromise. This is clear once one sees the degree to which success under the merit selection plan is equated with the retention of incumbents.

Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 *ALB. L. REV.* 803, 813 (2004). Charles Gardner Geyh, a leading opponent of judicial elections, concurs: “Retention elections are designed to minimize the risk of non-retention, by stripping elections of features that might inspire voters to become interested enough to oust incumbents.” Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 *OHIO ST. L.J.* 43, 55 (2003).

23. Winters & Allard, *supra* note 21, at 164.

24. *Id.*

popular government by reading their own ideological predilections into the law and that merit selection is “a masquerade to put political power in the hands of the organized bar and other members of the elite.”²⁵ Today, as then, supporters of merit selection counter that unfair ideological attacks on the courts, combined with political efforts to influence judicial rulings, are undermining public respect for the courts and threatening the rule of law. And, as in the past, those advocating merit selection and retention elections find themselves on one side of an ideological divide, viewing the problem less in terms of the substance of judicial rulings and more in terms of the quality of the bench and its insulation from political influences. There are, however, two important differences between the current and earlier debates over judicial selection. First, today it is conservatives who are most critical of the courts and progressives who are most supportive. Second, we now have the benefit of a half century of experience with merit selection and retention elections, so we are in a position to assess their actual effects in order to determine whether retention elections in fact serve the aims for which they were created.

II. THE ADVANTAGES OF RETENTION ELECTIONS

Proponents of merit selection have identified several ways in which retention elections are superior to contested elections, whether partisan or non-partisan.²⁶ First, retention elections serve to depoliticize judicial selection, thereby promoting judicial independence and impartial decision-making. Second, by replacing contested elections with a simple yes-or-no vote on incumbents, retention elections reduce the likelihood of negative campaigning and the need for judges to solicit sizable campaign contributions, thereby avoiding practices that undermine respect for the judiciary. Third, by eliminating party affiliation and other irrelevant cues for voting, retention elections encourage voters to focus on judicial experience and performance, thereby promoting better voter choice. Finally, as a result, retention elections lead to a highly qualified judiciary.²⁷

Needless to say, each of these claims is controversial; moreover, taken together, they rest on a contested understanding of the problems that courts face and how a system of judicial selection can help address those problems. The next sections of this Article will consider each claim in detail.

25. Carrington, *supra* note 11, at 106.

26. See AM. JUDICATURE SOC'Y, MERIT SELECTION: THE BEST WAY TO CHOOSE THE BEST JUDGES, www.ajs.org/js/ms_descrip.pdf. For a more general analysis of the claims of proponents of merit selection, see Aman Mcleod, *If at First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499 (2005).

27. See sources cited *supra* note 26.

A. Retention Elections and Depoliticization

The primary goal of proponents of merit selection has been to depoliticize the selection of judges. Early advocates of merit selection were concerned with breaking the power of political parties over judicial selection, and the system of merit selection was specifically designed to address this concern. Under merit selection, nomination of candidates by non-political judicial nominating commissions replaced nomination by party leaders, and this ensured that qualifications, not party service, were the criteria for elevation to the bench. Also, under merit selection, retention elections were conducted without competing candidates or the sponsorship of political parties, which ensured that performance in office, not party label, determined a judge's continuation in office.²⁸

In the present day, however, the threat of politicization comes not from party elites but from contentious and expensive election campaigns dominated by special interests, from transparent efforts to influence judicial rulings through campaign contributions, and through independent spending designed to influence the outcome of judicial elections. Therefore, one obvious question is whether merit selection is equally appropriate as a remedy for these new threats. Even a cursory examination of judicial elections over the last three decades should dispel the notion that retention elections are altogether immune from the "pernicious rhetoric directed at courts and individual judges," from "relentless negativity," or from the "dirty politics, even gutter politics" found in recent judicial elections.²⁹ Indeed, surveying the effects of elections on judicial behavior, one scholar concluded, "Retention elections have the same potential for intimidation and a chilling effect on judicial decision-making as direct elections."³⁰ Therefore, the key question is whether

28. This understanding of politicization in terms of dominance of selection by political parties was paramount in the thought of Albert Kales, the originator of merit selection. See Kales, *supra* note 17. Although the theory behind merit selection was sound, whether it banished partisan influences in practice has been questioned. For a classic account of merit selection, which concludes that it changes the politics of judicial selection rather than eliminating politics from judicial selection, see RICHARD A. WATSON & RONALD G. DOWNING, *THE POLITICS OF THE BENCH AND BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* (1969).

29. Paul J. De Muniz, *Eroding the Public's Confidence in Judicial Impartiality: First Amendment Federal Jurisprudence and Special Interest Financing of Judicial Campaigns*, 67 ALB. L. REV. 763, 764 (2004); Carrington, *supra* note 11, at 111; Clive S. Thomas et al., *Interest Groups and State Court Elections: A New Era and Its Challenges*, 87 JUDICATURE 135, 138 (2003); Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259 (2008).

30. Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 859 (1998). See also Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

judges running in retention elections are substantially less likely to be affected by the “hyper-politicization” that has characterized many state court elections in recent decades.³¹

It is not clear that retention elections do shield judges from these “nastier, noisier, and costlier” judicial campaigns, because the causes of the politicization of judicial selection in recent years are tied to factors that operate independently of the mode of judicial selection.³² For most of the twentieth century, most judicial elections – partisan and non-partisan, contested and uncontested – were low-key affairs. Incumbents often ran for reelection in uncontested races or faced only nominal challenges, particularly in non-partisan races or in jurisdictions dominated by a single political party. Candidates did not raise substantial campaign funds, advertise in the media, or mount sustained attacks on opposing candidates. As a result, campaigns were typically tepid, issueless affairs – according to one commentator, about as exciting as a checkers game conducted by mail.³³ These races rarely attracted the attention of organized interests, grassroots groups, or – most importantly – voters. While there were exceptions, this was true in the vast majority of judicial elections.³⁴

In the present day, this has changed for races for state supreme courts and increasingly for races for other judicial positions as well.³⁵ The rise of

31. For a description of how judicial elections have become politicized in recent decades, see G. Alan Tarr, *Politicizing the Process: The New Politics of State Judicial Elections*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA 52 (Keith J. Bybee ed., 2007). See also Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315 (1997).

32. DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS 6 (2002), available at <http://faircourts.org/files/JASMoneyReport.pdf> (quoting *Comment, supra* note 3, at 150).

33. William C. Bayne, *Lynchard's Candidacy, Ads Putting Spice into Judicial Race: Hernando Attorney Challenging Cobb*, COM. APPEAL, Oct. 29, 2000, at DS1, quoted in Roy A. Schotland, *Financing Judicial Elections*, in FINANCING THE 2000 ELECTION 213 (David B. Magleby ed., 2002).

34. As Richard Briffault neatly summarized it, judicial elections were “traditionally . . . low-salience events, with low public interest, very low free media coverage, and, as a result, low voter turnout.” See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 196 (2004).

35. Some observers have detected an extension of this politicization to races for state intermediate courts of appeals as well. See JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2006: HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS – AND HOW AMERICANS ARE FIGHTING BACK 24-27 (2007), <http://www.gavelgrab.org/wpcontent/resources/NewPoliticsofJudicialElections2006.pdf>; Charles Gardner Geyh, *An Overview of State Judicial Selection Systems and Their Relationship to Judicial Independence*, in BACKGROUND PAPERS FOR 2007 CONFERENCE: THE DEBATE OVER JUDICIAL

party competition in regions of the country that had previously been dominated by a single political party has also spilled over into judicial races. The involvement of state courts in controversial areas of public policy, such as tort law and public-school finance, has led groups interested in those areas to seek to place judges sympathetic to their views on the bench. As Charles Sheldon and Linda Maule have noted, "Interest groups have discovered that contributions to court contests have a pay-off similar to contributions to legislative races."³⁶ Indeed, the pay-off may even be greater, in that replacement of a single judge can have dramatic effects on a court's rulings. This, in turn, has affected the intensity and character of the reelection process. Powerful interest groups such as the Chamber of Commerce and the American Trial Lawyers Association have the resources to increase the salience of judicial races, whether contested or uncontested, and they are not bound by the ethical restrictions on campaign messages imposed on judges and judicial candidates. Also affecting judicial campaigns is the U.S. Supreme Court's ruling in *Republican Party of Minnesota v. White*, which authorizes – and hence encourages – candidates for judicial office in both contested and non-contested elections to elaborate their views on contested legal issues.³⁷ Before *White*, the Model Code of Judicial Conduct protected judicial candidates, who were able to plead that they were legally prohibited from discussing their views. Because they can no longer make that claim in the wake of *White*, groups can pressure judges to go public with their views.

One can expect that the factors that have encouraged the politicization of state judicial selection in recent years will continue to operate for the foreseeable future. One important effect of this appears to be a convergence among electoral systems, such that state supreme court justices running in retention elections may face the same expensive, vituperative challenges that were previously confined to partisan races. The 1986 race in California, in which Chief Justice Rose Bird and two associate justices were defeated,³⁸ pioneered the practice of groups organizing to target sitting justices in retention elections. But this practice is hardly unique. In 1996, interest groups successfully targeted Justice David Lanphier in Nebraska and Justice Penny White in Tennessee, and, in 2005, interest groups fueled the voter anger that led to defeat for Justice Russell Nigro in Pennsylvania.³⁹ In other instances, groups have mounted major, but unsuccessful, challenges in retention elec-

ELECTIONS AND STATE COURT JUDICIAL SELECTION 11 (2007). The argument in this paragraph draws on Tarr, *supra* note 31, at 58-67.

36. CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 76 (1998).

37. 536 U.S. 765, 788 (2002).

38. Herbert M. Kritzer, *Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 444 (2007).

39. *Id.*

tions, failing to unseat Chief Justice Leander Shaw in Florida in 1990⁴⁰ and Justice Sandra Newman in Pennsylvania in 2005.⁴¹ Although the intervention of interest groups in retention elections has been episodic, it has had effects that extend beyond the instances in which justices have been unseated. This interest-group involvement has warned sitting judges that they can never be sure whether they will face an organized effort to defeat them when they seek retention, and this in turn has encouraged judges to take preemptive steps to avoid such opposition.

Studies of retention elections indicate that incumbents are almost always retained in the absence of organized opposition.⁴² But the absence of opposing candidates in retention elections is no guarantee that those elections will be uncontested. In fact, just the opposite is true. Whereas opposing candidates must make known their intention to contest a race, groups seeking to defeat a sitting judge need not tip their hand as early. For example, those who unseated Justices White and Lanphier launched their attacks only two months prior to the elections, when it was too late for the incumbents to raise adequate funds to mount a response.⁴³ Given the potential threat, judges facing retention elections might feel obliged to build up a campaign war chest, both to discourage efforts to unseat them and to ensure that, if targeted, they will have resources available to respond to attacks. For example, fearful of opposition by anti-abortion groups that ultimately did not materialize, California Chief Justice Ronald George and Justice Ming Chin raised \$886,936 and \$710,139, respectively, for their retention elections in 1998.⁴⁴ Thus, the uncertainty about opposition in retention elections may lead to the same sort of fund-raising and campaigning found in contested elections, even when incumbents do not in fact face opposition.

Uncertainty about the likelihood of an electoral challenge may affect judicial decision-making as well, because judges may seek to avoid decisions that will bring the wrath of interest groups down on them. The prospect of an election in which a single decision can be taken out of context and used to attack a judge may have a chilling effect on judicial independence. In a series of interviews conducted with judges who ran in retention elections from 1986-1990, fifteen percent indicated that, as the election approached, they sought to avoid controversial cases and rulings, while another five percent indicated that they became more conservative in sentencing in criminal cas-

40. Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 36-37 (1995).

41. Tom Barnes, *Pa. Chief Justice Cappy, 64, to Retire Early at End of Year: "I Believe It Is Time To Go,"* PITTSBURG POST-GAZETTE, Sept. 12, 2007, at A1.

42. Webster, *supra* note 40, at 18.

43. Harold See, *An Essay on Judicial Selection*, in BENCH PRESS, *supra* note 31, at 111-12 n.114.

44. Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1407 n.40 (2003).

es.⁴⁵ Even judges who try to avoid being influenced by the prospect of a reelection campaign acknowledge that it may subconsciously influence their judgments. Thus, describing a judge's predicament in deciding controversial cases while facing reelection, former California Justice Otto Kaus suggested that "[i]t was like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."⁴⁶

Recent proposals by advocates of merit selection also implicitly suggest doubts about the efficacy of retention elections in protecting against a politicized reselection process. Thus, the Task Forces on Selecting State Judges have proposed lengthening terms of office for judges, requiring full disclosure of campaign contributions, and imposing contribution limits.⁴⁷ Also, the American Bar Association and the American Judicature Society have recommended the establishment of retention evaluation bodies to provide information to voters to counter messages disseminated by organized groups.⁴⁸ The American Bar Association has even departed from its earlier support of retention elections, suggesting recently that judges should have extended terms but not stand for reelection, lest it affect their decision-making.⁴⁹ Moreover, the 2007 conference of the Sandra Day O'Connor Project on the State of the Judiciary recommended that campaign conduct committees be established to promote appropriate campaign conduct and deter negative campaigning, that voter education guides be distributed to all voters, and that states strengthen

45. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312 tbl.4 (1994). Other studies have produced similarly troubling findings. See, e.g., Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5, 13-24 (1995); Carol Ann Traut & Craig F. Emmert, *Expanding the Integrated Model of Judicial Decision Making: The California Justices and Capital Punishment*, 60 J. POL. 1166, 1177 (1998); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004). For consideration of the implications of these findings, see Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS., Summer 1998, at 21.

46. Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

47. UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS, THE REPORTS OF THE TASK FORCES OF CITIZENS FOR INDEPENDENT COURTS 90-94 (2000).

48. AM. BAR ASS'N STANDING COMM. ON JUDICIAL INDEPENDENCE, STANDARDS ON STATE JUDICIAL SELECTION: REPORT OF THE COMMISSION ON STATE JUDICIAL ELECTION STANDARDS 17-18 (2000), available at <http://www.abanet.org/judind/downloads/reformat.pdf> [hereinafter A.B.A. REPORT]; AM. JUDICATURE SOC'Y, MODEL JUDICIAL SELECTION PROVISIONS 11-18 (2008), available at http://www.ajs.org/selection/docs/MJSP_web.pdf.

49. AM. BAR ASS'N, JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 26-27 (2003).

recusal processes and adopt codes of conduct that adhere to a narrow reading of *Republican Party of Minnesota v. White*.⁵⁰ Taken altogether, these proposals testify to a growing realization that retention elections cannot prevent the politicization of judicial selection absent supplemental reforms designed to address the politicization of judicial elections generally, not just the politicization of retention elections.

*B. Retention Elections, Contested Elections,
and Respect for the Judiciary*

Proponents of merit selection argue that, by replacing contested elections with a simple yes-or-no vote on incumbents, retention elections reduce the likelihood of negative campaigning and the need for judges to solicit sizable campaign contributions, thereby avoiding practices that tend to undermine respect for the judiciary. The prior Section raises doubts about the effectiveness of retention elections in eliminating negative campaigning and deterring judicial fund-raising. However, implicit in the reformers' claim is a broader point about those factors that contribute to popular perceptions of the legitimacy of the courts, and that point deserves our attention.

Poll data confirm widespread popular concern about the influence of political contributions on judicial decision-making. For example, a 2002 poll by the American Bar Association found that "seventy-two percent of respondents indicated that they were at least somewhat concerned that having to raise money might compromise judges' impartiality."⁵¹ A poll the same year by the Justice at Stake Campaign showed that seventy-six percent of respondents believed that judicial decisions were influenced, at least in part, by campaign contributions.⁵² Yet one might question whether it is the process of judicial selection rather than the substance of judicial rulings that most affects popular assessments of the judiciary. In a 2005 Maxwell School poll, a majority of respondents agreed with the view that "in many cases judges are really basing their decisions on their own personal beliefs," and eighty-six percent of respondents believed that the partisan background of judges influ-

50. See SANDRA DAY O'CONNOR PROJECT ON THE STATE OF THE JUDICIARY, 2007 CONFERENCE RECOMMENDATIONS FOR STATE COURT JUDICIAL SELECTION (2007), available at www.law.georgetown.edu/judiciary/documents/Recommendations.pdf.

51. Mcleod, *supra* note 26, at 509 (citing Press Release, American Bar Association, Poll: Confidence in Judiciary Eroded by Judges' Need to Raise Campaign Money (Aug. 12, 2002)).

52. GREENBERG QUINLAN ROSNER RESEARCH, INC., JUSTICE AT STAKE CAMPAIGN, JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 4 (2001), available at <http://www.faircourts.org/files/JASNationalSurveyResults.pdf> [hereinafter JUSTICE AT STAKE SURVEY].

enced their rulings “a lot” or at least “some.”⁵³ A poll for Justice at Stake reported similar findings: sixty-four percent of respondents agreed that “there are too many activist judges who make rulings that follow their own views rather than the law,” and sixty percent thought that “too many judges are legislating from the bench and making laws instead of interpreting the laws.”⁵⁴ In a poll conducted by the Annenberg Public Policy Center in 2006, seventy-five percent of respondents believed that judicial rulings were influenced to “a great extent” or “a moderate extent” by judges’ personal political views, and sixty-eight percent indicated that this was “not appropriate.”⁵⁵ More than half of those expressing an opinion believed that it was “essential” or “very important” that there be a way to remove judges from office if they make “an unpopular ruling,” and sixty-five percent favored popular election of judges (versus only thirty percent who favored commission-based appointment).⁵⁶

This last finding coincides with the findings in other polls. The respondents in the ABA poll mentioned above were more likely to trust elected than non-elected judges, and a 2005 Maxwell School poll found that seventy-five percent of respondents rejected the idea of reducing the number of judges subject to election.⁵⁷ These findings are also consistent with popular rejection in state after state of recent proposals to eliminate contested judicial elections. Since 1994, proposals for merit selection have been rejected by state legislatures or by popular vote in Florida, Georgia, Idaho, Illinois, Louisiana, Nevada, Texas, and West Virginia.⁵⁸

The relationship between politicization and popular skepticism about the impartiality of judges may, of course, be more complicated than the survey results suggest. It may well be that campaign ads that accuse judges of “legislating from the bench” and “judicial activism” or that highlight the groups from which judges have received campaign contributions have fueled popular suspicions that judges are partial and not independent. Yet it is unlikely that campaign ads created these suspicions or that, absent politicized election campaigns, such skepticism would vanish. Certainly that has not proved true with regard to federal judges. They are accused of activism even more than state judges are, despite the fact that they do not run for election and enjoy

53. CAMPBELL PUBLIC AFFAIRS INSTITUTE, THE MAXWELL POLL: LAW AND COURTS QUESTIONS FROM 2005 POLL (2005), <http://www.maxwell.syr.edu/campbell/programs/maxwellpoll/surveyresults/lawandcourtsquestionsfrom2005.htm>.

54. JUSTICE AT STAKE SURVEY, *supra* note 52, at 4.

55. Annenberg Judicial Independence Survey (2006), available at www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=218.

56. *Id.*

57. See sources cited *supra* notes 51, 53. For comment on this popular attachment to electing judges, see Geyh, *supra* note 22, at 52-55.

58. Information on state-by-state consideration of changes in systems of judicial selection is found at the web site of the American Judicature Society, at www.ajs.org/selection/sel_stateselect.asp.

tenure during good behavior.⁵⁹ Thus, despite the arguments of the creators of merit selection, reiterated today by their progeny, popular respect for the courts does not depend primarily on reducing attacks on judges.⁶⁰ These attacks resonate because they seem to accord, at least in part, with how courts operate – or at least how they are perceived to operate. It may be that judges should “not permit family, social, political, financial, or other interests or relationships to influence [their] judicial conduct or judgment,” but, as poll data reveal, the American public doubts that judges regularly meet this standard.⁶¹

These poll findings mirror the divide between conservatives and Progressives a century ago on the factors that undermine faith in the judiciary.⁶² Yet in the interim the American public has been fed a steady diet of Legal Realism by the media, witnessed the evolution of federal judicial selection into “an ideologically-driven appointments process [that] legitimizes ideological judicial decision-making,” and seen courts become aggressively involved in a wide range of policy disputes, often striking down long-standing policies or practices.⁶³ Given these developments, one suspects that negative campaigning and accusations of judicial legislation have reflected, rather than created, the current legal and political climate.

59. See, e.g., MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* (2005).

60. Consider on this point the impassioned plea of one participant in state judicial races:

[T]he media and the legal establishment think you the voters are too ignorant to make such decisions. Yet when the issues of a judicial campaign get a full airing before the public, so that voters can be educated about the candidates, the media and legal experts complain about how all the debate and controversy are ruining the reputation of the judiciary. But what about covering up the problems in the judiciary? Does that somehow enhance the judiciary's reputation?

WINTHROP E. JOHNSON, *COURTING VOTES IN ALABAMA: WHEN LAWYERS TAKE OVER A STATE'S POLITICS* 258 (1999).

61. MODEL CODE OF JUDICIAL CONDUCT, Rule 2.4(B).

62. See *supra*, text accompanying notes 6-23.

63. William P. Marshall, *Constitutional Law as Political Spoils, in* JUDICRY AND DISTRUST: RECONSIDERING THE FEDERAL JUDICIAL APPOINTMENTS PROCESS 193, 205 (2005); see also MICHAEL COMISKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* (2004); TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* (1999). One need not claim that the courts' innovative rulings are always wrong to recognize that they feed public skepticism about whether judicial pronouncements are rooted in law.

C. Retention Elections and Voter Choice

Proponents of retention elections insist that they encourage more informed and appropriate voter choice – that is, voting based on the qualifications and performance of those seeking retention. When the party affiliations of judicial candidates are listed on the ballot, voters are tempted to vote for judges in the same way they vote in the other partisan contests so that the electoral prospects of judicial candidates hinge on the outcome of top-of-the-ballot races for President or Governor rather than on their qualifications. Thus, one judge reported that “he was elected to his state’s supreme court in 1916 because President Wilson kept the country out of war, but was defeated in 1920 because the President did not keep the country out of war.”⁶⁴ Social science data tend to confirm the significance of party-line voting. For example, Phillip Dubois found that in states with partisan elections in which both a state supreme court seat and the governorship were at stake, there was a very strong correlation (.84) between the percentage of the vote received by the gubernatorial candidate and the supreme court candidate of the same party on the county level.⁶⁵ The study concludes that many voters were primarily guided by the judicial candidates’ party affiliation when deciding for whom to vote.

Ironically, this may actually promote judicial independence, particularly in low-information elections. Lawrence Baum and David Klein have summarized this argument:

When voters who are starved for information rely on what the ballot tells them, they are not basing their decisions on information about judges’ work on the bench, whatever the past performance of a judge in office At best they can infer candidates’ positions on judicial issues from information such as party affiliation and gender. One effect is to limit the accountability of judges for the quality of their work and the content of their decisions.⁶⁶

Proponents of retention elections argue, however, that when voters are not subjected to the charges of opposing candidates and unreliable information circulated by partisans, they are then able to decide based on more reliable information. Yet what we know about judicial elections, and about voting behavior more generally, raises serious questions about this argument.

64. *Quoted in Winters & Allard, supra* note 21, at 163.

65. PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 65-100 (1980).

66. Lawrence Baum & David Klein, *Voter Responses to High-Visibility Judicial Campaigns*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 140, 142 (Matthew J. Streb ed., 2007).

First, consider the claim that retention elections eliminate not only partisan voting but also reliance on other arbitrary voting cues – such as gender, ethnicity, the familiarity of names (whether recognition is tied to the particular candidate or not), and the ballot position of respective candidates. Obviously, retention elections eliminate the influence of ballot position by putting forth a single candidate for consideration. However, studies have shown that the other purportedly irrelevant factors continue to influence voter choice, particularly in the absence of more substantive cues that might guide voting decisions.⁶⁷ Moreover, voters may seek to use party as a cue even in the absence of party labels. Thus, in Ohio, Phillip Dubois found a strong correlation between partisan voting for other elected offices and voting for members of the same party whose family names were closely associated with that party on the non-partisan judicial ballot.⁶⁸ From this he concluded that, when partisan affiliation is left off the ballot, voters sometimes use family names as a proxy for party membership.⁶⁹

Second, consider the consequences of eliminating political party labels in light of what social science research tells us about how voters decide, particularly in low-information races. Most American voters lack detailed information about candidates and their policies, even for salient offices. The level of information (and interest) usually declines precipitously along with the visibility of the office – indeed, “many voters are not aware that these contests exist until they see the ballot.”⁷⁰ As one scholar summarized the research consensus, “The public’s lack of information was so well established that scholars lost interest in studying the subject.”⁷¹ Yet this lack of detailed information, scholars have concluded, does not preclude rational voting behavior.⁷² Citizens can compensate for their limited information about politics by taking advantage of judgmental shortcuts (cues) that can be used to clarify

67. For examples of the influence of extraneous factors, such as ethnicity and name familiarity, on voter choice in retention elections, see Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643 (2002).

68. Dubois, *supra* note 65, at 80-94.

69. *Id.*

70. Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter’s Perspective*, 64 OHIO ST. L.J. 13, 19 (2003).

71. ERIC R. A. N. SMITH, *THE UNCHANGING AMERICAN VOTER* 159 (1989).

72. See ARTHUR LUPA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 18 (1998) (“The assumption is that people can make reliable predictions about the consequences of their actions *only if* they know a detailed set of facts about those actions. If this assumption is true, then it must also be true that reasoned choices can only be made by ambulatory encyclopedias.”). See also ROBERT S. ERICKSON, MICHAEL B. MACKUEN & JAMES A. STIMSON, *THE MACRO POLITY* (2002) (“Looked upon as individuals, most Americans care little about politics and possess a level of knowledge of the details of public life that is consistent with not caring All these facts, insofar as they lead us to believe that the electorate acts without purpose, lead us astray.”).

and simplify political choices. These cues are efficient in “requiring relatively little information to execute, yet yielding dependable answers even to complex problems of choice.”⁷³ The key to good voter choice, then, is not to demand levels of civic virtue that are beyond the reach of most citizens but to “offer them instead cues and signals which connect their world with the world of politics.”⁷⁴ Among the cues that substitute for complex information, “the party label can provide low cost, but valuable, information concerning electoral choices.”⁷⁵ This is so because “in partisan elections, parties have incentives to develop policy brand names. In so doing, partisan elections create incentives for consistent behavior on the part of legislators and cues that can help voters make reasoned choices.”⁷⁶ Indeed, party labels are particularly valuable in low-visibility races. As William Flanigan and Nancy Zingale have observed, “party-line voting becomes stronger for less visible offices, including Congress, because issues and personal attributes of the candidate are less likely to have an impact on the voter in less publicized races.”⁷⁷

Proponents of merit selection reject the use of party affiliation as a cue in part because they believe that other types of information can serve as better guides for voter choice. In particular, they recommend that the information gap created by the removal of party labels be filled by the legal profession or by the state. They have encouraged state bar associations to distribute voters’ guides with information on factors such as the incumbent’s experience, integrity, professional competence, judicial temperament, and record of dealings with the public.⁷⁸ They have also urged that states distribute information about judicial performance prior to retention elections.⁷⁹ Such performance

73. PAUL M. SNIDERMAN, RICHARD A. BRODY & PHILIP E. TETLOCK, *REASONING AND CHOICE: EXPLORATIONS IN POLITICAL PSYCHOLOGY* 19 (1991).

74. SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL ELECTIONS* 236 (1991).

75. PETER F. NARDULLI, *POPULAR EFFICACY IN THE DEMOCRATIC ERA: A REEXAMINATION OF ELECTORAL ACCOUNTABILITY IN THE UNITED STATES, 1828-2000*, at 129 (2005).

76. LUPIA & MCCUBBINS, *supra* note 72, at 225. Whether this “branding” applies to judges as well as to legislators is a hotly contested issue.

77. WILLIAM H. FLANIGAN & NANCY H. ZINGALE, *POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE* 198 (10th ed., 2002). In fact, there is a wealth of evidence documenting that party affiliation is a good predictor of judicial ideology and of how judges will decide cases in various issue areas. For a summary of this literature, see Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 *JUST. SYS. J.* 219 (1999). This confirms that the information on judicial candidates’ party affiliation promotes rational voter choice.

78. See the recommendations in the sources noted *supra*, notes 47-49.

79. As of 2007, only six states had retention evaluation guides, although Kansas and Missouri were committed to providing them in 2008. See *AM. JUDICATURE SOC’Y, METHODS OF JUDICIAL SELECTION: RETENTION EVALUATION PROGRAMS*, http://www.judicialselection.us/judicial_selection/methods/judicial_performance_evaluations.cfm?state= (last visited June 25, 2009); see also Penny J. White, *Using Judi-*

evaluations would presumably be based on “objective, process-directed criteria expected of any judge” and would help prevent “one or two controversial issues [from becoming] the focus of the campaign,” thereby “helping voters to cast an informed ballot.”⁸⁰

This quote gives the game away. By choosing what information to convey about judges, these evaluations are designed not only to inform voters but also to influence the bases on which they decide. Proponents of retention elections accept that voters should have input, but they want to restrict this input to a particular sort. They contend voters should not decide based on the ideology or political orientation of the judge. They should not decide based on their agreement or disagreement with the judge’s rulings and, in particular, should not base their votes on their reaction to specific controversial decisions.⁸¹ They should not decide whether the judge has remained faithful to the law, presumably because they lack the expertise to make such a judgment.⁸²

An oft-repeated argument against electing judges is that voters lack the expert knowledge necessary to do the job well. What distinguishes judges from other public officials – and what makes their election problematic – is that the task of judging requires professionals with a distinctive expertise. One does not choose who should be a surgeon or an auto mechanic by popular vote, because ordinary people lack the knowledge necessary to establish the qualifications for these positions or assess adequately the competence of those seeking to operate on people or on cars. Similarly, one should not have ordinary citizens elect judges, because they lack essential knowledge about the judicial process and about the law. More specifically, those selecting judges need to have knowledge of the judicial process and of the responsibilities of the judge within that process, because only then would they be able to assess whether a prospective judge has the appropriate knowledge, temperament, and other qualities essential in a judge. As Charles Geyh forcefully put it,

It is one thing to expect voters with no training in the law to decide whether the policies favored by senators and governors (who may

cial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy, 74 MO. L. REV. 635 (2009).

80. Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 203, 207 (2007).

81. Yet as Charles Geyh observes,

If we make voters go to the trouble of deciding whether a judge should remain in office, it is fatuous to suppose that they can be persuaded to bracket out their views on the merits of the judge’s most important decisions and cast their ballots on the basis of an arid assessment of the incumbent’s general fitness.

Geyh, *supra* note 22, at 62.

82. *Id.* at 59.

not be lawyers either) coincide with their own positions, and quite another to expect them to decide whether the rulings of judges coincide with the law.⁸³

Three comments should be made about this argument. First, in principle the argument extends to all judicial elections. It is hard to see why retention elections are any more defensible than other judicial elections, which may be why such elections were, from the outset, a concession to political realities rather than a fundamental feature of merit selection. Second, this lack of judgment on the part of the public is irremediable: it derives from an absence of the professional expertise that comes from legal training rather than from some lack of information that might be remedied by providing more. Third, as the quote from Geyh makes clear, the argument rests on the assertion that judicial elections are different from other elections. Whereas the limited information possessed by voters in presidential, congressional, or mayoral elections does not exclude them from choosing who should occupy those high offices, it does justify excluding them from electing judges. Yet why the argument is not, in principle, an argument against all elections remains unclear. There may be a specialized expertise associated with offices other than that of judge.

Be that as it may, proponents of retention elections insist that voters should decide based on “process-based criteria” rather than on the substance of judicial rulings. Indeed, this is how proponents of retention elections understand informed – or at least appropriate – voter choice. So judicial performance evaluations typically do not convey information about judges’ sentencing behavior or their frequency of reversal by appellate courts – matters in which voters might be intensely interested – and they certainly do not highlight controversial rulings that judges have made.

Yet even on a theoretical level, this is problematic. If fidelity to the law is the most important trait in a judge, then it should certainly be a criterion in deciding whether a judge should remain on the bench. And if voters do not assess whether judges have adhered to the rule of law, who will? Judicial disciplinary commissions are prohibited from inquiring into the substance of judicial rulings, and many judicial rulings – including controversial decisions – are not subject to appellate review. For example, when state supreme courts base their rulings on independent and adequate state grounds, as they have in cases involving same-sex marriage, public-school finance, the rights of defendants, and other issues, there is no mechanism other than the judicial election to assess whether or not those rulings represent faithful interpreta-

83. *Id.* See also Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL’Y 273 (2002).

tions of the law.⁸⁴ The choice seems to be between an assessment that may be done badly and no assessment at all.

A more radical argument is also worth mentioning. When judges divide on a legal question, each arguably giving his or her best interpretation of the law, it suggests that more than one possible interpretation of the law is defensible. As Richard A. Posner has noted, “Legalism does exist, and so not everything is permitted. But its kingdom has shrunk and greyed to the point where today it is largely limited to routine cases, and so a great deal is permitted to judges.”⁸⁵ This in turn leads to two questions: who should choose among these defensible interpretations, and on what basis should they make that choice? There is a vast jurisprudential literature addressing these questions that need not detain us here.⁸⁶ The argument for popular participation in judicial elections is that where more than one interpretation of the law is possible, the people should, by their vote, provide input as to which defensible interpretation they believe should be followed.⁸⁷ This popular vote assessing judges based on their rulings does not involve expert legal analysis, nor does it claim to do so. Rather, the idea is that legal experts have found that the law is unclear, and, in such circumstances, political rather than legal considerations, matters of popular preference or public utility rather than legal necessity, must decide. Proponents of judicial elections claim that where the law is unclear, community sentiment should prevail. The alternative, they claim, is not the rule of law – the law points in more than one direction – but the rule of judges.⁸⁸

There are also reasons to doubt the adequacy of judicial performance evaluations and similar tools as a guide for voter choice. At the outset, one must question whether these sources of information can be relied upon to be

84. On same-sex marriage, see, for example, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) and *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); on public-school finance, see, for example, *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) and *Edge-wood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); on the rights of defendants, see *State v. Boland*, 800 P.2d 1112 (Wash. 1990) (en banc), *State v. Lachat*, 343 S.E.2d 872 (N.C. 1986) and, more generally, BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* (1991).

85. RICHARD A. POSNER, *HOW JUDGES THINK* 1 (2008).

86. For a controversial excursion through this literature, see *id.*

87. For an elaborate treatment of the popular role in constitutional interpretation, albeit one that focuses only on the federal level, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

88. Even if one accepts the premise of this more radical argument, there are complications. Voters may remove judges based on their votes in cases in which the law was clear and was followed by the judges. This, it is argued, was the case for Justices Penny White and David Lanphier. See Traci V. Reid, *The Politicization of Judicial Retention Elections: The Defeat of Justices Lanphier and White*, in RESEARCH ON JUDICIAL SELECTION 1999, at 45-72 (American Judicature Society 1999). Thus, one is left to balance the disadvantages of such mistakes against the advantages of popular input.

impartial and reliable – are the lawyers who write these evaluations, for example, simply neutral participants in the selection process? Beyond that, one must also ask whether the information meant to replace party labels is readily available. In many states the pertinent information is not even generated. According to one 2004 study, only fifteen states published online voters' guides with information about judicial candidates.⁸⁹ And, even if it is generated, there is a real question as to whether the information reaches the voting public. Myriad studies have documented voter ignorance of candidates and issues in judicial elections. To cite one recent example, a study by the Justice at Stake Committee found that seventy-three percent of voters reported having only some or a little information about judicial candidates, while fourteen percent reported that they had none at all, and this national survey included voters in states with such guides.⁹⁰ Voters themselves have expressed their frustration at having insufficient information to make knowledgeable choices.⁹¹ Several studies suggest that voters' guides have failed to alleviate this problem. For example, "a study of the 1996 retention elections [in Alaska] revealed that only [fifty-eight percent] of Alaska voters were aware of the judicial performance evaluation reports made available by the Alaska Judicial Council."⁹²

89. Deborah Goldberg, *Interest Group Participation in Judicial Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS*, *supra* note 66, at 73, 89.

90. JUSTICE AT STAKE SURVEY, *supra* note 52, at 4.

91. In a 1995 poll, two-thirds of voters in Washington's non-partisan election said they "seldom had enough information to cast an informed vote." Cited in Brian F. Schaffner & Jennifer Segal Diascro, *Judicial Elections in the News*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS*, *supra* note 66, at 115, 116. In several studies, members of the public have reported having little information of any kind about the candidates or the major issues in the judicial campaign. For example, in a Wyoming retention election, more than half the voters admitted that they knew nothing at all about any of the candidates for retention. Kenyon N. Griffin & Michael J. Horan, *Patterns of Voting Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming*, 67 *JUDICATURE* 72 (1983). A New York survey found that less than four percent of voters in New York City and Buffalo could identify the candidate that had been nominated for the state's highest court. Allen T. Klots, *The Selection of Judges and the Short Ballot*, in *JUDICIAL SELECTION AND TENURE* 78 (Glenn R. Winters ed., rev. ed., 1973). And in a study of voters in judicial primary and general elections in Washington, Charles Sheldon and Nicholas Lovrich found that almost eighty percent of general election voters reported that they had either no information or insufficient information about the judicial candidates on the ballot. Charles H. Sheldon & Nicholas P. Lovrich, *Voter Knowledge, Behavior and Attitudes in Primary and General Judicial Elections*, 82 *JUDICATURE* 216, 217 tbl.1 (1999).

92. Tillman J. Finley, *Judicial Selection in Alaska: Justifications and Proposed Courses of Reform*, 20 *ALASKA L. REV.* 49, 61 (2003). For a discussion of earlier studies that largely, though not unanimously, indicate that most voters were unaware of bar polls, see Reddick, *supra* note 5, at 736-38.

Even if voters are aware of bar polls or state performance assessments, it is not clear that these materials guide voter choice in retention elections in the most important cases, namely in those elections in which there is an organized effort to defeat incumbents, and such guides are competing for attention with television ads attacking sitting judges. In part this relates to the tone of such assessments and the information they convey. In marked contrast to televised ads, these assessments do not deal with the substantive rulings of judges, and the blandness of judicial performance evaluations stands in marked contrast to the dramatic – albeit simplifying and sometimes misleading – claims of political commercials in judicial races. In part, too, political advertisements can influence voter choice precisely because voters typically lack a basis on which to evaluate their claims, and thus they are especially vulnerable to manipulative characterizations of a few judicial decisions by interest groups. Ironically, this may be particularly true in retention elections. Although party labels may offer an inexact indication of a judge's general orientation, they can serve as voting cues, enabling voters to base their decisions on the overall performance or expected performance of the judge. But when these cues are removed, voters are more “likely to cast ballots consistent with the balance of campaign messages they have received, giving a substantial advantage to the candidate best able to get his or her message out to voters.”⁹³ Thus, the absence of party labels may make judges particularly susceptible to “electoral challenges based on narrow issues that arouse particular interest groups rather than the broad quality of their performance on the bench.”⁹⁴

D. Retention Elections and Electoral Outcomes

Advocates of merit selection contend that retention elections provide for popular input while safeguarding the quality of the state bench. This is, in a sense, another version of the preceding argument but with an empirical thrust, namely, that in practice retention elections lead to the retention of highly qualified jurists and to the defeat of those who are unqualified. Therefore, those challenging this claim would seek to show (1) that retention elections result in the defeat of too many qualified incumbents (false negatives), (2) that retention elections result in the retention of too many unqualified incumbents (false positives), or (3) that retention elections result in excessive false

93. Charles H. Franklin, *Behavioral Factors Affecting Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS 152 (Stephen B. Burbank & Barry Friedman eds., 2002). One should be wary of overestimating the effectiveness of even television commercials in conveying information about judges' voting behavior to a largely inattentive public. See Baum & Klein, *supra* note 66, at 162; Lawrence Baum, *Judicial Election and Appointment at the State Level: Voters' Information in Judicial Elections: The 1986 Contests for the Ohio Supreme Court*, 77 KY. L.J. 645 (1989).

94. Franklin, *supra* note 93, at 154.

negatives and false positives. The advocacy literature on merit selection has focused almost exclusively on the defeat of qualified incumbents in retention elections. For example, numerous articles have decried the defeats of Justice Penny White and Justice David Lanphier, but none lament the retention of too many unqualified incumbents.⁹⁵ But electoral data suggest that unjustified defeats of incumbents may not be the most serious concern.

The data reveal that from the inception of the Missouri Plan the vast majority of judges seeking retention have kept their seats. For example, a study of retention elections from 1942-1978 found that only thirty-three judges were not retained in office.⁹⁶ A more recent survey of retention elections, for state supreme court justices from 1980-2000, revealed that less than two percent of candidates were defeated.⁹⁷ Indeed, the most comprehensive study of retention elections, examining trial and appellate court races in ten states from 1964-2006, found that only fifty-six of the 6,306 judges running in retention elections were not retained (less than one percent).⁹⁸ More than half of the defeated judges from 1964-2006 were in Illinois, which “requires a sixty percent affirmative vote for retention,” and the super-majority requirement has been crucial: only one of the judges who was not retained received a positive vote of less than fifty percent.⁹⁹

Retention races are rarely close: the mean yearly average positive vote has ranged from a low of sixty-nine percent in 1990 to a high of eighty-five percent in 1964 and has not fallen below seventy-five percent over the last decade.¹⁰⁰ This does not mean that voters are altogether indiscriminate in their voting. The defeat of one judge typically does not spell defeat for others running in the same jurisdiction. Still, absent specific negative information about a sitting judge, voters have tended to favor incumbents – the positive vote that judges received has been tied closely to voters’ overall level of trust in governmental institutions. Moreover, again absent specific negative information, voters tended not to differentiate among candidates for retention: there was little deviation in the positive vote for judges within a particular

95. See, e.g., Reid, *supra* note 88. See also Robert S. Thompson, *Judicial Retention Elections and the Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 207 (1988) (discussing 1986 judicial retention election which resulted in the removal of three California Supreme Court Justices from office).

96. Susan B. Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 210, 221-22 tbl.1 (1980).

97. Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS, *supra* note 66, at 165, 177, tbl.9.4.

98. Larry Aspin, *Judicial Retention Election Trends: 1964-2006*, 90 JUDICATURE 208, 210 (2007).

99. *Id.*

100. *Id.* at 209 tbl.1. See also Larry T. Aspin et al., *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1 (2000).

district in a particular year.¹⁰¹ Aspin concludes that “[v]oters still routinely retain almost all judges, which is what existing judicial performance evaluation systems usually recommend (e.g., Alaska, Arizona, and Colorado).”¹⁰²

These data are troubling. It is hard to believe that more than ninety-eight percent of all appellate judges consistently decide cases based on law rather than their personal attitudes and “demonstrate scholarly writing and academic talent, and the ability to write to develop a coherent body of law.”¹⁰³ It is likewise questionable that more than ninety-nine percent of trial judges consistently exhibit “[j]udicial temperament, . . . judicial management skills, [and] courtesy to litigants, counsel, and court personnel.”¹⁰⁴ It is far more likely that retention elections result in a large number of false positives, meaning that incumbents enjoy a level of success that far exceeds what would be expected if voters made informed decisions on all judges.

Several factors appear to be at work here. First, if voters tend to support incumbents in the absence of reasons not to, in most retention elections there is not enough information available about judicial performance to generate a negative vote.¹⁰⁵ That is not, of course, the same as saying that the incumbent who is running has performed well. Rather, it is merely saying that there is no evidence of poor performance or that the pertinent evidence has not reached the voters. As noted previously, voters often believe that they lack sufficient information to cast an informed vote in judicial elections.¹⁰⁶ In a contested election, one’s opponent has an interest in publicizing negative aspects of one’s performance in office. But, in a retention election, that incentive is lacking, and it is rare that others take up the responsibility of providing pertinent information. Newspapers rarely do so: a study of local newspaper coverage of fifty-one state supreme court races in sixteen states from 2000-2004 found that coverage of judicial elections was very limited, and the absence of a race with competing candidates reduced coverage even

101. *Id.* at 211.

102. *Id.* at 213. Note that performance evaluations overwhelmingly support retention, which raises questions about the rigor of their assessments.

103. A.B.A. REPORT, *supra* note 48, at 7. These criteria for retention are drawn from the Standards on State Judicial Selection approved by the American Bar Association in 2000. *Id.*

104. *Id.*

105. It has been suggested that voter scrutiny of political events more closely approximates that of a firefighter rather than a police officer. Instead of a constant surveillance, voters react only when an alarm indicates that something has gone wrong. *See* Nardulli, *supra* note 75, at 6-10. “Merit selection hopes to limit the pressure on incumbents to rule in particular ways by ensuring that there will be no candidate opposing the incumbent, and therefore less chance that the public will be alerted to those instances where the judge has flouted the popular will.” Dimino, *supra* note 22, at 805.

106. *See supra* note 90 and accompanying text.

more.¹⁰⁷ Bar associations may provide evaluations of judicial performance, but, even leaving aside concerns about the neutrality of such evaluations, there is little evidence that they reach their intended audience of voters or, if they do, that they affect electoral outcomes.¹⁰⁸ A few states have established retention evaluation programs to provide information to voters, but again there is little evidence that they have enabled voters to distinguish qualified from unqualified jurists.¹⁰⁹ As Charles Geyh, a leading opponent of electing judges, has summarized it,

Retention elections are designed to minimize the risk of non-retention, by stripping elections of features that might inspire voters to become interested enough to oust incumbents. Thus, there is no choice to make between competing candidates or viewpoints, no race to follow, no opportunity to pick a new winner, and no political party to support.¹¹⁰

And in the absence of these considerations, voters either fail to vote at all – the roll-off rate in retention elections averaged more than thirty percent from 1996-2006 – or tend to support incumbents.¹¹¹ As a result, unqualified incumbents have been retained, sometimes in the face of public opposition by the bar, presumably because reports of judicial misconduct or ineptitude had not filtered down to the voting public.¹¹² Only when organized groups have targeted particular judges and widely disseminated negative information about their performance in office have incumbents been defeated.¹¹³ Of course, this is the very politicization that proponents of merit selection abhor.

Certainly one might deny that the exceedingly high retention rate for judges poses a problem, given the care taken in their initial selection.¹¹⁴ However, this attributes an infallibility to judicial selection commissions, not to mention the governors who ultimately appoint, that is belied by available research, which shows that judges chosen via merit selection do not differ

107. Schaffner & Diascro, *supra* note 91, at 131-32. They specifically found that partisan races generated more coverage than non-partisan ones and contested races more than uncontested. *Id.* at 132.

108. Most, though not all, social science studies support this conclusion. For a summary and analysis of the existing studies, see Reddick, *supra* note 5, at 736-38.

109. Fewer than ten states have instituted such programs. For a listing, see METHODS OF JUDICIAL SELECTION: RETENTION EVALUATION PROGRAMS, *supra* note 79.

110. Geyh, *supra* note 22, at 55. See also Dimino, *supra* note 22, at 806-07.

111. Aspin, *supra* note 98, at 212-13.

112. William Jenkins, Jr., *Who Wins When No One Loses*, 61 JUDICATURE 79, 83-86 (1977).

113. Aspin, *supra* note 98, at 210.

114. See generally Laura Denvir Stith & Jeremy Root, *The Missouri Non-Partisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 744 (2009).

appreciably in their qualifications from those chosen by other selection systems.¹¹⁵ For example, judges chosen by merit selection do not attend better law schools; they do not have greater legal or judicial experience; and they are just as likely to have had partisan political careers.¹¹⁶ What seems more pertinent in the face of the overwhelming effect of incumbency is the shift in evaluation that occurs from initial selection to retention. The rationale underlying merit selection is that the judicial nominating commission chooses a slate of highly qualified candidates from which the governor can choose the most qualified person for the position.¹¹⁷ Thus, even if a candidate is well qualified to be a judge, this does not guarantee selection, because one is being compared with others who likewise are well qualified.¹¹⁸ But once the initial appointment is made, the grounds for evaluation shift dramatically. No longer is one compared to other qualified persons who might occupy the position. In retention elections the concern is not to ensure that the judicial office is held by the best possible person but rather that incumbents should retain their positions unless there is evidence of wrongdoing on their part. This is reflected in the recommendations of judicial evaluation commissions, which – as noted previously – overwhelmingly recommend retention. So voting in retention elections is concerned with rooting out incompetents and malefactors, not in choosing the most qualified person for the position. To borrow a word from the public administration literature, retention elections are concerned with “satisficing.”¹¹⁹

III. RETENTION ELECTIONS AND THE RULE OF LAW

Proponents of judicial independence argue that it is not an end in itself but rather a means to impartial judicial decision-making according to law. They insist that the politicization of judicial elections has the effect of undermining the rule of law, because if judges can be denied continuation in office

115. See Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228 (1987); Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges – Reconsidered*, 6 LAW & SOC'Y REV. 579 (1972); Philip L. DuBois, *The Influence of Selection System and Region on the Characteristics of a Trial Court Bench: The Case of California*, 8 JUST. SYS. J. 59 (1983); Herbert Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104 (1964).

116. See sources cited *supra* note 115.

117. See G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 FORDHAM URB. L.J. 291 (2007).

118. Data analyzing gubernatorial choices in merit-selection systems confirm that they overwhelmingly choose fellow partisans. See Aman McLeod, *The Party on the Bench: Party Politics and State High Court Appointments* (unpublished paper delivered at the 2009 Midwest Political Science Association meeting).

119. HERBERT A. SIMON, REASON IN HUMAN AFFAIRS 85 (1983).

based on their rulings, they may be tempted to mirror public sentiments rather than to make the difficult decisions that adherence to law sometimes requires. Certainly this is a danger, particularly because, as Justice Kaus's crocodile-in-the-bathtub metaphor reveals, judges may not even be aware that they are being influenced by a forthcoming election. Insofar as judges consciously decide to curry popular favor, they are betraying the public's trust and violating their oath of office. One can reasonably expect judges chosen via merit selection (or any other process) to have the strength of character to avoid doing so. This expectation was highlighted by the U.S. Supreme Court in *Bridges v. California*. Writing for the Court, Justice Hugo Black overturned a finding of contempt against a newspaper that had published material critical of a judge's behavior in a highly publicized case.¹²⁰ In rejecting the claim that such criticism interfered with the administration of justice, Black argued that to assume it would have a "substantial influence . . . would be to impute to judges a lack of firmness, wisdom, or honor – which we cannot accept as a major premise."¹²¹ One should expect similar fortitude in the judiciary of our day as well.

The other fear of proponents of judicial independence is that judges who adhere to what they believe to be the demands of the law will be removed from office, as happened for example to Justice Penny White.¹²² There is no doubt that this will sometimes occur in an elective system, including a system of retention elections. The aim of merit selection, however, is not to retain in office all judges who act in good faith and seek to adhere to the law. Like others who hold office at the discretion of the people, judges may be removed for good reasons or for bad, and non-retention is part of the risk of going before the public. To insist that judges should be reelected absent proof of wrongdoing is to claim that they have a right to their offices and that the burden lies on those who would remove them. But it is not clear why this should be so. Holding public office is employment at will.

If a qualified judge is removed from office in a retention election and the merit-selection process is working well, then his or her replacement would likewise be a qualified judge. The effect would be great on the particular judge but not, presumably, on the quality of justice within the court system. Although voters can remove a judge with whose interpretations they disagree, they cannot guarantee that the judge's replacement will share their understanding of the law. It might be argued that uncertainty of tenure under this sort of system would deter highly qualified persons from seeking judicial office. Although this may be true in individual instances, in general it seems unlikely. As noted previously, data on the background characteristics and qualifications of judges reveal that judges in merit-selection systems do not

120. *Bridges v. California*, 314 U.S. 252 (1941).

121. *Id.* at 273.

122. See Reid, *supra* note 88 (discussing the removal of Justice Penny White from office).

differ significantly from those chosen in contested elections, in which the danger of electoral defeat is greater.¹²³ Thus, the prospect of electoral defeat has not deterred qualified persons from seeking judicial office, and so the increasing (although still slim) prospect of defeat in retention elections is unlikely to have that effect. Moreover, if one looks beyond the judiciary, one finds that, in a competitive economy, persons who act in good faith and give their best efforts may well find that their positions disappear or that their services are terminated. This does not deter people from seeking rewarding, even if risky, positions.

IV. CONCLUSION

Retention elections represent an uneasy compromise between contested elections and the elimination of the populace from direct participation in the process of judicial selection. When retention elections were first proposed, they promised a way to eliminate the control over judicial selection by party leaders without sacrificing popular input. But currently the threat of politicization no longer comes from party leaders, and retention elections seem less effective as a mechanism for shielding judges from today's political pressures. Indeed, there seems to be a convergence among the systems of judicial elections. Some retention elections have exhibited the same interest-group involvement, the same scramble for campaign funds, and the same negative campaigning as other judicial elections. They have neither encouraged more informed choice on the part of voters, nor have they ensured a more qualified judiciary. In fact, it is not clear that they have promoted greater respect for the judiciary or for the rule of law.

If retention elections no longer serve the purposes for which they were created, as this Article argues, then the obvious question is: what next? One might choose to embrace judicial elections, with all their faults, as a way to promote accountability to the public. Alternatively, one might choose to emulate the federal model, removing the populace altogether from the selection process and granting tenure during good behavior or at least to a specified age in order to maximize judicial independence. One might choose to have judges – or at least state supreme court justices – serve a single, non-renewable term, as the members of European constitutional courts do, in order to avoid having judges' rulings influenced by the hope of reelection or reappointment.¹²⁴ Or one might explore some other alternative. But merit selection with retention elections does not solve the problems of politicization and the loss of public confidence in the judiciary that have arisen in the late twentieth and early twenty-first centuries. This is hardly surprising: reforms

123. See *supra* notes 115-16 and accompanying text.

124. For discussion of this alternative, see G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1465-66 (2003).

have a limited shelf life. We need new solutions to the problems currently confronting state courts.