

It's Not Who Hires You but Who Can Fire You: The Case Against Retention Elections

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Since Republican Party of Minnesota v. White was decided by the Supreme Court, “merit selection” plans have been the favored method for judicial election reform over non-partisan elections. This Note will offer a survey of the reform methods and examine their flaws — specifically, the assumption that retention elections are less of a threat to judicial impartiality than elections to fill vacancies. This Note proposes that states that wish to retain some public control over the judiciary should abolish retention elections, while preserving elections to fill judicial vacancies. The theory that the method of judicial selection is more important than judicial retention methods in maintaining an impartial and qualified judiciary is not supported by evidence and should be discarded.

I. INTRODUCTION

Fierce debate has existed over the merits of electing judges since Georgia first started judicial elections in 1812,¹ and the controversy was most recently rekindled by Justice Sandra Day O'Connor's speeches on the issue following her retirement from the United States Supreme Court.² Reformers have often advo-

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1. Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 310 (2003).

2. Mark Cohen, *Justice O'Connor Stumps for Judicial Election Reform*, MINN. LAW. (Sept. 10, 2010), <http://minnlawyer.com/minnlawyerblog/2010/09/10/justice-oconnor-stumps-for-judicial-election-reform-in-minn/>.

cated moving fully to the federal model, in which judges are appointed for life by the executive, but have found that in many states it is not politically tenable to abolish judicial elections entirely. Therefore, the thrust of many reform efforts has been aimed at implementing systems that retain judicial elections in a limited role, such as non-partisan elections and merit selection plans. Merit selection plans generally involve the screening of potential judges by a commission and the appointment by the governor of one of the approved judges. These judges will then periodically face retention elections — where voters either allow them to retain their seats or remove them, but do not have the option of electing someone else in their stead.

This Note argues that the method by which judges are retained rather than elected has the greatest effect on judicial independence and impartiality. There is not a significant difference between the measurable qualifications of judges chosen through merit selection and judges elected in partisan or non-partisan elections, a significant rationale for the system,³ but the particulars of the method of judicial retention used do have a significant effect on the actions of sitting judges.⁴

This Note will discuss the reform efforts and debate surrounding the election of judges. Part II introduces *Republican Party of Minnesota v. White* and provides a history of judicial elections. Part III focuses on the arguments made for three common methods of judicial elections in the United States, using the various opinions in *Republican Party of Minnesota v. White* that advocate for each: Justice Antonin Scalia's defense of partisan judicial elections; Justice John Paul Stevens's and Justice Ruth Bader Ginsburg's arguments in favor of non-partisan judicial elections; and Justice O'Connor's arguments against judicial elections in general and her suggestion that states implement merit selection plans. Part IV demonstrates that these reform efforts have not been successful because they all require judges to be subject to periodic retention elections. As this Note will argue, retention elections are a greater threat to judicial independence than any other form of judicial elections. Finally, Part V recommends that

3. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 316–17 (2003).

4. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004).

states that demand some form of judicial elections abolish retention elections and instead institute selection elections⁵ in order to create a more impartial and independent judiciary.

II. THE HISTORY OF JUDICIAL ELECTIONS AND AN INTRODUCTION TO *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

The issue of judicial selection and retention has been a topic of debate since the American colonial era. The Declaration of Independence declared judicial independence as a founding principle of the nation and justified independence, in part, by accusing the King of making “Judges dependent on his Will alone, for the Tenure of their Offices.”⁶ During the debate over ratification of the Constitution, Alexander Hamilton in *Federalist 78* argued that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.”⁷ Since Georgia became the first state to use elections to select judges in 1812,⁸ and as that method of judicial selection became increasingly popular at the state level throughout the era of Jacksonian politics,⁹ the debate over the proper method of selecting and retaining judges has continued.

Currently, three types of elections are typically used. First, there are partisan elections, where multiple candidates for the same post appear on the ballot, with their party affiliation noted.¹⁰ Second, there are non-partisan elections, where multiple candidates appear on the ballot but without their party affiliation noted.¹¹ Finally, there are retention elections, where only the incumbent appears on the ballot and the choices are to retain or remove him or her. Some states use different procedures for filling an open judicial slot and retaining or removing a sitting

5. A “selection election” is a term I have used to indicate an election where an empty vacancy is filled by candidates running for the position.

6. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

7. THE FEDERALIST NO. 78 (Alexander Hamilton).

8. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 715 (1995).

9. *Id.* at 716.

10. *Fact Sheet on Judicial Selection Methods in the States*, A.B.A [hereinafter *Fact Sheet*], http://www.abanet.org/leadership/fact_sheet.pdf (last visited Dec. 30, 2010).

11. *Id.*

judge. For example, Pennsylvania installs judges with a partisan election, then subjects them to retention elections.¹² In Missouri, judges are initially appointed by the governor but are then subject to retention elections.¹³ In states with no judicial elections, judges are retained through a re-nomination process or are given lifetime tenure.¹⁴

The current methods of judicial selection have been evaluated by three opinions in *Republican Party of Minnesota v. White*.¹⁵ In *White*, the Court invalidated a measure, known as the “announce clause,” designed to ensure the integrity of Minnesota’s non-partisan elections by barring specified inappropriate topics.¹⁶ The announce clause prohibited candidates from discussing their views on disputed legal issues that might come before the Minnesota court for which they were running; this silence would help candidates avoid an appearance of partiality.¹⁷ By striking down Minnesota’s restriction on the speech of judicial candidates during an election, *White* removed a mandate that judicial elections only focus on appropriate topics.¹⁸ As a result, states with judicial elections can choose only between relatively unrestricted elections or “merit selection” plans, as *White* bars the sort of campaign restrictions that provided a meaningful distinction between partisan and non-partisan elections.¹⁹

Most states have used one of three methods of judicial selection — partisan elections, non-partisan elections, and executive appointment — combined with one of three models of retention —

12. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 83 tble.1.91 (Kathleen Maguire ed.) [hereinafter SOURCEBOOK], available at <http://www.albany.edu/sourcebook/pdf/t191.pdf> (last visited Dec. 30, 2010).

13. The Missouri Plan is the preferred model for proponents of merit-selection systems in other states. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 791–92 (2002) (O’Connor, J., concurring).

14. *Fact Sheet*, supra note 10.

15. 536 U.S. 765 (2002).

16. *Id.* at 768. The announce clause is part of the Code of Judicial Conduct adopted by the Minnesota Supreme Court. *Id.* The clause at issue is contained within MINN. CODE OF JUDICIAL CONDUCT Canon 5, § A(3)(d)(i), held unconstitutional by *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

17. *White*, 536 U.S. at 775.

18. See *id.* at 781.

19. It should be noted there is considerable debate over whether merit selection plans actually influence the quality of judges selected; thus, the name may be a misnomer. At the very least, it should not be taken as a given that so-called merit selection plans appoint better judges. See Hall, supra note 3, at 316.

contested elections, uncontested retention elections, and lifetime tenure.²⁰ The debate has focused on methods of judicial selection rather than retention. Likewise, each opinion in *White*²¹ supports a different view of the proper method of judicial selection.

Justice Scalia's majority opinion held that the Minnesota rule violated the First Amendment and implicitly supported the partisan model of elections by asserting that Minnesota had kept "the principle of elections in place while preventing candidates from discussing what the elections are about."²² In response, Justices Stevens and Ginsburg each filed dissenting opinions, both favoring non-partisan elections, in which there is an effort to shape the election to fit the character of the judicial role.²³ Justice Stevens charged that the majority opinion "obscure[d] the fundamental distinction between campaigns for the judiciary and the political branches,"²⁴ while Justice Ginsburg argued that "[t]he announce clause is thus more tightly bounded, and campaigns conducted under that provision more robust, than the Court acknowledges."²⁵ In contrast, Justice O'Connor's concurrence scarcely discussed the case before the Court; instead, she wrote "to express . . . concerns about judicial elections generally"²⁶ and to highlight the benefits of merit selection accompanied by retention elections, especially as formulated by Missouri in its eponymous Plan.²⁷ As set forth by the Justices, these three positions dominate the debate over judicial selection, as there remain only three states remaining that follow the federal model of a completely appointed

20. SOURCEBOOK, *supra* note 12.

21. This Note's analysis excludes Justice Kennedy's concurring opinion, which concerns whether compelling state interests ought to be able to override First Amendment concerns and is not relevant to this Note. *White*, 536 U.S. at 792–96 (Kennedy, J., concurring).

22. *Id.* at 787–88 (majority opinion).

23. *Id.* at 808 (Ginsburg, J., dissenting); *id.* at 797 (Stevens, J., dissenting).

24. *Id.* at 797 (Stevens, J., dissenting).

25. *Id.* at 810 (Ginsburg, J., dissenting).

26. *Id.* at 788 (O'Connor, J., concurring).

27. *Id.* at 791–92. The Missouri plan is the most common form of merit selection, in which a nominating commission selects a roster of three possible candidates for any judicial vacancy; the governor selects a judge from this group to fill the vacancy. Office of the State Courts Administrator, *Missouri Nonpartisan Court Plan*, YOUR MO. CTS., <http://www.courts.mo.gov/page.jsp?id=297> (last visited March 19, 2011). Once appointed, judges face periodic retention elections, where they will be removed if they fail to garner the support of a majority of votes cast. *Id.*

judiciary with life tenure.²⁸ The next part of this Note will use these opinions to illustrate the arguments for the current models of judicial election.

III. THE CASE FOR THE CURRENT MODELS

This section will lay out the arguments in favor of judicial elections. Two arguments are commonly made in favor of judicial elections: policy arguments and democratic principle arguments. First, policy arguments state that fair trials and enforcement of the law can be better implemented with judicial elections than with appointments.²⁹ When looking at these policy arguments, two major arguments exist. The first of these arguments is that the process of electing judges lends a greater degree of legitimacy to the judicial system, enhancing its power and prestige.³⁰ The second is that periodic reelection of judges gives them a greater incentive to “take care that their opinions reflect justice and right”³¹ and to ensure the efficient disposition of cases. Periodic reelection also allows for the removal of judges who are unfit for office due to minor misconduct or incompetence that does not rise to the level of an impeachable offense.

Second, democratic principle arguments indicate that elections are a necessary component of a democratic system of government, regardless of their consequences.³² A judge can wield tremendous power and act in ways that can block the will of the majority for policy reasons; thus requiring that judges be answerable to the people.³³ The democratic principle arguments address the fundamental tension in a constitutional democracy between the democratic principle and the constitutional principle. The democratic principle declares that the majority ought to be able to

28. These states are Massachusetts, New Hampshire, and Rhode Island. SOURCEBOOK, *supra* note 12. Massachusetts and New Hampshire mandate retirement at age 70 and so do not follow the federal model exactly. *Id.* Rhode Island retains lifetime tenure. *Id.*

29. Dimino, *supra* note 1, at 311–12.

30. This position is suggested as one of the prime motivations behind the initial acceptance of judicial elections in the 1800s. *Id.*

31. *Id.* at 312 (internal quotation marks omitted).

32. *Id.*

33. Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 10–11 (1995).

enact its will, and questions the “legitimacy of [judicial] power over the majority.”³⁴ In contrast, the constitutional principle places some subjects outside the reach of the majority and favors judicial independence as a “necessary means [for] the protection of constitutional rights.”³⁵ Both of these policy and principle arguments for judicial elections are advanced by Justice Scalia, as elaborated on in the following section.

A. JUSTICE SCALIA’S MAJORITY OPINION IN *WHITE* AND THE CASE FOR PARTISAN ELECTIONS

Justice Scalia’s majority opinion in *White* is supportive of the legitimacy of judicial elections in general, and partisan judicial elections in particular. Justice Scalia’s opinion emphasized that those statements barred under the announce clause are “what the elections are about”³⁶ and thereby implicitly argued that judicial elections should be about the values and ideology of the judges, not merely their qualifications and judicial temperament. Thus his opinion reflected the notion that “judicial decisions have policy consequences, and . . . the decisions are often the result of judges’ value judgments.”³⁷ Likewise, Justice Scalia wrote elsewhere, “[T]he people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*,”³⁸ arguing that such policy-making should be dictated not by the values of the judges, but by the values of the people. Additionally, consistent with Justice Scalia’s position, it has been argued that since judges have, legitimately or illegitimately, become arbiters of important policy issues it is “unreasonable” to demand that the public “accept the decisions of courts without attempting to correct wrong-headed decisions through the ballot box.”³⁹

34. Croley, *supra* note 8, at 710.

35. Croley, *supra* note 8, at 707.

36. *White*, 536 U.S. at 788 (majority opinion).

37. Dimino, *supra* note 1, at 378.

38. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 1001 (1992) (Scalia, J., concurring in part and dissenting in part). Scalia argues judges should implement no values but those in the Constitution, but if it is accepted that judges will impose values in their judgments, he argues that at least those values should be the people’s. *Id.*

39. Dimino, *supra* note 1, at 378.

The argument for partisan elections follows this logic closely. Partisan elections offer the best opportunity for the public to select judges with the values it wants in the judiciary. As party affiliation is “an important proxy for determining whether a judge’s decisions are likely to reflect the preferences of the voter,”⁴⁰ partisan elections more effectively allow the public to influence the judiciary. Studies have demonstrated that when voters in non-partisan elections are provided with the political party affiliation of judicial candidates, there is an increased likelihood that voters will have an opinion on a particular judge.⁴¹

The crux of *White* was whether the infringement of speech, placed on judicial candidates by the announce clause, was justified by the state’s interest in judicial impartiality under strict scrutiny review.⁴² Accordingly, Justice Scalia’s majority opinion in *White* hinged upon an analysis of judicial impartiality.⁴³ This analysis rested on Justice Scalia’s three definitions of judicial impartiality: first, that a judge holds no bias against a particular party (“party impartiality”);⁴⁴ second, that a judge holds no preconception against or in favor of a particular legal view (“issue impartiality”);⁴⁵ and third, that a judge retains open-mindedness (“open-mindedness impartiality”).⁴⁶ Justice Scalia addressed each of these forms of impartiality, then held that none justified the announce clause.

First, Justice Scalia found that the announce clause was not “narrowly tailored to serve impartiality (or the appearance of impartiality),” when defined as party impartiality, because “it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*.”⁴⁷ Party impartiality is predicated on the inference that a judge announcing his legal views is not indicating a bias against a particular party or class of

40. Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803, 805 (2004).

41. Peverill Squire & Eric R.A.N. Smith, *The Effect of Partisan Information on Voters in Nonpartisan Elections*, 50 J. POL. 169, 170 (1988).

42. *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002).

43. While both Justice O’Connor and Justice Kennedy wrote concurrences, both joined Justice Scalia’s opinion, helping to make it the majority opinion. *White*, 536 U.S. 765.

44. *Id.* at 775–76.

45. *Id.* at 777.

46. *Id.* at 778.

47. *Id.* at 776.

parties, but against an argument.⁴⁸ As Justice Scalia argues, “[a]ny party taking that position is just as likely to lose.”⁴⁹ Essentially, this argument maintains that in many cases, the law is clearly on the side of one of the parties, and the party taking the side against precedent is extremely likely to lose.⁵⁰ However, this likelihood does not create a biased court, and so a judge having a particular legal view does not, by itself, create a violation of impartiality.

Second, Justice Scalia argued that impartiality as defined as lacking preconceived legal views is impossible and undesirable, as a judge who has no views on the law is by definition unqualified, and therefore can neither serve as a compelling state interest nor justify the announce clause.⁵¹ Finally, Justice Scalia held that the last definition of impartiality, that a judge retain open-mindedness, could not justify the announce clause because it was too underinclusive to survive strict scrutiny.⁵² Since the clause did not survive scrutiny under any of the definitions of impartiality, Justice Scalia, writing for the Court, held that the clause was barred by the First Amendment.⁵³

B. JUSTICES STEVENS AND GINSBURG, AND THE CASE FOR NON-PARTISAN ELECTIONS

The case against partisan judicial elections in *White* is made in the dissents of Justices Stevens and Ginsburg to Justice Scalia’s majority opinion. Their dissenting opinions both attack the majority’s analysis of judicial impartiality and the First Amendment, and in their reasoning strongly suggest that only non-partisan judicial elections are appropriate. Justice Stevens found the Court’s reasoning regarding judicial impartiality to be “even

48. *Id.* at 777.

49. *Id.*

50. *Id.* at 776.

51. *Id.* at 777–78 (“Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.” *Id.* at 778 (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (mem.)) (internal quotation marks omitted)).

52. *Id.* at 779 (“[S]tatements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible.”).

53. *Id.* at 788.

more troubling than its holding.”⁵⁴ Justice Stevens focused on two main issues: first, Justice Scalia’s analysis of “the importance of judicial independence and impartiality”; and second, the majority opinion’s assumption that judicial candidates should have the same First Amendment protections that other candidates for elected office possess.⁵⁵ Justice Ginsburg’s dissent argued against what she termed the “an election is an election” approach of Justice Scalia.⁵⁶

In Justice Stevens’s dissent, the Justice argued that certain types of statements by judges can indicate that they will lack party impartiality in their courtrooms, without seeming to pledge a bias against a particular party or group. Specifically, he pointed to the example of a judge stressing his or her “unbroken record of affirming convictions for rape,” which implies that the judge will be biased in favor of particular parties — the prosecutors — and against others — the defendants.⁵⁷ Justice Stevens also strongly disagreed with Justice Scalia’s assertion that announcing a judge’s view on the law offended no notion of impartiality and does not impinge upon a compelling state interest.⁵⁸

Justice Ginsburg attacked Justice Scalia’s reasoning on why impartiality as “open-mindedness” is not served by the announce clause. Justice Scalia had argued that because campaign statements are an “infinitesimal portion” of the statements on legal positions judges or potential judges make, the announce clause is vastly underinclusive.⁵⁹ Justice Scalia had further dismissed the argument that statements during a campaign “pose a special threat to open-mindedness,” arguing this stance might only be plausible were such statements “campaign promises.”⁶⁰ Justice Ginsburg, however, argued that during a campaign the “*quid pro quo* between candidate and voter” is just as understood when phrased in terms of a campaign promise as in terms of a general observation on the law.⁶¹ The distinction between a potential candidate arguing that the Constitution allows the legislature to

54. *Id.* at 797 (Stevens, J., dissenting).

55. *Id.*

56. *Id.* at 805 (Ginsburg, J., dissenting).

57. *Id.* at 800–01 (Stevens, J., dissenting).

58. *Id.* at 801–03.

59. *Id.* at 779 (majority opinion).

60. *Id.* at 780.

61. *Id.* at 820 (Ginsburg, J., dissenting).

prohibit same-sex marriages in a newspaper editorial outside of campaign season and stating such views “behind a podium [to] a throng of cheering supporters” is significant.⁶²

Justice Ginsburg also addressed Justice Scalia’s argument that because a judge or potential judge may say whatever he wished “up until the very day before he declares himself a candidate, and . . . after he is elected,” the announce clause is underinclusive.⁶³ Justice Ginsburg responded that by reversing himself or herself on a view expressed during a campaign, a judge “ris[ks] being assailed as a dissembler.”⁶⁴ This risk “works a feat of alchemy: transubstantiating electoral pressure into skewed legal rulings.”⁶⁵ A judge elected after stating certain views publicly during the course of the campaign has committed himself to those views in the public’s eye. This commitment seriously weakens the appearance of impartiality that even Justice Scalia’s opinion recognizes as a compelling state interest while holding it is insufficiently served by the announce clause.⁶⁶ Even if all judges who made such statements felt free to go back on their earlier views, it would still create the appearance of partiality to the general public.⁶⁷ The appearance of partiality towards the views expressed by winning candidates would inevitably create the impression that cases were being decided with one eye on the popular sentiment, rather than with only the law at issue.⁶⁸

The general principle behind the creation of non-partisan elections is to reconcile the desire for judicial elections with the principle that “it is the business of judges to be indifferent to unpopularity.”⁶⁹ Non-partisan elections are an attempt to ameliorate the threat that rights will be subject to the whim of the majority. The hope is that with the removal of party labels, “judicial elections will center fully upon the professional qualifications of

62. *Id.*

63. *Id.* 779–80 (majority opinion).

64. *Id.* at 816 (Ginsburg, J., dissenting) (quoting *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 878 (8th Cir.), *cert. granted in part*, 534 U.S. 1054 (2001), *rev’d sub nom. Republic Party of Minn. v. White*, 536 U.S. 765 (2002)).

65. Gastón de los Reyes, Case Comment, *Appearance of Impartiality in the Republican Party v. White Court’s Opinion*, 83 B.U. L. REV. 465, 481 (2003).

66. *White*, 536 U.S. at 777 n.7.

67. *Id.* at 800–02 (Stevens, J., dissenting).

68. *Id.*

69. *Id.* at 798.

judges.”⁷⁰ While partisan judicial elections, conducted in the same manner as a traditional election, will tend to elect judges with political skills rather than judicial skills, non-partisan elections may be able to elect or select better-qualified judges because the race will focus only on the qualifications of the judges themselves.

Non-partisan elections suffer from the obvious disadvantage that candidates are still free to turn elections into explicitly partisan ones, merely by announcing their views on legal issues that may come before their court. This would eliminate the theoretical advantage over partisan elections, where the election would be a campaign on judicial merit as opposed to a campaign on policy and values. In order to protect against this conversion of non-partisan elections, prohibitions against this type of campaigning have been a part of the American Bar Association’s judicial code of ethics since 1924 and were eventually enacted into law in several states.⁷¹

C. JUSTICE O’CONNOR’S CONCURRENCE AND THE CASE FOR MERIT SELECTION

Justice O’Connor’s concurring opinion is remarkable for what it does not contain — any serious discussion of the constitutionality of the announce clause. Instead, she chooses to offer her views on the matter without linking them to the case before the court. Justice O’Connor blames judicial elections for the erosion of judicial impartiality due to two major flaws with any system of judicial election. First, if judges are subject to periodic reelection, they “cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.”⁷² Second, judicial elections require judges to raise money for campaigns.⁷³ Such fundraising inevitably diminishes the public perception of judicial impartiality.⁷⁴

Justice O’Connor suggests that merit selection reduces threats to judicial impartiality in two ways, even though it “does not

70. Hall, *supra* note 3, at 316.

71. Dimino, *supra* note 1, at 314.

72. *White*, 536 U.S. at 789 (O’Connor J., concurring).

73. *Id.*

74. *Id.* at 790.

eliminate all popular pressures on judges.”⁷⁵ First, all candidates are screened by a non-partisan nominating commission, which creates a pool of qualified candidates from whom the legislature or governor must choose.⁷⁶ Second, it replaces contested elections with uncontested retention elections in an effort to depoliticize the retention process.⁷⁷

The theory is that a nominating committee can examine candidates’ credentials better than voters, with the result being better qualified judges.⁷⁸ While ideology likely still plays a role in which approved nominees are ultimately appointed, at least in theory, the quality of judges selected will improve.⁷⁹ There is, however, no data to substantiate this claim, and studies have shown no discernable difference in the professional credentials of judges appointed under different methods of judicial selection.⁸⁰ However, there may be some important differences: in Florida, where thanks to a quirk in the law some judges reach the bench through elections while some are initially appointed, the only judges removed from the bench for misconduct between 1966 and 1995 were initially elected.⁸¹

Retention elections under merit selection are designed to avoid the pitfalls of non-partisan contested elections — the presence of a challenger with a vested interest in the defeat of the sitting judge who benefits from the politicization of the race. The guiding principle behind retention elections is to allow judicial elections while structuring the elections so that judges are “insulate[d] . . . from politics and public appeals.”⁸² The goal is to minimize the possibility of the election becoming a partisan election where voters base their decisions on factors that would weaken the independence and fairness of the judiciary.

Opponents of retention elections attack them with two different arguments. The first is that retention elections are essential-

75. *Id.* at 791.

76. *Id.*

77. *Id.*; Traciell V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68 (1999).

78. Hall, *supra* note 3, at 316.

79. *Id.*

80. *Id.* at 316–17.

81. Webster, *supra* note 33, at 27–28.

82. Reid, *supra* note 77, at 69.

ly a “sham.”⁸³ This argument agrees with reformers that retention elections successfully eliminate any real public control over the judiciary; but unlike reformers, opponents argue that it is this removal of public control that make retention elections unacceptable. In addition, retention elections are attacked as undemocratic and just as potentially partisan as any other form of judicial election.⁸⁴ Those arguments do not contend that retention elections are a sham, but instead that such elections fail as a reform effort and are no better than the partisan or non-partisan elections they replace. The following section will analyze these arguments.

IV. THE FAILURES OF CURRENT REFORM MODELS

A. NON-PARTISAN ELECTIONS

The pitfall of non-partisan elections is that voters often lack sufficient information about the qualifications of the candidates, thereby creating a strong risk of random, idiosyncratic, or meaningless results.⁸⁵ Possibly worse, voters might simply pick judges by using a candidate’s gender, ethnicity, or other personal characteristics as a proxy for the candidate’s ideology.⁸⁶ One study has shown that in the non-partisan judicial elections in Dade County, Florida, a candidate’s position on the ballot was a stronger prediction of electoral success than newspaper endorsements, incumbency, or the candidate’s bar poll rating.⁸⁷ The only factor with a stronger correlation to electoral success was the number of other candidates on the ballot.⁸⁸ Even if sufficient information is conveyed to voters for them to make an informed choice, non-partisan elections cannot be free of partisanship if the candidates are free to make their political affiliation known. For

83. Dimino, *supra* note 40, at 807.

84. Reid, *supra* note 77, at 77.

85. Dimino, *supra* note,40 at 805.

86. *Id.* While governors might possess a similar disdain for their judicial appointments, they have the ability to delegate the process to individuals with interest and may be held accountable in the next election for a particularly poor pick.

87. Mary L. Volcansek, *An Exploration of the Judicial Election Process*, 34 W. POL. Q. 572, 575 (1981). I have been unable to find a study that analyzed whether the judge’s position on the list of candidates corresponds in any way to his or her competence, but I presume the reader is willing to accept the assumption it does not on faith.

88. *Id.*

this reason, Justices Stevens and Ginsburg regarded the court's striking down of the announce clause as an assault on an integral part of a judicial election thus creating "the false impression that the standards for the election of political candidates apply equally to candidates for judicial office."⁸⁹

B. MERIT SELECTION AND RETENTION ELECTIONS

The common solution to the problems of partisan elections is non-partisan elections or merit selection; yet neither is satisfactory. The retention elections that are part of merit selection have the same potential for partisanship as other forms of judicial elections. The effort to reduce the public input to "acceptable" levels, or the "effort to marginalize the public," as it has been termed, has had little effect on the dangers of judicial elections.⁹⁰ In practice, studies have shown that non-partisan elections — both contested selection and retention — "are easily turned into partisan contests" with only a small amount of partisan information.⁹¹ Additionally judicial elections have moved closer to normal elections and are losing their historic niche as a unique type of election.⁹² The status of retention and non-partisan elections as the least offensive type of election is becoming less and less valuable.⁹³ There is also a disturbingly low level of public understanding of what retention elections even are: one study in Florida showed that forty percent of poll respondents thought retention elections occurred because a judge had done something wrong.⁹⁴

There are several flaws of partisan elections that merit selection is intended to ameliorate, and merit selection's usefulness depends on its ability to address them. One is the effect elections have on judicial impartiality. As mentioned before, Justice Scalia's conception of "impartiality" — not favoring any particular party in a proceeding before the court — is not generally chal-

89. *Republican Party of Minn. v. White*, 536 U.S. 765, 802 (2002) (Stevens, J., dissenting).

90. Dimino, *supra* note 40, at 808.

91. Squire & Smith, *supra* note 41, at 169.

92. David Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 269 (2008).

93. *See id.* at 309–10.

94. Webster, *supra* note 33, at 35.

lenged by judicial elections and judicial campaigning.⁹⁵ General pronouncements of how judicial candidates will decide cases, or their views on legal issues, do not affect this conception of impartiality. However, Justice Scalia's argument misses the most insidious undermining of judicial impartiality: promises to be "tough on crime." A case in point is the 1982 campaign of then-Professor Ramsey for a judgeship on the Alameda County Superior Court, who campaigned on the argument that he was "30% tougher on average in sentencing rapists" than other state judges.⁹⁶ Statements such as these cannot but help to convince an accused rapist who will later go before this judge that he or she will not receive a fair trial.

Furthermore, the concept of a fair trial is potentially at odds with the idea of an elected judge who is "faithful to popular sentiment."⁹⁷ This tension is exacerbated by the fact that not everyone with an opinion on the case will read the actual opinion, setting out the judge's reasoning. Few judges would likely be willing to follow the lead of former Nebraska Justice Norman Krivosha, who stated that he was "eager to respond when the public complained about judges 'getting crooks off on technicalities,'" because those technicalities "were [portions of] the Constitution."⁹⁸ Rather than being rewarded for adherence to the law, "[a] 'just' judge is very likely to be politically vulnerable for being legally right."⁹⁹ The judiciary is forced to answer to a public that is not "qualified to assess the legal merits" of the decision¹⁰⁰ and who is unlikely to have done so.

The last justification for judicial elections — that the public must have some redress against wrongheaded decisions — is the

95. This statement assumes that the *Caperton* safety valve requiring recusal for judges who have been strongly supported by one party before the court is effective. See *infra* notes 127–128 and accompanying text. It is not yet clear, however, how broadly this case will be applied.

96. Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 80 (1985).

97. Bright & Keenan, *infra* note 130, at 813–14.

98. *Id.* at 792 n.168 (quoting Sheila MacManus, *Changes in Code of Judicial Conduct, Judicial Campaigns and Alcohol Abuse Among Topics Debated at 11th National Conference*, 72 JUDICATURE 185, 185 (1988)).

99. Dimino, *supra* note 1, at 330 (alteration in original) (quoting Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1031, 1043 (1997)) (internal quotation marks omitted).

100. Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 MO L. REV. 573, 587 (2009).

least convincing. The extreme difficulty of overturning a United States Supreme Court constitutional decision can give the impression it must be extremely difficult to overturn a decision of a state supreme court, but this may not be the case. In no state is it nearly as difficult to amend the state constitution as it is to amend the Federal Constitution — which requires a nation-wide effort. Many state constitutions are quite easy to amend: Alabama has added over 750 amendments to its constitution since 1901;¹⁰¹ California has added over 425 since 1879;¹⁰² Texas has added over 400 since 1876;¹⁰³ and Arkansas has added a paltry 87 since 1874.¹⁰⁴ In short, voters should be able to readily overturn unpopular decisions of their state supreme courts. Voters have more than enough access to the ballot box to reverse the consequences of state constitutional decisions.

One study from California showed that giving potential voters the name of the governor who appointed a particular judge increased the percentage of voters supporting that judge's removal by ten to sixteen percentage points.¹⁰⁵ It is not possible to prevent voters from acquiring this information by barring candidates or third parties from conducting partisan advertising, as such restrictions on third parties violate the First Amendment,¹⁰⁶ and restrictions on candidates are now mostly barred by the First Amendment under *White*. The failures of merit selection plans and non-partisan elections have been obscured by low public interest and knowledge about the issue.¹⁰⁷ It is likely that when a political group deems it advantageous to do so, it will be able to shatter the nominal safeguards of non-partisan and retention elections and leave them little different from partisan judicial elections.¹⁰⁸

101. See ALA. CONST.

102. See CAL. CONST.

103. See TEX. CONST.

104. See ARK. CONST.

105. Squire & Smith, *supra* note 41, at 172. Increases in voters supporting the retention of the judges also increased with the additional information, but only by one to five percentage points. *Id.*

106. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

107. Dimino, *supra* note 1, at 374–75.

108. See, e.g., A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

Retention elections have already become highly partisan with all the decried features of partisan elections.¹⁰⁹ They can be just as expensive and hard-fought as partisan elections; the most expensive judicial election on record was the 1986 retention election in California that resulted in the removal of three members of the state Supreme Court.¹¹⁰ They can also focus solely on unpopular opinions without detailed description of why they were legally wrong; such as when Tennessee Supreme Court Justice Penny White was removed in 1996 after a vitriolic campaign largely sparked by her ruling in one case, *State v. Odom*.¹¹¹ In *Odom*, she joined an opinion requiring a new sentencing for a defendant convicted of a heinous crime, based on several reversible errors in the previous sentencing.¹¹² This ruling touched off a political storm and led to a campaign for her ouster.¹¹³ The campaign against her was not based on the claim that she ought to be removed because of any lack of professional qualifications or any legal error in the decision, but on the grounds that she was “pro-criminal” and “anti-death penalty.”¹¹⁴

Retention elections may also disfavor incumbents. In a contested election, a challenger may be forced to explain how he or she would have ruled in a politically charged case, giving the incumbent judge a position to attack. In a retention election, no alternative need be presented, and the campaign likely will be dominated by the “manipulative characterizations of a few decisions by interest groups.”¹¹⁵ Such charges are extremely difficult to respond to in a politically effective way and any response may be precluded by judicial ethics codes that forbid discussing the disputed case, leaving incumbents unable to effectively counter the attacks.¹¹⁶

In addition, there are no filing deadlines to oppose a sitting judge like there are in partisan or non-partisan elections.¹¹⁷

109. See G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 612–13 (2009).

110. Dimino, *supra* note 40, at 808.

111. 928 S.W.2d 18 (Tenn. 1996); see generally Reid, *supra* note 77.

112. Reid, *supra* note 77, at 70.

113. *Id.*

114. *Id.* (internal quotation marks omitted).

115. Dimino, *supra* note 40, at 808.

116. Reid, *supra* note 77, at 72.

117. See Tarr, *supra* note 109, at 614.

Without a formal challenger, judges are vulnerable to surprise attacks in which campaigns to unseat them are announced only shortly before the election, giving the judge little time to effectively counter the attack and raise campaign funds.¹¹⁸ This problem was illustrated by the 1996 defeat of Nebraska Supreme Court Justice David Lanhier in a campaign announced only two months before his retention election.¹¹⁹ The more perverse result of a potential surprise challenger is that judges are forced to maintain constant “war chests” of campaign funds, solicit donations, and risk the appearance of bias even in the absence of a credible challenger.¹²⁰

In its most virulent form, judicial fundraising for campaigns can amount to institutionalized corruption of the judiciary.¹²¹ Even in a mild form, it almost inevitably creates the impression of such corruption, even where none may exist. As Justice O'Connor noted, the cost of judicial campaigns for state supreme courts has grown exponentially.¹²² Campaigns now will routinely spend over a million dollars, requiring extensive fundraising to mount a credible challenge or to maintain a seat.¹²³ The damage done to the judicial system by the need for a judge to engage in such fundraising is made considerably worse by the fact that lawyers appearing before them are the most common donors.¹²⁴ At the very least, lawyers giving money to judges creates the impression of decisions for sale.¹²⁵ In fact, studies have found a “direct correlation between the amount of money contributed and the court’s petition-acceptance rate.”¹²⁶

The concern over judicial fundraising biasing judges was addressed by the Supreme Court recently in *Caperton v. Massey*.¹²⁷ Justice Kennedy, writing for the Court, held that when someone

118. *Id.*

119. Reid, *supra* note 77, at 76.

120. Paul Carrington, *Judicial Independence and Democratic Accountability in the Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 112–13 (1998).

121. See, e.g., *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

122. 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, 278–79 (2002).

123. *Id.*

124. *Id.* at 279–81.

125. *Id.* at 281.

126. *Id.* at 279–80.

127. 129 S. Ct. 2252 (2009).

with “a personal stake” in a case had “a significant and disproportionate influence” in placing the judge on that case by “raising funds or directing the judge’s election campaign” while the case was “pending or imminent,” due process requires the judge’s recusal.¹²⁸ This ruling provides an important safety valve in states with election campaigns, allowing for a federal challenge to a judge’s refusal to recuse him or herself when he or she has seemingly been “bought” — and thus reducing the incentive to buy a judge in the first place. However, this safety valve only applies to extremely blatant cases of judge-buying. The court considered the facts in *Caperton* to be “extraordinary”¹²⁹ suggesting that the application of the case will be limited to rare circumstances.

Another significant crisis of legitimacy for judicial elections, one beyond the reach of the *Caperton* safety valve, comes in the interplay between politics and criminal trials. Areas of criminal procedure where judges decide whether to overturn convictions or whether to suppress evidence, and which carry the potential that guilty defendants may be released, may be most influenced by politics. A judge who sets aside a death penalty or overturns a conviction because of a procedural violation is likely to be painted as “soft on crime,” a label that may stick with a public who “unfamiliar with constitutional law, sees only the grieving mother and a picture of the innocent victim.”¹³⁰ Even Justice Scalia concedes that a judge ordering someone like Timothy McVeigh released would have a dramatic effect on a judge’s re-election chances, even if the judge’s reasoning was airtight and compelled by the law.¹³¹

This impact of politics on the judiciary is heightened in death penalty cases. A willingness to overturn death sentences or convictions in capital cases, regardless of the legal backing, is politically dangerous. As mentioned above, Justice Penny White of Tennessee was removed from the bench largely for overturning a single death sentence, leading to the charge she was “pro-

128. *Id.* at 2263–64.

129. *Id.* at 2265.

130. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 785 (1995).

131. *Republican Party of Minn. v. White*, 536 U.S. 765, 782 (2002).

criminal”;¹³² yet it is the removal of California Chief Justice Rose Bird and two associate justices that provides the most blatant case of political repercussions from death penalty cases. After Governor George Deukmejian announced he opposed the retention of Justice Bird, he warned two other justices that unless “they voted to uphold more death sentences,” he would oppose their retention as well.¹³³ After the governor carried through on his threat, Chief Justice Bird and the two associate justices were voted out in 1986, and in the years following that election, California’s Supreme Court had one of the highest rates of upholding death sentences in the nation.¹³⁴

Several studies suggest a systemic bias in favor of the death penalty, induced by judicial elections. Perhaps the mildest is a study of the Louisiana Supreme Court and of the Texas court system, which shows that justices who are less secure about their chances of reelection are far less likely to dissent from death penalty cases than judges who feel more secure.¹³⁵ This study suggests that elected judges are less likely to make unpopular rulings favoring criminal defendants. There is also evidence demonstrating that Pennsylvania judges impose significantly stiffer criminal penalties as they near reelection.¹³⁶

C. LEGISLATIVE RETENTION

The flaw with judicial elections is not their use to select judges, but their use to determine if a judge may keep his or her seat. This is not changed by shifting these retention elections to the legislature.

Any sort of retention election undermines the independence of the judiciary and makes judges beholden to whatever controls

132. See *supra* Part IV.B.

133. Bright & Keenan, *supra* note 130, at 760.

134. *Id.* at 760–61.

135. See generally Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427 (1992); Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117 (1987). Melinda Gann Hall is a professor of political science at Michigan State University. *Biographical Sketch of Melinda Gann Hall*, MICH. ST. DEP’T OF POL. SCI., <http://polisci.msu.edu/index.php/people/faculty/item/faculty/melinda-gann-hall> (last visited Apr. 9, 2011).

136. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004).

their continued employment. But the most dangerous system of appointing judges may be that of the eight states that subject judges to legislative retention — retention elections by the state legislature or reconfirmation by the governor or both.¹³⁷ The danger of this system is that the legislature is likely to be more knowledgeable and concerned with the political effects of judicial decisions, and, as a politically concentrated body, it will have the ability to implement its will more easily than the dispersed electorate could. In these states, the pressure to be “tough on crime” may be lower due to the judiciary being less directly responsive to public sentiment,¹³⁸ but at the risk of a marked reluctance to challenge the legislature’s authority.

South Carolina provides an interesting lesson on the pitfalls of legislative control over retention. South Carolina reappoints its judges through the legislature, and in 1996, passed some changes to the process adding a Judicial Merit Selection Commission with the sole power to nominate and re-nominate candidates — though the legislature must still confirm nominated candidates.¹³⁹ This was a seemingly minor change in the process, as the commission was entirely selected by officers of the legislature, with the Speaker of the House alone given the right to pick half of its members; accordingly, the process is almost entirely still under legislative control.¹⁴⁰ However, there is a slight reduction in the control the legislature has over the judiciary, since being forced to work through an intermediary reduces the legislature’s direct control. In the ten years prior to these changes, the Court overruled its precedent only twice, yet after these changes, it overruled its past precedent thirty-six times.¹⁴¹ Although the changes only slightly weakened the power of the legislature to control the judiciary (this weakening does not appear to have been intended), it had a measurable effect on the judiciary’s behavior — demon-

137. Those eight states are Connecticut, Delaware, Maine, New Jersey, New York, South Carolina, Vermont, and Virginia. SOURCEBOOK, *supra* note 12.

138. It is not clear this would be the case, as governors and legislators may actually have more to gain from making a political issue over judicial rulings.

139. Kimberly C. Petillo, Note, *The Untouchables: The Impact of South Carolina’s New Judicial Selection System on the South Carolina Supreme Court, 1997–2003*, 67 ALB. L. REV. 937, 937–38 (2004).

140. *Id.* at 940.

141. *Id.* at 938.

strating that the method of retention can create statistically significant variations in judicial behavior.¹⁴²

The change in the willingness of the South Carolina judiciary to overturn precedent as a result of the new selection and retention method cannot simply be attributed to the new selection method changing the makeup of the court. Members of the State Supreme Court who had been in place before the new retention method also demonstrated a marked increase in their willingness to overturn precedent after the change. Justice James E. Moore, for example, who voted to overturn only one decision between 1991 and 1997, overturned thirteen in the period between 1999 and 2003.¹⁴³ Justice Waller, appointed in 1994, overturned no decisions before the changes took effect in 1997, and nine times afterwards.¹⁴⁴ The other two justices already on the bench have not been seriously affected by the change, with Chief Justice Toal remaining extremely reluctant to overturn precedent,¹⁴⁵ while Justice Burnett, who was appointed only two years before the change and so lacks useful before and after data, has demonstrated a willingness to overturn past precedent.¹⁴⁶

Whether or not the newfound willingness of the South Carolina Supreme Court to overturn past precedent is a good thing depends largely on the precedents it is overturning and why, but that is beyond the scope of this Note. Relevant to this Note is the point that the independence of the judiciary is based on the security a judge enjoys against being removed from office. This ability of legislative elections to promote judicial accountability at the cost of judicial independence is not lost on South Carolina. The change discussed above has been characterized by the researchers who uncovered it as coming “at the cost of accountability to the public or the General Assembly.”¹⁴⁷ This statement’s implication is that South Carolina has not kept legislative retention elections generally to stifle the potential infringements of judicial independence caused by popular retention elections; it has re-

142. *Id.*

143. *Id.* at 943.

144. *Id.* at 948.

145. *Id.* at 955.

146. *Id.*

147. *Id.* at 938.

tained legislative retention as another method by which to retain popular control over the judiciary.

V. HOW CONFIRMATION ELECTIONS AND VACANCY ELECTIONS AVOID THE FAILURES OF PAST REFORMS

This Part argues that attempts to moderate the partisan nature of judicial elections through non-partisan elections or through retention elections have not been successful because they continue to require sitting judges to face periodic elections to retain their seats. Rather than the traditional focus on eliminating judicial selection elections while subjecting incumbent judges to retention elections, reform efforts should be directed to establishing a system whereby judges are elected but do not face retention elections. Popular control of a judge following their rulings, rather than before their appointment, is the component of judicial elections that most damages the rule of law.¹⁴⁸ There are two ways this reform could be accomplished. First, states could establish a system where judges are selected through contested elections, with either lifetime tenure or a long tenure (such as twenty years) with no opportunity for reelection. Alternatively, states could retain their existing merit selection plans, where candidates must be screened and appointed by the governor, but also require a “confirmation” election, mandating the appointee be approved by a majority of voters in order to take his or her seat. Once confirmed the candidate takes his or her post with either lifetime tenure, or a similarly long term with no possibility of reelection. Neither of these systems would suffer from the pitfalls of merit selection plans or non-partisan elections.

The previous Part went into detail on the flaws of the existing reform models. Merit selection plans tackle the problem backwards, by removing the public from the appointment process, but with retention elections in place, the benefits are illusory. These systems provide a false sense of confidence in a judicial system and thereby impede the impetus for reform. In contrast, electing judges who serve with lifetime tenure offers a workable reform

148. See Pozen, *supra* note 92, at 285.

model.¹⁴⁹ Such a system — an elective appointment system, to give it a name — whereby judges are initially elected but face no subsequent elections, has obvious attraction as a method of improving judicial independence while retaining an element of popular participation in judicial selection. This elective appointment system would allow judges to make decisions free of concerns about public sentiment while also satisfying those that demand some form of judicial elections.

There are counter-arguments against this sort of elective appointment system that must be addressed. First, a highly objectionable candidate could be elected and there would be no mechanism to remove them short of impeachment. This risk is not unique to the elective appointment model however, and may not pose a significant risk over other models more similar to the Federal appointment model. In any case, an elective appointment system creates significantly different incentives and pressures on judges than that created by systems where judges are initially elected, then face retention elections. In merit selection plans, the public gains the ability to remove highly objectionable judges that do not merit impeachment with retention elections, but at an unacceptably high cost to the integrity of the judicial process.

While an elective appointment system requires initial campaigning along with its associated dangers, it may not be possible to eliminate these dangers even in system that contains no direct public input such as the Federal model of the judiciary. If the judicial appointments are a salient political issue, then politics can enter into judicial selection even without direct judicial elections. With the high level of public interest in the Supreme Court in the modern era, part of the Presidential race has become a proxy vote on what type of judges will be appointed to the Supreme Court. For example, in the 2000 Presidential election cycle, Al Gore campaigned on the promise that he would “guarantee that a woman’s right to choose is protected.”¹⁵⁰ Given the lack of ethical prohibitions on such pledges by legislatures and governors, it is possible that an elective system could be superior to a

149. This has been suggested before, though without elaboration. See Croley, *supra* note 8, at 699, and Pozen, *supra* note 92, 285–86.

150. *Election 2000: Presidential Candidates Testy in Latest New Hampshire Debates*, CNN, <http://edition.cnn.com/TRANSCRIPTS/0001/27/tod.03.html> (last visited Feb. 12, 2011).

system where governors appoint judges to fill vacancies to select impartial judges.

Both confirmation elections and selection elections can be turned into political battles. However, if a judge cannot seek reelection, campaign promises are considerably less binding. If a judge rules differently than his or her supporters anticipated or makes rulings unpopular with his or her supporters, the voters have no recourse against the judge. Advocacy organizations may be increasingly effective at pre-screening candidates, as they are in federal appointments. It is not clear, however, that any system will be able to eliminate these efforts; but that does not mean they cannot be ameliorated.

Alternatively, a state may retain the basic structure of a merit selection program; but rather than an appointee taking office upon appointment and then being subject to retention elections, he or she must face a "confirmation election." In essence, the confirmation election would perform a similar function to Senate confirmation of federal judges: the judge would not take his or her seat until an election was held and would only be seated if he or she received more "yes" votes than "no" votes in the next public election. Once the judge is seated, however, he or she faces no further elections and holds the seat for life or for a long tenure. This scheme offers the advantages of the merit selection plan in screening potential appointees, and allows the public to provide input on judicial candidates, but avoids retention elections.

VI. CONCLUSION

This Note contends that the arguments showing no improvement in the qualification of judges through use of a merit selection system for vacancies, as opposed to an election system, undercut the rationale for merit selection plans. This rationale is further undercut through the failure of retention elections to protect judicial independence to a greater degree than partisan or non-partisan elections. The lack of judicial independence is at the root of the failures of partisan election systems and must be addressed in any reform method. As an alternative, merit selection does not do so and offers no other advantages over existing systems. As a reform method, it is a failure.

This Note takes no position on whether elections are an appropriate method of appointing judges but argues instead that

this decision is less important than the method whereby judges are subject to retention review. After examining the flaws of current reform efforts for judicial elections, this Note proposes the following ideas for reform: first, that judicial vacancies should be filled through elections, while allowing judges to retain their seat for a fixed, nonrenewable term; or alternatively, that governors should be given the power to appoint judges, but any appointed judge would be required to face a confirmation election before taking his or her seat. Implementing these reforms rather than traditional merit selection plans would enable states to permit judicial elections, without impinging on judicial independence.