



# Merit Selection and Retention Elections Keep Judges Out of Politics

Billy Corriher November 1, 2012

*This report is the third in a series on different policies that could help mitigate the influence of corporate campaign cash in judicial elections. The reports are intended for advocates or legislators who want to ensure our justice system works for everyone, not just those with enough money to donate.*

As the amount of money donated to judicial campaigns has exploded in recent elections, the influence of campaign cash on the judiciary has become a more urgent problem. Candidates in state supreme court races from 2000 to 2009 raised around \$211 million—two and a half times more than in the previous decade.<sup>1</sup> Conflicts of interest have arisen as special interests and parties before high courts have spent money to influence elections to those courts.<sup>2</sup> The insurance giant State Farm, for example, was facing a \$1 billion verdict in a case pending before the Illinois Supreme Court in 2004. The plaintiffs in that case allege that State Farm asked a lower court judge to run for a seat on the high court, organized his campaign, and spent millions to elect him. After the justice took his seat on the bench, he voted to overturn the \$1 billion verdict.<sup>3</sup>

To curb the influence of special interests in the selection of judges, many reform advocates have called for more states to choose judges through merit-selection systems, used in some form by two-thirds of the states to select judges.<sup>4</sup> In those systems a nominating commission composes a list of potential judicial candidates from which the governor chooses a nominee. The state senate must confirm the choice in some states. The commissions use a wide range of criteria to make their recommendations.<sup>5</sup> Connecticut law, for example, requires the nominating commissions to consider “the legal ability, competence, integrity, character and temperament of such judge and any other relevant information.”<sup>6</sup>

Most merit-selection systems require appointed judges to subsequently face voters in unopposed retention elections in which voters are asked whether the judge should remain on the bench. Historically, retention elections saw very little campaigning and hardly any campaign contributions.<sup>7</sup> Conservative interests groups—usually angered by one or two high-profile cases—are now mounting unprecedented campaigns opposing retention elections in Iowa, Florida, and possibly in Indiana and Arizona.<sup>8</sup> As a consequence, retention elections could join the trend of expensive and politicized judicial elections.

This brief argues that, despite this risk, merit selection and retention elections offer a far better alternative to contested elections. Judges must be independent from political pressure so they can vindicate constitutional rights without fear of political backlash. The judiciary is the only institution that can remedy violations of the constitution by the other branches of government. At the first step of the process, merit selection frees a potential judge from political influence by focusing on his or her qualifications, not on the ability to make deals with legislators or rake in campaign contributions. Retention elections, the second step of the process, subject judges to much less political pressure than contested elections and offer greater judicial independence. Although some recent retention elections have become politicized, these systems can provide the public with unbiased, neutral information on a judge's qualifications and record. This allows voters to focus on merit and not on one or two politicized, high-profile cases.

The very name—merit selection—implies that the system produces higher-quality judges, but, admittedly, measuring a judge's "merit" is a difficult task. Merit-selection commissions have a wide range of information to evaluate potential judges, but voters in contested elections usually lack meaningful information on judicial candidates, except for what they glean from sound bites and advertisements.

Critics argue merit-selection commissions are undemocratic and often do not share the values of a state's population. Opponents are particularly critical of systems in which state bar associations appoint some members of the commissions. Some conservatives argue this practice leads to judges who are too liberal.

To address these perceived deficiencies, conservative legislators have sought to impose greater control over judges and the merit-selection nominating process. Missouri lawmakers have placed a referendum on the 2012 ballot that would give the governor more appointees on the nominating commission, and conservative legislators in Florida are giving voters the chance to require senate confirmation of a judicial nominee.<sup>9</sup> Some politicians have gone much further to "rein in" judges. New Hampshire legislators, for example, introduced a bill that would essentially end judges' power to rule laws unconstitutional.<sup>10</sup> Supporters of merit selection warn that conservative efforts to chip away at the process will culminate in a push for contested elections.<sup>11</sup>

At the same time, recent efforts to institute merit-selection systems have stalled. Voters in a 2010 Nevada election rejected a referendum to use merit selection, even after a *Los Angeles Times* story exposed judges being swayed by campaign contributions in a "style of wide-open, frontier justice that veers out of control across ethical, if not legal, boundaries."<sup>12</sup> Likewise, a merit-selection bill recently stalled in the Pennsylvania legislature.<sup>13</sup> Yet a poll from merit-selection advocates found that voters in Pennsylvania have little information on which to base their votes for judges, and once respondents were given information on the merit-selection system, a sizable majority liked the idea.<sup>14</sup>

The very name—  
merit selection—  
implies that the  
system produces  
higher-quality  
judges, but,  
admittedly,  
measuring a  
judge's "merit" is a  
difficult task.

Some critics of judges chosen through merit selection argue the judges are “activist”—usually a code word for liberal. The term suggests that judges are making policy and doing so in line with their own liberal views. At times, of course, courts do have to make policy decisions because the law is ambiguous, but that is clearly not their primary role. Judges are rarely making up law from whole cloth because their successors or other courts would call them on it. Some state courts do build on judge-made common law. Many states, however, have codified entire areas of common law, and even if they have not, legislatures can always override judge-made common law.

Judges often suffer the strongest political backlash when they settle a conflict between a constitutional rule and a statute or referendum. As defenders of constitutional principles, high court justices must be free to make unpopular decisions that protect the rights of individuals.

Constitutions are composed of timeless principles that govern the relationship between branches of government and between a government and its citizens. These principles are approved by super majorities (such as two-thirds or three-quarters) of an electorate or its representatives.<sup>15</sup> Because super majorities approve constitutional principles, these laws trump ordinary statutes or referenda that are approved by a simple majority of representatives or voters. That’s why, unlike the political branches of government, independence is more critical than accountability for the judiciary.

Some judges, even in states with retention elections, have faced a political backlash for rulings that protected the constitutional rights of same-sex couples, women, religious minorities, or unpopular groups such as criminals.<sup>16</sup> In state supreme courts, this often means ruling on the constitutionality of statutes or citizen-sponsored referenda on hot-button social issues such as same-sex marriage.<sup>17</sup> The targets of many of these statutes and referenda are often politically powerless, so the judicial branch is the only place where they can turn for protection of their rights.

---

## An independent judiciary is crucial to the idea of checks and balances

More than any other institution, judges have to keep the government true to its constitution. The framers of the U.S. Constitution and state constitutions established governments with checks and balances. The executive, legislative, and judicial branches have distinct roles. In general, the legislatures make the laws; the executive branches enforce them; and courts interpret the laws, including constitutions. A judiciary free from political constraints is crucial to this system of separation of powers. Without this independence, judges are just politicians in black robes.

In the *Federalist Papers*, Alexander Hamilton affirmed the judiciary’s power to rule statutes unconstitutional and described the judiciary as the only institution that can ensure

the legislature does not violate the Constitution.<sup>18</sup> Hamilton said that unless courts can rule statutes unconstitutional, “all the reservations of particular rights or privileges would amount to nothing.”<sup>19</sup>

Judges interpret constitutions and define the boundaries of individual rights and rules that prohibit the government from taking certain actions. This sometimes requires courts to strike down statutes that violate constitutional rights, even though the laws may be popular with voters. As Hamilton explained:

*[I]t is not to be inferred ... that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions.*<sup>20</sup>

In other words, just because a statute is popular does not mean it is constitutional. Courts must be free from political pressure in order to protect constitutional rights.

The justices of the Iowa Supreme Court struck down a statute limiting marriage to heterosexual couples in a 2009 case. The court unanimously ruled that denying same-sex couples the right to marry violates the Iowa and U.S. constitutions.<sup>21</sup> In its opinion, the court noted that, “The idea that courts, free from the political influences in the other two branches of government, are better suited to protect individual rights was recognized at the time our Iowa Constitution was formed.”<sup>22</sup>

Though the Iowan justices had never before been compelled to raise campaign funds, the ruling spurred Christian conservative groups that are opposed to the decision to mount a campaign to unseat the justices in the 2010 retention election—solely because of the ruling on same-sex marriage. Conservative political groups from outside Iowa spent nearly \$1 million attacking the justices.<sup>23</sup>

All three justices lost their seats in 2010, but polling suggests a fourth justice may fare better this year.<sup>24</sup> One Iowan who attended a recent rally against the justice said, “I don’t think judges should have the right to decide for us on the marriage issue or other constitutional issues.”<sup>25</sup> When voters argue judges should not have the power to decide constitutional issues, there is a drastic misunderstanding of the role of the judicial branch.

Iowa’s experience shows that retention elections can become politicized. But uncontested elections are less susceptible to political pressure than contested elections. In a two-person race, a challenger will likely characterize an incumbent judge’s rulings in a certain way and detail how his or her own rulings would be different and, presumably, better. A judge in a retention election, however, only needs to defend his or her record and qualifications. Voters in a merit-selection system never actually get to choose a judge; they just decide whether to throw him or her out of office. Merit-selection systems can be structured to

Iowa’s experience shows that retention elections can become politicized. But uncontested elections are less susceptible to political pressure than contested elections.

provide voters with useful information or evaluations based on neutral criteria, and such systems make judges even less susceptible to political pressure.<sup>26</sup>

If the judiciary becomes another political branch responsive to political pressure, then there would be no branch of government that could check the power of legislatures or executives when they infringe on the constitutional rights of individuals. Retired U.S. Supreme Court Justice John Paul Stevens warned that, “Disciplining judges for making an unpopular decision can only undermine their duty to apply the law impartially.”<sup>27</sup> Judges who face contested elections may feel more pressure to avoid striking down laws that are popular with voters and therefore cannot protect the constitutional rights of individuals. These rights are meaningless if they cannot be vindicated.

---

## Judges as politicians

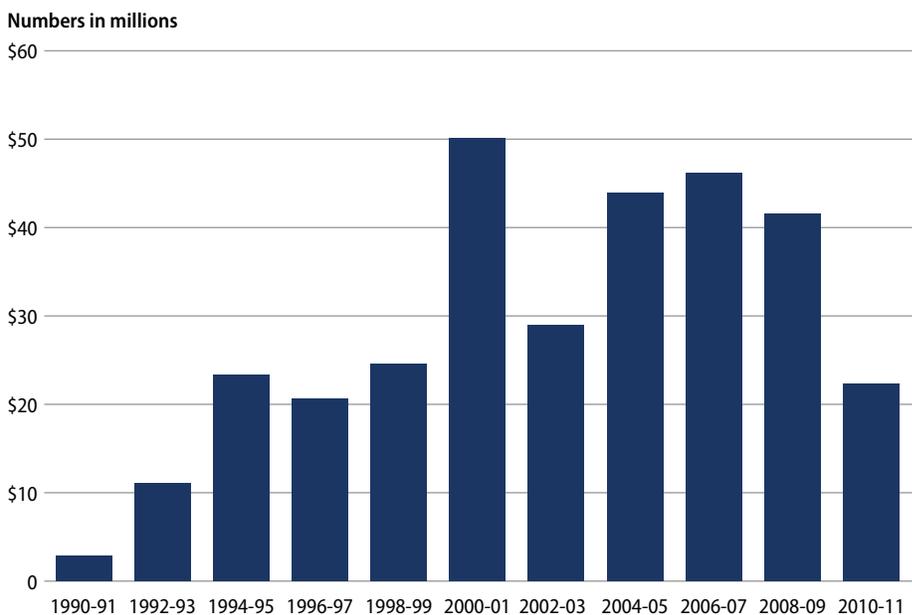
Judges should not be forced to act like politicians to keep their jobs. Legislators have to raise funds for their re-election campaigns, and citizens are not surprised when legislators are responsive to their campaign contributors. Judges, however, should not be beholden to election funders in the same manner. The judiciary should be beyond the influence of special interests.

The drafters of the U.S. Constitution recognized that political considerations or campaign contributors should not be able to influence judges. They established a system in which federal judges are subject to political processes when they are nominated by the president and confirmed by the U.S. Senate, but they serve for life once confirmed.<sup>28</sup> Current Chief Justice John Roberts, during his 2005 confirmation hearing, said that, “Judges are not politicians. They cannot promise to do certain things in exchange for votes.”<sup>29</sup>

Chief Justice Roberts’ lofty promise of judicial independence is threatened when judges must campaign the way other

### Campaign cash in state supreme court races

Campaign contributions, 1990-2011\*



\*These figures include campaign contributions and do not include independent spending.

Source: National Institute on Money in State Politics, High Court Candidates, 2000-2010, available at <http://followthemoney.org/database/nationalview.phtml?l=0&f=J&y=2011&abbr=0>

politicians do and must rely on interest groups to ensure their political futures. Retired U.S. Supreme Court Justice Sandra Day O'Connor said that, "When you enter one of these courtrooms, the last thing you want to worry about is whether the judge is more accountable to a campaign contributor or an ideological group than to the law."<sup>30</sup>

In August 2012 the Center for American Progress issued a report on how campaign donations from big business have come to dominate judicial elections. The states that have seen the most campaign cash now have high courts dominated by judges who favor corporations over individual citizens. In states with contested elections, some Democratic judges count on labor unions or trial lawyers for campaign cash or "get out the vote" operations. Republicans often look to corporations and organizations funded by big business for campaign money.<sup>31</sup> As these so-called big-money judicial elections spread to more states, these judicial candidates will come to depend on these same interest groups. In these states, those who sue corporations—such as injured employees or consumers who have been scammed—are finding it much more difficult to obtain real justice from these courts.<sup>32</sup>

The CAP report demonstrated how contested judicial elections open the door for special interest groups to influence the law. Groups that desire a change in the law can seek out judges who will deliver that change and then spend money to get those judges elected. The insurance industry in Ohio, for example, was dissatisfied with several rulings against insurers in the late 1990s and donated money to elect judges who promptly reversed those rulings once in office.<sup>33</sup> In a merit-selection system, special interests lose the chance to bolster candidates who favor their agenda.<sup>34</sup>

### Special interests influence contested elections

Contested races affect judicial behavior in other ways, as well. A court's role as protector of constitutional rights sometimes requires it to rule for criminal defendants, even if the defendant's actual guilt is not in doubt.<sup>35</sup> Studies have found that judges facing imminent elections are less likely to overturn criminal convictions. A 2009 study found that this tendency was highest in partisan elections and not as significant in retention elections.<sup>36</sup> The vindication of a defendant's rights should not depend on a judge's political considerations.

Criminal cases provide fodder for special interests running attack ads against judges. In a 2006 race for the Washington Supreme Court, an ad featured a grieving mother criticizing an incumbent judge for a decision that "let my son's killer walk free after serving less than a third of his murder sentence. You could have a convicted murderer released ... next door and you wouldn't even know it." The ad was paid for by Americans Tired of Lawsuit Abuse, a pro-tort-reform group that has nothing to do with criminal law.<sup>37</sup>

When a West Virginia coal executive spent a huge sum of money to influence the 2004 election to the West Virginia Supreme Court, he poured his money into a group that attacked the judge for allegedly granting probation to a child abuser.<sup>38</sup> These ads did not mention the coal company's \$50 million verdict that was pending before the court, but the U.S. Supreme Court took note of this conflict of interest when it ruled that the judge who benefited from the money should have recused himself.<sup>39</sup> Though they have no interest in crime, special interest groups use criminal cases to scare citizens into voting for judges who support their particular agenda.

Some of the same interest groups that influence judicial elections have opposed merit-selection initiatives. In Pennsylvania, for example, pro-life groups opposed a statute that would have replaced the state's partisan judicial elections with a merit-selection system.<sup>40</sup> The proposed constitutional amendment would have created a commission to produce a list of nominees and allow the governor, with the state Senate's consent, to appoint the judges on the state's appellate courts.<sup>41</sup> Pro-life and conservative religious groups have donated hundreds of thousands of dollars to Pennsylvanian judicial candidates in recent years,<sup>42</sup> and in June 2012 they defeated a bill that would have lessened their ability to influence the law.

Merit selection reduces the opportunities for special interests to influence courts. Advocates point out that merit selection can "minimize political influence by eliminating the need for candidates to raise funds, advertise, and make campaign promises, all of which can compromise judicial independence."<sup>43</sup> Retention elections also subject judges to less political pressure than contested elections.

Many judges argue that merit selection leads to better-qualified judges.<sup>44</sup> One organization of civil defense lawyers warns that contested elections might prevent the most qualified lawyers from seeking seats on the bench, saying that, "Otherwise qualified individuals may opt not to run for fear of losing to a judge before whom future cases must be tried."<sup>45</sup>

Although empirical evidence is hard to come by, a recent study from conservative scholars used the number of times a judge's opinion was cited by other jurisdictions as an indicator of quality. By this measure, the authors found that appointed judges outperformed elected judges.<sup>46</sup> The authors posit that, "A system that selects for judges skilled at electioneering and politicking does not also necessarily select for judges skilled at authoring high quality legal opinions."<sup>47</sup>

---

## Structuring merit-selection systems to ensure independence

Critics of merit selection argue the system is undemocratic. They claim that unelected nominating commissions should not have so much authority over judicial selection.<sup>48</sup> These critics often fail to recognize that judicial independence—not democratic account-

ability—is the most important consideration in deciding how to select judges. The framers of the U.S. Constitution and the drafters of early state constitutions established systems in which judges are completely free from political accountability once they are appointed.

Some conservatives, acknowledging the value of judicial independence but decrying a lack of democracy in merit selection, argue for a system similar to the federal model—gubernatorial appointment (without a nominating commission), state Senate confirmation, and long terms.<sup>49</sup> This so-called Washington model would present its own problems, however, with politics being present at the selection stage. The process would not be as transparent as modern merit-selection systems, and would open the door to politicized appointments, as we see in the federal system today, appointments can lead to gridlock if the executive and legislative branches are controlled by different political parties.<sup>50</sup>

### The history of merit selection

Merit selection emerged after states saw gubernatorial appointments tarnished by allegations of partisanship and political corruption. The first system was approved by Missouri voters in 1940 after the state's courts had become politicized and subject to control by a powerful political machine.<sup>51</sup> The Missouri plan, as it came to be known, was adopted in Kansas after a 1956 scandal involving then-Gov. Fred Hall, who had lost the Republican primary. Gov. Hall's friend, the chief justice of the state supreme court, resigned his position at the same time Gov. Hall resigned as governor. The lieutenant governor assumed office for the last few days of the term, and his single official act was to appoint Gov. Hall to the empty seat on the Kansas Supreme Court.<sup>52</sup>

In 1970 a Florida governor appointed a state supreme court justice who was charged with selling drugs and who became a fugitive from the law. The then-president of the Florida state bar said the governor ignored the bar's background check, which had raised red flags.<sup>53</sup> Florida amended its constitution to institute a merit-selection system a few years after the scandal, but state legislators are fighting to establish a system that would again give politicians more control.

Merit selection frees judges from political infighting and shady deal-making. Opponents of merit selection are particularly critical, however, of systems that allow state bar associations to appoint some members of nominating commissions.<sup>54</sup> Conservative critics argue bar associations are often more liberal than their state's citizens.<sup>55</sup> A recent study found that merit-selection systems in Missouri and Tennessee resulted in judges that were more liberal than the majority of citizens in those states.<sup>56</sup> The author of the study acknowledged, however, that the governors of the two states and the elected officials who appointed some commission members were overwhelmingly Democrats during the time period studied.<sup>57</sup> Other scholars have found mixed results in asking whether state bar associations skew left.<sup>58</sup>

Merit selection  
frees judges  
from political  
infighting and  
shady deal-making.  
Opponents of  
merit selection  
are particularly  
critical, however,  
of systems that  
allow state bar  
associations to  
appoint some  
members of  
nominating  
commissions.

Studies that focus on the outcomes—not the processes—shed little light on the actual deliberations of the commissions. Earlier this year, the American Judicature Society conducted a broad survey of 487 nominating-commission members in 30 states, and the results cast doubt on the argument that merit selection is a politicized process. The survey found that commission members overwhelmingly reject the use of political considerations in their deliberations. More than 73 percent of the commission members said party affiliation is not considered during their deliberations.<sup>59</sup> A majority said they were not even aware of candidates’ party affiliations.<sup>60</sup>

The survey did find that Democrats outnumber Republicans in the total number of commission members, but this discrepancy was much more pronounced for members appointed by governors.<sup>61</sup> This suggests that any partisan imbalance is more a result of gubernatorial appointment than of the role of state bar associations.

A survey of older research suggests that a rule prohibiting a partisan imbalance on the nominating commissions can reduce the influence of political considerations.<sup>62</sup> This reform could address any imbalance on the nominating commissions without subjecting judicial candidates to more influence from the political branches of government.

### Ensuring legitimacy in the eyes of the public

The U.S. Chamber Institute of Legal Reform argues that state bars should recommend lawyers to serve on the commissions, but governors should actually appoint them.<sup>63</sup> New York has a requisite number of attorneys on its nominating commissions, but they are all chosen by elected officials and not by the state bar.<sup>64</sup> In Arizona the state bar recommends the attorney commissioners, but the governor actually appoints them.<sup>65</sup>

Merit-selection systems are not designed to be accountable to politicians or the public, because a judge’s role as a defender of the Constitution requires him or her to be above politics. That being said, many states have reformed their merit-selection processes to ensure that citizens perceive them as legitimate and unbiased.

Justice O’Connor offers Arizona’s system as a model. “In that state, nominating commissions are dominated by non-lawyers, and their meetings are open. Candidates’ applications are available online, and the public is invited to comment,” she said.<sup>66</sup> More transparency and lay-citizen participation can inspire confidence in the process. The American Judicature Society recommends that merit-selection systems include written ethical and procedural rules.<sup>67</sup> Massachusetts, for example, has strict standards for preventing any conflicts of interest with applicants.<sup>68</sup>

Nominating commissions must have clear and consistent criteria on which to assess candidates. In New York the commission is governed by an executive order, which requires



ASSOCIATED PRESS/HARRY CABLUCK

Retired U.S. Supreme Court Justice  
Sandra Day O'Connor

it to evaluate a candidate based on his or her “integrity, independence, intellect, judgment, temperament and experience.”<sup>69</sup> Most of the constitutional provisions establishing nominating commissions do not specify the criteria that govern them. While governors have issued executive orders filling in the blanks, legislatures can provide more continuity by passing statutes that establish criteria for assessing a candidate’s merit.

Many states that use merit selection appoint their judges for long terms—between 10 years and 12 years—before their first retention elections.<sup>70</sup> The longer the term, the more independence the judge enjoys from political influence because judges will less often feel pressure to ensure their decisions are popular.

---

### Giving voters useful information

With retention elections becoming more politicized, advocates of merit selection argue that voters should not make their decisions based on a single high-profile decision by a judge. Instead, advocates and state bar associations argue that impartiality, an understanding of the law, and other values are the criteria voters should use to make their decisions in a retention election. The Florida Bar Association, for example, asks citizens to base their votes on a judge’s “legal abilities, temperament, and commitment to follow the law and decide cases impartially.”<sup>71</sup>

Surveys have shown that voters often do not feel knowledgeable about judicial candidates.<sup>72</sup> It is therefore asking a lot for voters to seek out and find information on the judges’ qualifications, temperament, and legal abilities. If a voter is aware of a high-profile decision from his or her state supreme court, how can that voter put aside his or her views on that case and focus solely on merit? Retention elections must be accompanied by evaluations or voter guides that give the public useful information—a broad range of material beyond just one or two cases that received media attention.

Judicial performance evaluations have proven to be very useful for voters. These evaluations can promote meaningful accountability for judges by imparting knowledge about the judge’s performance in office. Supporters point out that judicial performance evaluations are “process-oriented, not outcome-oriented.”<sup>73</sup> Anonymous surveys are given to attorneys, jurors, and others who watch judges as they work, and more comprehensive programs include information on case-management statistics, public comments, and interviews with the judges.<sup>74</sup> New Mexico goes so far as to seek input from “court staff, other appellate judges, trial court judges whose cases have been appealed, the judge’s current and former law clerks, and law professors.”<sup>75</sup>

The Defense Research Institute, an organization of civil defense attorneys, says judicial performance evaluations should be structured to enable a judge’s self-improvement and a voter’s informed decision. The institute also says the evaluations should “educate the public that specific case outcome should not be the determinative factor in judicial

Judicial performance evaluations have proven to be very useful for voters. These evaluations can promote meaningful accountability for judges by imparting knowledge about the judge’s performance in office.

election or retention.”<sup>76</sup> The American Bar Association offers detailed model criteria for assessing a judge’s legal abilities, integrity/impartiality, communication skills, professionalism/temperament, and administrative capacity.<sup>77</sup>

North Carolina, a state that holds nonpartisan contested elections, offers citizens a voter guide, which describes the candidates’ background. Voters are informed of the candidates’ experience, education, and endorsements. The candidates are also allowed to submit statements to be included in the guide.<sup>78</sup>

As recent campaigns have shown, retention elections are not perfect and do not provide judges with complete independence from political considerations. Retention elections are vastly preferable to contested elections, though, and providing voters with relevant, unbiased information can keep the focus on a judge’s merit, not on his or her views on a single high-profile issue. Further, voters in retention elections make their decisions after a judge has been on the bench for at least one term, giving voters a track record to consider before making a decision.

---

## Conclusion

Constitutional principles are supposed to be above the petty politics of legislatures. When a statute or referendum conflicts with the constitution, a court must enforce constitutional values. It is often a thankless task that judges carry out, striking down the will of the people manifested in statutes and referenda. But judges are the only institutions in place to protect our constitutions and the individual rights enshrined therein.

If judges are politically accountable, they cannot perform this crucial function. We need institutions in our society that can check the whims of the citizenry when they are not in accordance with the timeless principles laid down by the leaders who founded these states and our country.

There are times when it might be politically popular for politicians to target certain groups—those that are in the minority, naturally, since attacking a majority of citizens would likely not lead to electoral victory. This is especially true in tough economic times, when politicians have used groups such as immigrants as scapegoats. Courts must be able to stop legislatures and governors who cross the line. A majority of citizens might feel satisfied when elected judges avoid striking down popular statutes related to certain hot-button issues, but a constitution suffers when there is no branch of government to ensure the laws conform to it. If the courts do not protect individual rights from government encroachment, no one can.

Unfortunately, judicial independence is increasingly threatened by politicized retention elections. In an eerily prescient 2008 law review article, Justice Mark Cady of the Iowa Supreme Court warns of this very danger. Cady remarked:

*Just as the personal views of a judge should not drive the judicial decision-making process, the personal views of the voter also should not be a focus in retention elections. Both views are inappropriate as a driving mechanism for judicial decisions because no individual's view—either judge or voter—is above the law.*<sup>79</sup>

Justice Cady points out that states that use retention elections can provide useful information to voters, allowing them to make decisions based on a broad understanding of a judge's role.<sup>80</sup>

Despite Iowa's experience in 2010, the question of whether a judge should be retained is less likely to be politicized than a choice between two candidates with divergent views. Voters in retention elections are not asked to replace a candidate with a specific alternative, and special interests cannot recruit a candidate they believe will serve their agenda. If judicial independence is paramount, the question of whether to vote a judge off the bench for protecting the rights of same-sex couples is preferable to choosing between a judge with a certain view on same-sex marriage and a challenger with an opposite view.

Not surprisingly, conservative critics of merit selection like to quote the framers of the U.S. Constitution on the need for democratic legitimacy.<sup>81</sup> Those with an affinity for the framers must remember that they did not favor judicial elections, which were not introduced for state supreme courts until many decades later. On the contrary, the framers of the U.S. Constitution set up a federal system that completely insulates judges, once on the bench, from political accountability. In the *Federalist Papers*, Alexander Hamilton said citizens “of every description” should value judicial independence because “no man can be sure that he may not be tomorrow the victim of a spirit of injustice.”<sup>82</sup> As the framers of the Constitution clearly understood, a judiciary that can protect our constitutional rights without fear of political backlash guarantees freedom for all.

*Billy Corriher is the Associate Director of Research for Legal Progress at the Center for American Progress Action Fund.*

## Endnotes

- 1 "National Overview Map, High Court Candidates," available at <http://www.followthemoney.org/database/nationalview.phtml?l=0&f=J&y=2000&abbr=1> (last accessed October 2012).
- 2 *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252 (2009). This case ruled that a litigant's due process rights were violated when the opposing party spent more than \$3 million to elect a high court judge who subsequently ruled to overturn a \$50 million verdict against the opposing party. See also Erwin Chemerinsky and James Sample, "You Get the Judges You Pay For," *The New York Times*, April 17, 2011, available at <http://www.nytimes.com/2011/04/18/opinion/18sample.html>; Viveca Novak, "Under the Influence," *The American Prospect*, September 19, 2011, available at <http://prospect.org/article/under-influence>.
- 3 *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100 (Ill. 2005). This case overruled the \$1 billion class-action verdict against the insurer. The plaintiffs asked the court to reopen the case, but the court refused. *Avery v. State Farm Mut. Auto. Ins. Co.*, No. 91494, Advisement Docket (Ill. Nov. 17, 2011). This case declined the motion to reopen the case. The plaintiffs have now filed a Racketeer Influenced and Corrupt Practices Act (RICO) suit against the company and others involved in the justice's 2004 campaign. Bethany Krajelis, "Class action suit alleges RICO enterprise in *Avery v. State Farm*," *The Madison-St. Clair Record*, September 26, 2012, available at <http://madisonrecord.com/news/246926-class-action-suit-alleges-rico-enterprise-in-avery-v-state-farm>.
- 4 American Judicature Society, "Merit Selection: The Best Way to Choose the Best Judges," available at [http://www.judicialselection.us/uploads/documents/ms\\_descrip\\_1185462202120.pdf](http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf).
- 5 In Missouri applicants provide information on education, professional experience, any professional discipline or legal malpractice suits, tax delinquencies, and criminal charges, as well as writing samples, references, and consent for a background check. Appellate Judicial Commission, "Commission seeks applicants for Wolff Vacancy on Supreme Court of Missouri," June 6, 2011, available at <http://www.courts.mo.gov/pressrel.nsf/3966cdf827e0d8d7862565ec00679fb1/d2729f536faeade862578a70068e7f82?OpenDocument>.
- 6 Conn. Gen. Stat. § 51-44a. Rhode Island has a longer list of desired qualities. R.I. Gen. Laws § 8-16.1-4. Kansas law includes a similar list and notes that "the best qualified nominees may be those whom it would be most difficult to persuade to serve." Kan. Stat. Ann. § 20-133 (2011). The Vermont law states that, "The criteria and standards shall include, but not be limited to, such factors as integrity, legal knowledge and ability, judicial temperament, impartiality, health, experience, diligence, administrative and communicative skills, social consciousness, and public service." Vt. Stat. Ann. title 4 § 601.
- 7 One campaign finance reform organization warns that "traditionally low-cost retention elections" are seeing more spending from interest groups. Brennan Center for Justice, "Campaign Money Patterns Entering New Phase in 2012 Judicial Races," Press release, September 13, 2012, available at [http://www.brennancenter.org/content/resource/campaign\\_money\\_patterns\\_entering\\_new\\_phase\\_in\\_2012\\_judicial\\_races/](http://www.brennancenter.org/content/resource/campaign_money_patterns_entering_new_phase_in_2012_judicial_races/).
- 8 Igor Volsky, "Iowa Chief Justice Defends Marriage Decision, Judiciary Review: 'Courts Serve The Law,'" ThinkProgress, January 12, 2011, available at <http://thinkprogress.org/lgbt/2011/01/12/177211/cady-marriage>; Editorial board, "GOP's Unwarranted Assault," *Miami Herald*, October 7, 2012, available at <http://www.miamiherald.com/2012/10/07/3036417/gops-unwarranted-assault.html>; Megan Simons, "Court Ruling from 2011 Sparks Anti-Retention Push in Indiana," Gavel Grab, October 12, 2012, available at <http://www.gavelgrab.org/?p=45319>; Howard Fischer, "High Court Judge in Fight to Keep his Post," *The Herald*, October 23, 2012, available at <http://www.svherald.com/content/news/2012/10/23/336020>.
- 9 Todd Phillips and Andrew Blotky, "The Conservative Takeover of State Judiciaries: Ballot Referendums to Watch" (Washington: Center for American Progress, 2012), available at <http://www.americanprogress.org/wp-content/uploads/2012/08/StateCourtBallotReferendum.pdf>.
- 10 Eeva Moore, "NH Legislators Propose End to Judicial Review of Laws," Gavel Grab, January 5, 2012, available at <http://www.gavelgrab.org/?p=29118>.
- 11 The Kansas Republican Party platform argues the state should "change its judicial selection process to reflect the federal model of legislative confirmation or by adopting direct election of judges statewide." The Republican Party of Kansas, "2010 Republican State Platform" (2010), available at [http://ksgop.org/state\\_platform/](http://ksgop.org/state_platform/).
- 12 Michael J. Goodman and William C. Rempel, "In Las Vegas, They're Playing with a Stacked Judicial Deck," *Los Angeles Times*, June 8, 2006, available at <http://articles.latimes.com/2006/jun/08/nation/na-vegas8>.
- 13 Josh Isreal, "Special Interests Kill Proposal for Merit Selection of Judges in PA," ThinkProgress, June 16, 2012, available at <http://thinkprogress.org/justice/2012/06/16/500331/special-interests-kill-proposal-for-merit-selection-of-judges-in-pa/>.
- 14 The poll was conducted for Pennsylvanians for Modern Courts, and 69 percent of respondents said they either had "not much" information on judicial candidates or "none." Sixty-two percent of respondents favored replacing the system with merit selection. Pennsylvanians for Modern Courts, "Pennsylvania Statewide Poll," May 25-26, 2010, available at <http://www.judgesonmerit.org/wp-content/uploads/2010/06/2010-Merit-Selection-Poll1.pdf>.
- 15 Some Constitutions outline a ratification process that requires the approval of three-fifths of the state legislature, followed by approval of a majority of voters. Illinois Const., Art. XIV, § 2; Alabama Const. Art. XVIII, Sec. 284. Others require two-thirds of the legislature and a majority of the electorate to ratify an amendment. Kan. Const. Art. 14, § 1. Some states, including California and Massachusetts, require ratification by a majority or super majority of two consecutive legislatures and a majority of voters. Cal Const, Appx. I Art. X § 1 (requiring ratification by a majority of two consecutive legislatures and a majority of voters); ALM Constitution Amend. Art. IX (2012) (requiring ratification by a majority of senators and two-thirds of the members of the state House of Representatives in two consecutive sessions before approval by a majority of voters). In New Jersey the ratification process begins with approval by three-fifths of the legislature or approval by a majority in two consecutive legislatures. N.J. Const., Art. IX, Para. 1. A few states allow ratification by simple majorities of a legislature and the electorate. Mo. Const. Art. XII, § 2.
- 16 Three members of the Iowa Supreme Court lost their seats in 2010 after ruling that denying same-sex couples the right to marry is unconstitutional. See *Varnum v. Bailey*, 763 N.W.2d 862 (Iowa 2009). Three members of the Florida Supreme Court are facing unprecedented opposition in this year's election. Opponents have singled out a Florida case in which the court found that a lawyer provided inadequate counsel to his client when he admitted to the jury that the client was guilty without the client's consent. *Nixon v. State*, 857 So. 2d 172 (2003) (overruled by *Florida v. Nixon*, 543 U.S. 175 (2004)).
- 17 *Varnum v. Bailey* (ruling that a state law limiting marriage to heterosexual couples violates the U.S. and Iowan constitutions).
- 18 Chief Justice John Marshall echoed this sentiment in his seminal opinion in *Madison v. Marbury*. The U.S. Supreme Court said the role of the judiciary is to interpret the law, and "the law" includes the Constitution. *Marbury v. Madison*, 5 U.S. 137, 178 (1803).
- 19 Alexander Hamilton, "The Federalist #78, The Judiciary Department." In *The Federalist Papers* (1788), available at <http://www.constitution.org/fed/federa78.htm>.
- 20 Ibid.
- 21 *Varnum v. Bailey*.
- 22 Ibid. at p. 875-76.
- 23 Patrick Caldwell, "Disorder in the Court," *The American Prospect*, September 19, 2011, available at <http://prospect.org/article/disorder-court>.

- 24 A *New York Times* report mentions a survey from the *Des Moines Register* that found that 49 percent of respondents said they would vote to retain the justice, while only 41 percent said they plan to vote to deny retention. John Eligon, "Gay Marriage Ruling Fuels Iowa Vote on a Justice," *The New York Times*, October 23, 2012, available at [http://www.nytimes.com/2012/10/23/us/gay-marriage-ruling-fuels-iowa-vote-on-a-justice.html?\\_r=1](http://www.nytimes.com/2012/10/23/us/gay-marriage-ruling-fuels-iowa-vote-on-a-justice.html?_r=1).
- 25 David Alexander, "Local Park Hosts Dueling Rallies on State Justice," *Times-Republican*, September 27, 2012, available at <http://www.timesrepublican.com/page/content.detail/id/553094/Local-park-hosts-dueling-rallies-on-state-justice.html?nav=5005>.
- 26 Rebecca Love Kourlis and Jordan M. Singer, "Using Judicial Performance Evaluations to Promote Judicial Accountability," *Judicature* 90 (2007): p. 201, available at [http://iaals.du.edu/images/wygwam/documents/publications/Using\\_JPE\\_To\\_Promote\\_Judicial\\_Accountability2007.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Using_JPE_To_Promote_Judicial_Accountability2007.pdf).
- 27 John Paul Stevens, "Should we have a New Constitutional Convention?" *New York Review of Books*, October 11, 2012, available at <http://www.nybooks.com/articles/archives/2012/oct/11/should-we-have-new-constitutional-convention/>.
- 28 "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III § 1.
- 29 Senate Judiciary Committee, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the U.S.*, 109th Cong., 1st sess., 2005, 56.
- 30 Sandra Day O'Connor, "Take Justice off the Ballot," *The New York Times*, May 23, 2010, available at <http://www.nytimes.com/2010/05/23/opinion/23oconnor.html>.
- 31 Stephanie Mencimer, *Blocking the Courthouse Door* (New York: Free Press, 2006).
- 32 Billy Corriher, "Big Business Taking Over State Supreme Courts" (Washington: Center for American Progress, 2012), available at <http://www.americanprogress.org/wp-content/uploads/2012/08/StateCourtsReport.pdf>.
- 33 *Ibid.* at 13-16.
- 34 In the 2004 election for Illinois Supreme Court, State Farm allegedly recruited Judge Joseph Karmeier to run for a seat on the high court, ran his campaign, and donated millions toward his election. Justice Karmeier then voted to overturn a \$1 billion class-action verdict against the company. Ann Maher, "Supreme Court won't Reopen *Avery v. State Farm*," *Madison-St. Clair Record*, November 11, 2011, available at <http://www.madisonrecord.com/news/239796-supreme-court-wont-reopen-avery-v-state-farmi>.
- 35 William Blackstone, *Commentaries*, 4, p. 358; *In re: Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("In a criminal case ... we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. ... [The reasonable doubt standard is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.")
- 36 Joanna Shepherd, "The Influence of Retention Politics on Judges' Voting," *Journal of Legal Studies* 38 (2009): p. 169. Shepherd found that judges in retention elections with Republican-leaning constituencies "are more likely to vote for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice cases, for businesses in products liability cases, for the original defendant in torts cases, and against criminals in criminal appeals." The opposite tendency is found in states with liberal constituencies.
- 37 Justice at Stake, National Institute on Money in State Politics, and the Brennan Center for Justice, "New Politics of Judicial Elections: 2000-2009, Decade of Change" (YEAR), available at [http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE\\_8E7FD3FEB83E3.pdf](http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf).
- 38 Mannix Porterfield, "For the Sake of Kids gets \$2.5 million, mostly Massey cash," *Register-Herald*, October 15, 2004, available at [http://www.wvcag.org/news/fair\\_use/2004/10\\_15.htm](http://www.wvcag.org/news/fair_use/2004/10_15.htm).
- 39 *Caperton v. Massey Coal Co.*
- 40 Isreal, "Special Interests Kill Proposal for Merit Selection of Judges in PA."
- 41 *Ibid.*
- 42 "Contributor Summary, John M. Templeton, Jr., Pennsylvania 2007," available at <http://www.followthemoney.org/database/StateGlance/contributor.phtml?d=939328986> (last accessed October 2012).
- 43 American Judicature Society, "Merit Selection: The Best Way to Choose Judges?"
- 44 Sandra Day O'Connor, "Foreward," *Wayne Law Review* 56 (2010): p. 581. O'Connor argues that Arizona's merit-selection system has "produced a better qualified and more diverse judiciary in Arizona."
- 45 DRI, The Voice of the Defense Bar, "Without Fear or Favor in 2011: A New Decade of Challenges to Judicial Independence and Accountability" (2011), available at [http://www.dri.org/ContentDirectory/Public/WhitePapersReports/DRI%20Judicial%20Task%20Force%20Report%20-%20Without%20Fear%20or%20Favor%20\(2011\).pdf](http://www.dri.org/ContentDirectory/Public/WhitePapersReports/DRI%20Judicial%20Task%20Force%20Report%20-%20Without%20Fear%20or%20Favor%20(2011).pdf).
- 46 Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, "Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary," *J.L. Econ. & Org.* 26 (2008): p. 291. The authors find that elected judges outperformed other judges in another measure of quality: productivity, or the number of opinions issued. "Appointed judges write higher quality opinions than elected judges do, but elected judges write many more opinions, and the evidence suggests that the large quantity difference makes up for the small quality difference."
- 47 *Ibid.*
- 48 Matthew Schneider, "Why Merit Selection of State Court Judges Lacks Merit," *Wayne Law Review* 56 (2010); Brian T. Fitzpatrick, "The Politics of Merit Selection," *Missouri Law Review* 74 (2009).
- 49 Stephen J. Ware, "The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court," *Kansas Journal of Law and Public Policy* 18 (2009): p. 424. Ware argues for a judicial-selection system requiring Senate confirmation of a governor's nominee with no merit selection committee, followed by "terms of office that are long and non-renewable."
- 50 For example, New Jersey's tradition of maintaining a partisan balance on the state's high court has fallen apart, and the Democratic-controlled state Senate is refusing to confirm the Republican governor's nominees, leaving two seats vacant on the high court. Charles Stile, "Christie Fight over State Supreme Court Justices is One for the Ages," *North Jersey Record*, October 7, 2012, available at [http://www.northjersey.com/news/crime\\_courts/crime\\_courts\\_news/Christie\\_fight\\_over\\_state\\_Supreme\\_Court\\_has\\_roots\\_in\\_19th\\_century.html?page=all](http://www.northjersey.com/news/crime_courts/crime_courts_news/Christie_fight_over_state_Supreme_Court_has_roots_in_19th_century.html?page=all).
- 51 Brett Emison, "Special Interests Attacking Missouri Court Plan Stand Down ... but They'll be Back," *The Legal Examiner*, October 3, 2012, available at <http://kansascity.legalexaminer.com/wrongful-death/special-interests-attacking-missouri-court-plan-stand-down-but-theyll-be-back.aspx?googleid=304624>.
- 52 *Dool v. Burke*, No. 10-3320, 4-5 (10th Cir. Sept. 13, 2012) (O'Brien, J., concurring) (describing the "Kansas triple play" that led the state to adopt merit selection).
- 53 Burton Young, "Politics Again Threatens the Independence of the Judiciary," *South Florida Sun-Sentinel*, October 29, 2012, available at <http://www.sun-sentinel.com/news/opinion/fl-bycol-oped1029-20121029,0,1429082.story>.
- 54 Schneider, "Why Merit Selection of State Court Judges Lacks Merit"; Fitzpatrick, "The Politics of Merit Selection"; Ware, "The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court."

- 55 Fitzpatrick, "The Politics of Merit Selection."
- 56 Ibid, p. 693-696. The study looked at 87 nominees in Tennessee and found that "67% voted more often in Democratic primaries, and 33% voted more often in Republican primaries." The study examined 54 nominees in Missouri and found that "87% gave more [campaign contributions] to Democrats than Republicans, and only 13% gave more to Republicans than Democrats."
- 57 Ibid, p. 700-701. Fitzpatrick noted that Missouri had Democratic governors in 10 years during the 14-year period studied. He also found that the commissions sent "overwhelmingly Democratic slates to Democratic governors." Fitzpatrick also said that the leaders of the two houses of the Tennessee legislature select "almost all" of the commission members, and he acknowledged that, "Over almost the entire period since 1995 [the period studied], the speakers of both Tennessee houses were Democrats."
- 58 A recent article looked at the partisan composition of the Nebraska bar association's executive council, which appoints members to the state's nominating commission. It found that, "In 2006, the council was 83% Democrat and 17% Republican. In 2010, the council was 67% Republican and 33% Democrat by party registration." L. Steven Grasz, "Judicial Selection in Nebraska" (Washington: The Federalist Society, 2012), available at <http://www.fed-soc.org/publications/detail/judicial-selection-in-nebraska>.
- 59 Respondents were asked if "political considerations, such as applicant's party affiliations, play a role" in the process. Approximately 37 percent of respondents strongly disagreed, and 35.9 percent disagreed. About 11 percent neither agreed nor disagreed. Rachel Paine Caufield, "Inside Merit Selection" (Des Moines, Iowa: American Judicature Society, 2012), available at [http://www.judicialselection.us/uploads/documents/JNC\\_Survey\\_ReportFINAL3\\_92E04A2F04E65.pdf](http://www.judicialselection.us/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdf).
- 60 Ibid. Of the respondents, 19.2 percent said they "strongly disagreed" with the idea that members know an applicant's party affiliation, and 30.9 percent disagreed.
- 61 Ibid.
- 62 Malia Reddick, "Merit Selection: A Review of the Social Scientific Literature," *Dickinson Law Review* 106 (2002): p. 733. Reddick discusses previous studies, which found that nominating commissions that require partisan balance have fewer members who say that political considerations influence their decisions.
- 63 U.S. Chamber Institute for Legal Reform, "Promoting 'Merit' in Merit Selection" (2009), available at <http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/research/meritselectionbooklet.pdf>.
- 64 N.Y. Judiciary Law § 62(1) (2012). "The commission shall consist of twelve members of whom four shall be appointed by the governor, four by the chief judge of the court of appeals, and one each by the speaker of the assembly, the temporary president of the senate, the minority leader of the senate, and the minority leader of the assembly. Of the four members appointed by the governor, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state. Of the four members appointed by the chief judge of the court of appeals, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state."
- 65 "Selection of Judges," available at [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm) (last accessed October 2012).
- 66 O'Connor, "Take Justice off the Ballot."
- 67 American Judicature Society, "Model Judicial Selection Provisions" (2008), available at [http://www.ajs.org/selection/docs/MJSP\\_web.pdf](http://www.ajs.org/selection/docs/MJSP_web.pdf).
- 68 Mass. Exec. Order No. 500, "Order Reconstituting The Judicial Nominating Commission And Establishing A Code Of Conduct For Commission Members And Nominees To Judicial Office" §§ 1.5.7 & 2 (March 13, 2008), available at <http://www.mass.gov/governor/docs/executive-orders/executive-order-500.pdf>.
- 69 N.Y. Exec. Order No. 15, "Establishing Judicial Screening Committees" (June 18, 2008), available at <http://www.governor.ny.gov/executiveorder/15>.
- 70 Justices on the Colorado, Maryland, Utah, and Indiana High Courts serve 10-year terms. Justices on the Delaware and Missouri High Courts serve 12-year terms following merit selection. New York's highest court is composed of justices serving 14-year terms. "Selection of Judges," available at [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm).
- 71 Florida Bar Association, "Guide for Florida Voters: Questions and Answers about Florida Judges, Judicial Elections, and Merit Retention" (2012), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/53691BEC3B7D4C0B852579E6006BFD1B/\\$FILE/Voter%20Guide%20FINAL.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/53691BEC3B7D4C0B852579E6006BFD1B/$FILE/Voter%20Guide%20FINAL.pdf?OpenElement).
- 72 One 2002 survey found that only 13 percent of respondents said they had "a great deal of information" on which to base their vote for judges. Greenberg Quinlan Rosner Research, Inc., "RE: Justice At Stake National Surveys of American Voters and State Judges" (2002), available at [http://www.justiceatstake.org/media/cms/PollingsummaryFINAL\\_9EDA3EB3BEA78.pdf](http://www.justiceatstake.org/media/cms/PollingsummaryFINAL_9EDA3EB3BEA78.pdf).
- 73 Rebecca Love Kourlis and Jordan M. Singer, "Using Judicial Performance Evaluations to Promote Judicial Accountability," *Judicature* 90 (2007): p. 201.
- 74 Ibid.
- 75 Ibid.
- 76 DRI, The Voice of the Defense Bar, "Without Fear or Favor in 2011: A New Decade of Challenges to Judicial Independence and Accountability."
- 77 American Bar Association, "Black Letter Guidelines for the Evaluation of Judicial Performance" (2005), available at [http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/jpec\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/jpec_final.authcheckdam.pdf).
- 78 North Carolina State Board of Elections, "2010 General Election Judicial Candidate Voter Guide" (2010), available at [www.ncsbe.gov/GetDocument.aspx?id=2408](http://www.ncsbe.gov/GetDocument.aspx?id=2408).
- 79 Mark S. Cady and Jess R. Phelps, "Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World," *Cornell Journal of Law and Public Policy* 17 (2008): p. 368, available at <http://www.lawschool.cornell.edu/research/JLPP/upload/Cady-Phelps.pdf>.
- 80 Ibid.
- 81 One anti-merit-selection publication said that efforts to replace contested elections with merit selection would "shock the founding generation who formed our nation and states on the notion that all power traces back to the people." American Justice Partnership, "Justice Hijacked" (2010), available at [http://americanjusticepartnership.com/pdf/Justice\\_Hijacked\\_Report.pdf](http://americanjusticepartnership.com/pdf/Justice_Hijacked_Report.pdf).
- 82 Alexander Hamilton, "The Federalist #78, The Judiciary Department."