

10-17-2012

Perspective on Judicial Merit Retention in Florida

Scott G. Hawkins

Follow this and additional works at: <http://scholarship.law.ufl.edu/flr>



Part of the [Judges Commons](#)

Recommended Citation

Scott G. Hawkins, *Perspective on Judicial Merit Retention in Florida*, 64 Fla. L. Rev. 1421 (2012).

Available at: <http://scholarship.law.ufl.edu/flr/vol64/iss5/8>

This Essay is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outler@law.ufl.edu.

PERSPECTIVE ON JUDICIAL MERIT RETENTION IN FLORIDA

*Scott G. Hawkins**

Abstract

This November, voters will decide whether to retain in office three justices of the Florida Supreme Court and fifteen judges of the district courts of appeal. This Essay explains the merit retention process and puts that process in historical context. It analyzes the challenges voters face in making decisions about whether to retain appellate court judges and highlights The Florida Bar’s role in educating voters about merit retention. The Florida constitution entrusts the important decision whether to retain appellate court judges, including supreme court justices, to the voters, and in order to make that decision, voters must be informed about the judicial role in American democracy.

INTRODUCTION..... 1422

I. OVERVIEW AND HISTORICAL BACKGROUND..... 1423

 A. *Overview of Merit Retention Elections in Florida* 1423

 B. *History of Judicial Selection in Florida* 1424

II. JUDICIAL REFORM: THE INSTITUTION OF MERIT RETENTION
IN FLORIDA 1425

III. CHALLENGES FACING VOTERS WHEN ASSESSING
JUDICIAL MERIT 1428

 A. *Limited Understanding of Judicial Role* 1428

 B. *The Role of a Judge on a Retention Ballot Differs from
that of a Candidate for Representative Office* 1429

 C. *Limitations on Judicial Campaigns*..... 1430

IV. THE IMPORTANCE OF VOTER EDUCATION AND THE
ROLE OF THE FLORIDA BAR..... 1431

CONCLUSION..... 1432

* Immediate Past President, The Florida Bar, 2011–2012; Vice Chair and Shareholder, Jones, Foster, Johnston & Stubbs, P.A., West Palm Beach. J.D., University of Florida, 1983; BSBA, University of Florida, 1980; MBA, University of Edinburgh, 1985. Appreciation to Professor Keith Rizzardi, St. Thomas School of Law, former chair of the Government Law Section of The Florida Bar, and Special Counsel to Jones, Foster, Johnston & Stubbs, P.A., for his review and input. Further appreciation for assistance with this Essay is extended to Molly Waldron, an intern with Jones, Foster, Johnston & Stubbs, P.A.

“[T]he greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary.”

—Chief Justice John Marshall¹

INTRODUCTION

In the history of judicial retention elections, the November 2012 general election in Florida will be significant. Voters will decide whether to retain three sitting justices of the Florida Supreme Court and fifteen sitting judges on Florida’s appellate courts.² The central question for voters is whether these judges merit retention. Stated differently, voters will decide whether the records and reputations of these judicial officers merit their continuation in judicial office.

While the concept of judicial merit retention is not new in American government,³ it appears there is fundamental voter misunderstanding on the subject. Focus group research conducted on behalf of The Florida Bar indicates that 90% of the participating voters do not understand what the term “judicial merit retention” means.⁴ This apparent lack of understanding is disturbing given both the importance of the vote (whether to retain in office sitting constitutional officers—appellate judges and supreme court justices) and the breadth of judicial merit retention. Under the Florida constitution, merit retention elections are the sole mechanism for determining whether Florida Supreme Court justices and other appellate court judges should continue to serve in judicial office.⁵

1. John Marshall, Speech on Dec. 11, 1829, in PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30 619 (1830).

2. See *The Vote’s in Your Court: Judicial Merit Retention. Know the Facts.*, THE FLA. BAR, <http://www.floridabar.org/thevotesinyourcourt> (last visited July 5, 2012) [hereinafter *The Vote’s in Your Court*] (listing supreme court justices and appellate judges up for merit retention).

3. A system of merit selection and retention for judges at all levels was first implemented in Missouri. See Charles B. Blackmar, *Missouri’s Nonpartisan Court Plan from 1941 to 2005*, 72 MO. L. REV. 199, 200–02 (2007). Hence, states which have a form of judicial merit selection and retention are said to have adopted the “Missouri Plan.”

4. Moore Consulting Grp., *The Florida Bar Merit Retention Education Program 4* (2012) (on file with author) (describing results of focus group research). By way of comparison, studies from other states have found low levels of voter information with respect to judicial elections. See, e.g., Kenyon N. Griffin & Michael J. Horan, *Patterns of Voting Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming*, 67 JUDICATURE 68, 72 (1983) (reporting that over 50% of voters had “no information” about justices on the ballot); Charles H. Sheldon & Nicholas P. Lovrich Jr., *Voter Knowledge, Behavior and Attitudes in Primary and General Judicial Elections*, 82 JUDICATURE 216, 218 tbl.1 (1999) (showing that more than 75% of voters had “no information” or “not enough information” about judicial candidates).

5. This analysis does not include disciplining of judges by the Judicial Qualifications Commission (JQC). Unlike a merit retention vote, the focus in a proceeding before the JQC is whether the subject judicial officer violated the Code of Judicial Conduct. Discipline of judicial officers may include censure, reprimand, or removal from office. See generally Hon. James R.

The Florida Bar appreciates the opportunity to participate in this discussion. Like state bars across the country, The Florida Bar has as a core mission to “improve the administration of justice.”⁶ In keeping with this mission and the longstanding commitment of The Florida Bar to encourage voter education, the Board of Governors of The Florida Bar initiated an education program with the goal of enhancing voter understanding of judicial merit retention in connection with the general election in November 2012.⁷ In this regard, considerable effort has been expended to educate voters about Florida’s merit retention system, including an examination of the system that immediately predated the 1976 constitutional referendum that implemented the current system.

This Essay puts merit retention in context and discusses The Florida Bar’s efforts to educate Florida voters about merit retention. Part I outlines how merit retention works and charts the history of judicial selection in Florida. Part II explains the judicial reforms that led to the current system in the early 1970s. Part III analyzes some of the challenges voters face as they make important decisions about whether to retain judges. Finally, Part IV highlights the Bar’s role in educating voters about merit retention.

I. OVERVIEW AND HISTORICAL BACKGROUND

A. *Overview of Merit Retention Elections in Florida*

In contrast to the selection, appointment, and retention of judges in the federal system, the Florida constitution provides voters with a direct role in determining whether appellate court judges and supreme court justices should be retained to continue serving the state.⁸ The current system has been in place since 1976 as the result of a constitutional referendum to institute a merit retention system designed to provide Florida citizens with an opportunity to vote, in nonpartisan elections, on the merits of sitting state appellate court judges and justices of the Florida Supreme Court. The referendum to amend the Florida constitution in this manner passed by a substantial majority.⁹

Wolf, *Judicial Discipline in Florida: The Cost of Misconduct*, 30 NOVA L. REV. 349 (2006). This topic is beyond the scope of this Essay.

6. RULES REGULATING THE FLORIDA BAR, Rule 1-2 (“The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.”).

7. See *The Vote’s in Your Court*, *supra* note 2.

8. Compare U.S. CONST. art. I, § 2 (providing for presidential appointment of federal judges “by and with the advice and consent of the Senate”), and U.S. CONST. art. III, § 1 (granting federal judges tenure “during good behaviour”), with FLA. CONST. art. V, § 10 (requiring retention elections for state supreme court justices and appellate judges).

9. See Martin Dyckman, *Merit Retention Passes*, ST. PETERSBURG TIMES, Nov. 3, 1976, at 2B (“Florida voters agreed Tuesday to give up their power to elect new members of the Supreme Court and district courts of appeal as they ratified the so-called merit-retention amendment by a margin of better than 2-1.”).

The judicial article of the Florida constitution succinctly addresses judicial retention: “If a majority of the qualified electors voting within the territorial jurisdiction of the court vote to retain, the justice or judge shall be retained for a term of six years.”¹⁰ Accordingly, with respect to judicial retention, the November 2012 ballot will read substantially as follows: “Shall Justice (or Judge) . . . (name of justice or judge) . . . of the . . . (name of the court) . . . be retained in office?”¹¹

To place the current system in context, a review of the history of Florida judicial selection is warranted.¹² As indicated below, judicial selection in Florida has evolved over time and has taken multiple forms prior to the current system.

B. *History of Judicial Selection in Florida*

Florida’s first constitution was adopted by convention in 1838 and became effective upon statehood in 1845.¹³ Under the 1838 constitution, all judges except justices of the peace were elected by “the concurrent vote of a majority of both Houses of the General Assembly.”¹⁴ There were two important subsequent changes to the system under the 1838 constitution. In 1851, the legislature established an independent supreme court whose three members would be elected by the legislature to eight-year terms.¹⁵ And in 1852, the constitution was amended to increase voters’ role in judicial selection.¹⁶ With this amendment, circuit court judges were elected for six-year terms.¹⁷

In contrast to using the popular vote as the mechanism for selecting judges, the Florida constitution of 1865 required supreme court justices to “be appointed by the Governor, by and with the advice and consent of the Senate.”¹⁸ Then, in 1868, the adoption of a new constitution again changed

10. FLA. CONST. art. V, § 10(a).

11. *Id.*

12. Balanced treatment of the subject of judicial merit retention in Florida necessarily requires reference to the current system of judicial selection. Merit selection and merit retention are integral parts of a single policy and must be considered together. Notably, merit retention elections for supreme court justices and state appellate judges only occur after judges have been selected through the judicial nominating commission process and have served at least one year. *See* FLA. CONST. art. V, § 11(a). In contrast, candidates for open seats on the county and circuit courts are elected by popular vote by registered voters in the particular county or circuit. *See id.* § 10(b). If a county court or circuit court seat becomes vacant during a judge’s term, that vacancy is filled through the judicial nominating commission process. *See id.* § 11(b).

13. *See* Joseph W. Little, *An Overview of the Historical Development of the Judicial Article of the Florida Constitution*, 19 STETSON L. REV. 1, 3 (1989).

14. FLA. CONST. of 1838, art. V, § 11.

15. *See* Little, *supra* note 13, at 6.

16. *See id.*

17. *See id.*

18. FLA. CONST. of 1865, art. V, § 10. However, voters still elected circuit judges. *See id.* § 11. The legislature was also empowered to establish an elected chancery court. *See id.* § 13.

several aspects of judicial selection.¹⁹ First, county courts were established, with county court judges appointed by the governor and confirmed by the senate to serve four-year terms.²⁰ Second, circuit court judges were appointed by the governor for eight-year terms, thus eliminating popular elections as the mechanism for selecting circuit court judges.²¹ Third, supreme court justices, who were still appointed by the governor and confirmed by the senate, now held “their offices for life or during good behavior.”²²

The Florida constitution of 1885 introduced yet another approach to judicial selection.²³ The 1885 constitution gave voters the ability to elect supreme court justices²⁴ and county judges²⁵ but reserved the selection of circuit court judges to the governor, through gubernatorial appointment subject to confirmation by the senate.²⁶ The evolution of Florida’s judicial system, from gubernatorial appointments, to general elections, to joint governor–senate selections, continued well into the twentieth century.²⁷ In 1942, Florida’s constitution was amended to restore elections for circuit court judges, beginning with the 1948 elections.²⁸ In 1956, the judicial article was completely revised to create the district courts of appeal.²⁹

II. JUDICIAL REFORM: THE INSTITUTION OF MERIT RETENTION IN FLORIDA

Florida’s transition to merit selection and retention was part of a larger effort to reform judicial selection in the states. Professor Albert Kales of Northwestern University School of Law proposed merit selection and retention as an alternative to judicial elections, which he thought had become politicized.³⁰ Professor Kales’s proposal provided for appointment by an elected chief justice, but it also required appointed judges to stand

19. See Little, *supra* note 13, at 9–14.

20. FLA. CONST. of 1868, art. VI, § 9.

21. *Id.* § 7.

22. *Id.* § 3.

23. See Little, *supra* note 13, at 16–17.

24. FLA. CONST. of 1885, art. V, § 2.

25. *Id.* § 16.

26. *Id.* § 8.

27. See generally Raquel A. Rodriguez, *Judicial Selection in Florida—An Executive Branch Perspective*, FLA. B.J., Jan. 2005, at 16–19. As analyzed by Raquel Rodriguez, former General Counsel to Governor Jeb Bush, the various evolving modifications to judicial selection in Florida derived generally from the policy goal of seeking to establish a system for selecting judges that would promote an independent and impartial judicial branch.

28. See Little, *supra* note 13, at 23.

29. FLA. CONST. of 1885, art. V (1956).

30. See G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 608–09 (2009); see also Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUDICATURE SOC’Y 178, 186 (1937) (“Putting courts into politics, and compelling judges to become politicians . . . has almost destroyed the traditional respect for the Bench.”).

for retention elections.³¹ A similar system was instituted in Missouri, but instead of the chief justice making appointments, the governor appointed judges from a list of candidates submitted to him by a commission.³² This system spread to other states in the South, the Great Plains, and the Rockies.³³

In 1971, Florida Governor Reubin Askew began implementing such a judicial selection system in the hopes that it would encourage the nonpartisan review of judicial nominees on the basis of merit.³⁴ By executive order, Governor Askew established a framework to fill judicial vacancies through the creation of judicial nominating councils.³⁵ Initially each council was composed of six active members of The Florida Bar, three appointed by the governor and three appointed by The Florida Bar.³⁶ Those six Bar members then jointly selected three citizens to join the council.³⁷ Each nine-member council then had the responsibility of nominating candidates to the governor to fill judicial vacancies.³⁸

Under the 1971 executive order, however, the governor retained full discretion over whether to appoint any of the judicial nominees presented by the Judicial Nominating Councils.³⁹ In 1972, Floridians voted to amend the Florida constitution to curtail this gubernatorial discretion.⁴⁰ Specifically, Florida voters amended the Constitution to require the governor to appoint “one of not fewer than three persons nominated.”⁴¹

In 1976, Floridians again voted to amend the Florida constitution regarding the selection and retention of judges and justices. Under the 1976 amendment, the authority of nominating commissions was increased when Floridians voted to end the general elections for both appellate court judges and supreme court justices.⁴² Thus, the 1976 constitutional amendment placed the appellate courts and the supreme court under the judicial nomination process and instituted the current system of nonpartisan judicial merit retention elections for retaining judges on those courts.⁴³

31. See Albert M. Kales, *Methods of Selecting and Retiring Judges*, 11 J. AM. JUDICATURE SOC'Y 133, 141–43 (1927) (outlining proposed procedures for merit selection and retention).

32. See Blackmar, *supra* note 3, at 200–02; Tarr, *supra* note 30, at 609.

33. See generally JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* ch. 10 (2012) (describing the spread of merit selection and retention).

34. See R. Stanley Lowe, *Voluntary Merit Retention Plans*, 55 JUDICATURE 161, 166–67 (1971) (describing efforts in Florida and other states to implement voluntary merit selection for judicial vacancies through executive decision).

35. *Id.* at 166.

36. *Id.*

37. *Id.*

38. *Id.* at 167.

39. See Rodriguez, *supra* note 27, at 16, 17.

40. *Id.* at 17.

41. FLA. CONST. art. V, § 11 (1972).

42. *Id.* § 10(a) (1976).

43. See Rodriguez, *supra* note 27, at 17.

With this amendment, candidates for judgeships on Florida's appellate courts no longer campaigned for office and no longer collected political contributions like candidates for representative office. Political campaigning for positions on the appellate courts and the supreme court thus ended when Floridians took steps to seemingly insulate the system of judicial selection and retention from electoral politics.⁴⁴

It is important to remember that this constitutional amendment emerged during a time the Florida Supreme Court was plagued with scandal.⁴⁵ As a result of the 1976 constitutional amendment, the system initiated by Governor Askew's executive order in the early 1970s—whereby the governor reserved full discretionary power in appointing judges—was synthesized with the new judicial nominating commissions. The current system has therefore operated since first being implemented in 1978 and has functioned under seven governors, both Democrats and Republicans.⁴⁶

Today, the system implemented by Floridians through the 1976 amendment emphasizes judicial selection through nonpartisan considerations of merit at two junctures. First, after applicants for judicial office are vetted on the basis of merit by nonpartisan judicial nominating commissions, the governor is required to appoint “one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission.”⁴⁷ Second, following the initial review, in the first election after a newly appointed judge has served for at least one year and every six years thereafter, voters cast ballots in nonpartisan elections to determine, on the basis of judicial merit, whether to retain a

44. Nineteen states currently use retention elections to retain at least some sitting judges. *See generally* *Judicial Selection in the States*, AM. JUDICATURE SOC'Y, <http://www.judicialselection.us> (last visited July 5, 2012) (collecting information about judicial selection and retention). Even amid limited changes and opposition, the merit retention system in Florida has remained intact. Significantly, “[n]o state that has chosen the merit system has ever given it up.” *Merit Selection and Retention*, THE FLA. BAR, <http://www.floridabar.org> (search for “merit selection”); then follow “Board Issue Paper—Merit Selection and Retention” hyperlink (last visited July 5, 2012).

45. *See generally* MARTIN A. DYCKMAN, *A MOST DISORDERLY COURT: SCANDAL AND REFORM IN THE FLORIDA JUDICIARY* (2007) (detailing a series of high-profile scandals that rocked the Florida judiciary in the 1970s and prompted judicial reforms).

46. There have been attempts to modify Florida's current system. In 2001, House Joint Resolution 627 and House Bill 367 were proposed in an attempt to regain much of the authority for judicial selection that had been lost by the executive and legislative branches. Then-President of The Florida Bar Herman Russomanno concluded that the proposed resolution would “remove all checks on the politicization of judicial selection, place incumbent judges at the whim of the legislature or any group of persons dissatisfied with a particular decision, and significantly reduce the independence of the judiciary.” Herman J. Russomanno, *An Independent Bar and Judiciary: As American As Baseball and Apple Pie*, 75 FLA. B.J. 4, 4–6 (2001). President Russomanno expressed concern about the proposal, saying, “this bill would completely politicize a judicial selection process that was intentionally set up to ensure balance and greater impartiality within the judicial nominating commissions.” *Id.* at 6.

47. FLA. CONST. art. V, § 11.

judge in office.⁴⁸

III. CHALLENGES FACING VOTERS WHEN ASSESSING JUDICIAL MERIT

As previously noted, recent focus group research conducted on behalf of The Florida Bar indicates that 90% of voters lack an understanding of judicial merit retention.⁴⁹ Given this deficiency in understanding, The Florida Bar Board of Governors initiated a voter education program directed to the dissemination of basic information on judicial merit selection.⁵⁰ A central issue, however, is trying to understand more broadly the reasons for the lack of voter understanding. The analysis of this topic, no doubt, would benefit from empirical research. However, based on comments raised in various public forums, the following appear to be important considerations.

A. *Limited Understanding of Judicial Role*

Understanding the important role that judges play in our democracy and how judges perform their work is a significant challenge for voters. Based on opinions expressed in public forums, there appear to be varying degrees of voter understanding about the roles and functions of a judge. For example, voters often show a lack of understanding when asked how they would weigh disputed facts in light of an evidentiary burden of proof or when considering that appellate judges are generally limited in their review to matters contained in the lower court record and to the issues properly preserved for appeal.⁵¹ The voters' limited appreciation for the difficult work of judging applies to all levels of the judiciary: to trial judges in county and circuit courts; to appellate judges in the five district courts of appeal; and to justices on the Florida Supreme Court.

In the context of judicial merit retention, however, having a basic understanding of what judges do, and what functions judges perform, is important when considering the question of how voters assess judicial merit. In the end, the policy underlying judicial merit retention elections—as a mechanism for determining whether judges merit continuation in office—is grounded in part on the premise that voters will cast votes in favor of retaining or not retaining a particular judge based on the citizen's assessment of the merit of that particular judge. If voters lack an understanding of what judges do, then how can voters actually assess the

48. *Id.* § 10.

49. *See* Moore Consulting Grp., *supra* note 4.

50. *See The Vote's in Your Court*, *supra* note 2.

51. For example, following a well-publicized trial in Florida, a resident sought my view as President of the Bar about the State's failure to obtain a guilty verdict. I responded by asking if that person had ever tried to prove a fact "beyond a reasonable doubt." The inquirer initially seemed puzzled, but then the conversation turned to sanctity of the burden of proof that under the United States Constitution governs a criminal proceeding.

merits of a particular judge? Further complicating the matter, judges are not permitted in our system to explain their rulings or defend how they arrived at a particular ruling. Therefore, the electorate does not have an ability to question judicial candidates on prior rulings. Instead, the voters are left to decipher a judge's merit through their own readings, communications with others, and the media.

B. The Role of a Judge on a Retention Ballot Differs from that of a Candidate for Representative Office

Another challenge voters face arises from the fundamental difference between judges and representative officeholders such as members of Congress or state legislators. Evidence of the distinctions is borne out in the campaigns of those seeking judicial office and those seeking representative office. In American democracy, voters are conditioned to vote for candidates based on name recognition and political positions. For example, when running for Congress, a candidate will endeavor to broadly communicate his name in the pertinent media markets in the hopes of attracting votes through name recognition. Likewise, a candidate for the state legislature will enunciate policy positions—in the form of campaign promises and platforms—in hopes of stimulating voter interest, campaign contributions, and ultimately election-day support. These factors, in part, represent the voter mindset when considering how to support a particular candidate. Voters are conditioned to expect candidates to proceed in this manner. However, in considering candidate behavior, it is important to note that the roles and functions judges perform are fundamentally different than the roles and functions representative public officials perform. Likewise, unlike candidates for representative office, candidates for judicial office are restricted by severe campaign limitations, as discussed below. Nevertheless, both are subject to voter approval through an election process.

As noted by one commentator when comparing judges with candidates for representative office: “Judges are different because they cannot be advocates, they cannot have political agendas, and in many instances, once a judge makes a determination of the facts, that judge has no choice as to what law to apply.”⁵² In contrast, elected public officials, sensitive to their political support, legislate and govern based on partisan philosophy. Stated differently, while judges interpret and apply the law, legislatures debate and enact the law. While legislatures are bound by the support of the people, judges are yoked to the confines of the law.

In analyzing the differing roles between judges and representative office holders, Alexander Hamilton noted, “The courts must declare the

52. Ben F. Overton, Senior Justice, Retired, Fla. Supreme Court, Remarks at the Hillsborough County Debate on Merit Selection and Merit Retention, Tampa, Fla. 9 (Nov. 2, 1999) (transcript on file with author).

sense of the law, and if they should be disposed to exercise will instead of judgment,” the legislature and the judiciary would cease to be distinct.⁵³ And the traits that make a good judge are quite different from the traits that make a good legislator. These important distinctions between judges and representative public officials, however, are often misunderstood, and may be difficult for some voters to comprehend, especially when they hear high-profile comments characterizing some judges as political activists.⁵⁴

C. Limitations on Judicial Campaigns

Another challenge for voters in the context of assessing judicial merit pertains to campaign limitations on candidates for judicial office. Due to campaign restrictions and the nature of judicial office, the campaign of a candidate for judicial office differs substantially from the campaign of a candidate for representative office. Specifically, judicial candidates are prohibited from announcing personal or political views.⁵⁵ Since judges cannot self-promote, efforts to generate name recognition and political donations are impeded. Further, judicial candidates are nonpartisan and may not enunciate opinions about potential rulings.

The notion that judicial candidates cannot express policy views, or that judicial candidates are limited in what they can do to differentiate themselves from one another, contradicts voters’ expectations. While voters expect candidates for office to express their views on policy issues such as taxes and defense, candidates for judicial office are limited on expressing such views. These limitations embody the goal that courts should be led by fair and impartial judges and should be independent of the executive and legislative branches. Impartiality could vanish if judges are permitted to express their policy views or indicate how they might rule on particular issues.

In contrast to the severe campaign limitations imposed on judges, few restrictions limit the efforts of groups opposed to their retention. As noted, the efforts of opposition groups whose “aim is usually not merely to punish a particular justice but to send a message to other justices” can invest resources in the election which “affect the orientation and decisions of the court.”⁵⁶ Therefore, “retention elections have the same potential for

53. THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (C. Rossiter ed., 1961).

54. See, e.g., Amy Gardner & Matt DeLong, *Newt Gingrich’s Assault on ‘Activist Judges’ Draws Criticism, Even from Right*, WASH. POST (Dec. 17, 2011), available at http://www.washingtonpost.com/politics/newt-gingrichs-assault-on-activist-judges-draws-criticism-even-from-right/2011/12/17/gIQAoYa80O_story.html.

55. Some restrictions on political speech by judges have come under constitutional challenge. See *Republican Party of Minn. v. White*, 536 U.S. 765 (2002); see also Michael Richard Dimino, Sr., *Counter-Majoritarian Power and Judges’ Political Speech*, 58 FLA. L. REV. 53 (2006).

56. G. Alan Tarr, *State Judicial Selection and Judicial Independence*, in JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY app. D at 5 (2003).

intimidation and a chilling effect on judicial decision making as direct election.”⁵⁷ Voters must be wary of interest group involvement in the upcoming retention election because it has the power to “[transform] those elections into races virtually indistinguishable from partisan contests.”⁵⁸ As noted by then-Judge Benjamin Cardozo, judicial selection does not take place in a void; rather, “the great tides and currents which engulf the rest of men [seeking political office] do not turn aside in their course and pass the judges by.”⁵⁹

IV. THE IMPORTANCE OF VOTER EDUCATION AND THE ROLE OF THE FLORIDA BAR

Mindful of the challenges voters face in casting an informed vote in judicial retention elections, the Florida Bar Board of Governors launched a public education program in an attempt to enhance voter understanding on this important subject.⁶⁰ Branded *The Vote’s in Your Court*, the public education program is designed to educate Florida voters about the merit retention process and to urge voters to make informed decisions when casting their ballots to retain appellate judges and supreme court justices in November 2012.⁶¹ The program urges voters to carefully evaluate judges based on merit as represented by their reputations for ability, commitment, scholarship, ethics, diligence, demeanor, and treatment of colleagues and those who appear before them.⁶² Further, the program urges voters to weigh a judge’s full body of work and record of accomplishment.⁶³

Voters are urged to check the truth of circulated opinions and to be mindful of the importance of a “judge’s professional qualifications”⁶⁴ amid the “constructed political coalitions”⁶⁵ that will mount opposition—such efforts often mirroring “the coalitions formed for other partisan political

57. Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 859 (1998).

58. Tarr, *supra* note 56, at 4.

59. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

60. *See The Vote’s in Your Court*, *supra* note 2. The Florida Bar’s efforts to educate voters are especially important given the high visibility of this year’s retention elections. One study showed that following a high-visibility judicial campaign more voters participated in the election but those voters were less informed about their choices. *See* Lawrence Baum & David Klein, *Voter Responses to High-Visibility Judicial Campaigns*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 160–61 (Matthew L. Streb ed., 2007).

61. *See The Vote’s in Your Court*, *supra* note 2.

62. *See* THE FLA. BAR, *GUIDE FOR FLORIDA VOTERS: QUESTIONS AND ANSWERS ABOUT FLORIDA JUDGES, JUDICIAL ELECTIONS AND MERIT RETENTION* (2012), *available at* <http://www.floridabar.org/thevotesinyourcourt> (follow “Florida Bar Guide for Florida Voters” hyperlink).

63. *See id.*

64. Tarr, *supra* note 56, at 4.

65. *Id.*

disputes.”⁶⁶ While voters receive information about judges and their work from a variety of sources, ultimately voters must decide for themselves, based on the facts and their own judgment, whether those judges deserve to be retained in office.

CONCLUSION

Judicial retention elections have emerged as a product of various movements with the same apparent goals: establishing, maintaining, and promoting an impartial and independent judiciary. By constitutional amendment, voters established Florida’s judicial merit retention system in 1976. The merit retention system has functioned uniformly in Florida since that time under seven different governors, both Democrats and Republicans.

The November 2012 general election could prove to be a pivotal test for merit retention in Florida given the number of justices and appellate judges on the ballot. As discussed in this Essay, merit retention elections present special challenges for voters entrusted with assessing the merits of particular judges. This difficulty, in part, stems from the complicated roles judges fulfill in our democracy and the limitations placed on judicial campaigning. To address the lack of voter understanding, The Florida Bar has engaged in a public education effort to enhance voter understanding. The *Florida Law Review* is commended for undertaking scholarly consideration of this important topic.

66. *Id.*