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MERIT RETENTION ELECTIONS

Joseph W. Little

Florida Bar Immediate Past President Scott Hawkins's law review essay publishes this eye-catching fact: "90% of the participating voters do not understand what the term 'judicial merit retention' means."¹ This ignorance sends a troubling message because merit retention of appellate judges has been the law in Florida since 1976 and three supreme court justices and numerous district court judges are on the November general election ballot. Even worse, Florida voters themselves chose this method to hold appellate judges accountable instead of submitting them to periodic popular elections, which was the rule in Florida for most of its history as a state.

Much has been written about the controversial history of how judges are selected and retained in the United States.² The controversy arises from a clash between irreconcilable political goals: a desire for judges to make decisions free of partisan biases, and an urge to hold judges publicly accountable when decisions stray too far from some measure of political legitimacy in the public eye. The Florida "merit" system reaches a somewhat uneasy compromise between these goals. Appellate judges are screened by nominating commissions, presumably on the merits, and appointed from a slate by the governor. They are then periodically "evaluated," presumably also on the merits, in an election in which the electors vote "yes" to "retain" for another six years or "no" to end a judge's tenure. Hawkins's essay laments that few voters know anything about merit retention elections much less about whether to vote yes or no. This ignorance casts doubt on the system's theoretical premises.

To date, the Florida merit retention system has equated to life appointments for appellate judges.³ In thirty-three years, the electors have voted out no judge or justice in a retention election. In other states, removal has been exceedingly rare.⁴ Even then, voters have not usually ousted incompetent, slothful or corrupt judges, but those who endorsed decisions offensive to the political beliefs of a major portion of the electorate. These include judges who steadfastly voted against the death

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1. Scott G. Hawkins, *Perspective on Judicial Merit Retention in Florida*, 64 FLA. L. REV. 1422, 1423 (2012).

2. See, e.g., Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839 (2012).

3. More accurately, appointment to age seventy. The Florida Constitution disqualifies judges at age seventy. FLA. CONST. art V, § 8. Also, some justices and judges voluntarily resign. As examples, Justice Rosemary Barkett accepted an appointment on the federal appeals court; First District of Appeal Judge Charles Kahn became a federal magistrate; and Justices Raoul Cantero, Kenneth Bell, and Arthur England, among others, resigned to return to private practice.

4. Albert J. Klumpp, *Three Decades of Elections and Candidates*, ARIZ. ATT'Y, Nov. 2008, at 12.

penalty,⁵ voted to invalidate school vouchers for religious schools,⁶ and voted to invalidate restrictions on gay marriage.⁷

Two former Florida supreme justices were unsuccessfully threatened on similar bases: Justice Leander Shaw for authoring a pro-abortion opinion and Justice Rosemary Barkett for her perceived “softness” on crime.⁸ Both these threats proved flabby and the electors retained them by safe margins. This year, the three retention candidates are targeted in part for their rejection of a Florida school voucher law that violated the Florida guarantee of a “uniform” system of free public schools.⁹ In sum, the justices scorned a measure cherished by the legislature, the governor, and major segments of the populace, and they now face the ire of the scorned in their bid for merit retention at the polling booths.

While it might have had merit in olden days, popular election of appellate judges in today’s cash-driven electoral world would be a democratic travesty. Although merit retention offers a better alternative to direct election, these elections in Florida are nevertheless a sham. Nothing in the system itself gives the electors a means to evaluate merit. When the retention elections routinely retain all candidates, the competent, the honest, the incompetent, and the corrupt, as they have done, their supporters may crow that the system promotes both merit and accountability. But when organized opposition arises against a judge on political grounds, defenders cry “foul” against mixing up politics with “merit.” This, they lament, is an assault against judicial independence.

From whence came this notion of judicial immunity to political scrutiny? In pre-revolutionary England, judges bowed and scraped to the person of the monarch who appointed them, removed them, and sometimes did worse things to those who acted contrary to the monarch’s will. One of the most stirring encounters occurred at Hampton Court where James I summoned the judges to lay down the law as to who had the last word on the decision in any case. Lord Chief Justice Edward Coke, timorously lying prostrate on the floor, instructed James I that “the king ought not to be under any man, but under God *and the law*.”¹⁰ In contrast to royal

5. The most notable instance is the removal of Chief Justice Rose Bird and others from the California Supreme Court. *See, e.g.,* Craig Haney, *Politicizing Crime and Punishment: Redefining “Justice” to Fight the “War on Prisoners,”* 114 W. VA. L. REV. 373, 409 & n.121 (2012).

6. The Florida Supreme Court justices are targeted in 2012 in part because of the school voucher decision in *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), even though that decision does not rest on church–state grounds.

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

8. Jacqueline R. Griffin, *Judging the Judges*, 21 LITIG. 5, 7. (1995). Justice Shaw’s opinion appears in *In re T.W.*, 551 So. 2d 1186 (Fla. 1989).

9. *Holmes*, 919 So. 2d 392; *cf.* FLA. CONST. art. IX, § 1 (“Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education . . .”).

10. Many writers cite this episode. *See, e.g.,* *Jones v. Clinton*, 869 F. Supp. 690, 693 & n.1

domination, the doctrine of parliamentary sovereignty largely avoided clashes (and still does) between English judges and the legislature. In England, with few exceptions, the legitimacy of an act of parliament is not subject to judicial review.

Hated decisions of royal judges who were answerable to England and not to the colonials gave great impetus to the American independence movement. That experience produced American constitutions, both federal and state, designed to make judges “independent” post-appointment from the ire of the executive branch. Just as important, *Marbury v. Madison*—that most famous of all American judgments—emphatically booted the notion of *parliamentary sovereignty* out of the American political system.¹¹ Congress, said Chief Justice John Marshall, is subservient to the Constitution and *this court* has the last word on what the Constitution means.¹² That decision was inflammatory at the time. Marshall wrote it to offend Thomas Jefferson—and he succeeded. President Jefferson hated the opinion and despised Marshall. Despite that, from that day to this, any act of Congress may be upended by what the judges deem to be an overriding constitutional principle.

The Florida Supreme Court claimed the power to render statutes unconstitutional in its first clear chance to do so¹³ and has emphasized its supervisory authority in these no uncertain terms: “The judiciary is in a lofty sense the guardian of the law of the land and the Constitution is the highest law.”¹⁴ The American doctrines of constitutional sovereignty and judicial interpretive supremacy inevitably create clashes between legislatures and judges. Call them what you may, judicial resolutions of these clashes are “political” decisions. The people freely vote to remove legislators whose decisions they dislike. Who, then, could convince them that they are not entitled to vote against judges whose “political” decisions they dislike?

What then are we to do? Until someone devises a better system for retaining judges, supporters of an assailed judge’s “political” decisions

(E.D. Ark. 1994).

11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

12. *Id.* at 177 (“It is emphatically the province and duty of the judicial department to say what the law is.”).

13. *Flint River Steamboat Co. v. Roberts*, 2 Fla. 102 (1848).

14. *Dade County Classroom Teachers Ass’n, Inc. v. Legislature*, 269 So. 2d 684, 686 (Fla. 1972). Alexander Hamilton had referred to the “guardian” role of the courts in *The Federalist Papers*. THE FEDERALIST NO. 78, at 468–69 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (discussing the courts’ “duty as faithful guardians of the Constitution”). The Florida Supreme Court has also said, “Nevertheless, preference for legislative treatment cannot shackle the courts when legally protected interests are at stake. As people seek to vindicate their constitutional rights, the courts have no alternative but to respond. Legislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights.” *Satz v. Perlmutter*, 379 So. 2d 359, 360–61 (Fla. 1980).

must duke out retention elections with those who abhor those decisions. The judges' defenders and editorialists may plead for "judicial independence" as much as they please, but what will count most is the political strength of the warring partisans for and against the galvanizing decision. In the vernacular, are you "for it" or "agin' it?" While disappointing to merit retention proponents and a great shame, political conflict is inherent in the system.

What can the judges do to protect themselves from backlash retention opposition? One thing they cannot do is replace American constitutionalism with "legislative sovereignty." Doing that would be nothing less than a revolution—treason against the deeply ingrained culture of *Marbury v. Madison*. Neither may judges duck constitutional issues. Nobody benefits from timid judges. Still, judges might occasionally invoke what used to be called the "political question" doctrine.¹⁵ Even though, according to Tocqueville, every political question in the United States ultimately becomes a legal question,¹⁶ courts might legitimately leave breathing room for political processes to work out some issues before making a dispositive judicial ruling.¹⁷ Perhaps temporary judicial deference would have avoided the notorious Iowa removal episode.¹⁸

Toning down judicial rhetoric might be more palatable and effective. The exiting corpus of judicial opinions, starting with *Marbury v. Madison*, provides enough high-flown rhetoric to serve all our needs. Today's judges might be well advised to craft opinions in a manner that corresponds to what they repeatedly say they are doing: merely measuring governmental actions against constitutional standards that the people have imposed. Eliminating high-minded language about "the duty of the courts" to protect this or that interest might go a long way to defuse personal attacks upon judges by electors who do not agree that this or that interest deserves constitutional protection.¹⁹ It could refocus that ire into campaigns to change the constitutional standards. After all, in Florida, "[a]ll political power is inherent in the people"²⁰ including the power to initiate amendments to the Florida Constitution.²¹ Widely debated constitutional amendment campaigns might supplant vendettas against virtually helpless judges in unnoticed retention elections. Then, the people as a whole could engage in determining what kind of constitution they want to govern them.

What then should Florida voters do in the 2012 merit retention

15. See *Baker v. Carr*, 369 U.S. 186 (1962).

16. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1840).

17. See, e.g., *Dade County*, 269 So. 2d 684.

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

19. Alexander Hamilton's justification and defense of judicial independence in *The Federalist Papers* cannot be improved upon. THE FEDERALIST NO. 78 (Alexander Hamilton). Modern opinions might merely drop a footnote to that and say no more about it.

20. FLA. CONST. art. I, § 1.

21. *Id.* art. XI, § 3.

election? That one is easy. They should vote to retain the current justices, none of whom has demonstrated undue partisan bias or unfitness to continue to serve.