

MERIT SELECTION FOR FLORIDA'S TRIAL JUDGES: OPPORTUNITY LOST, OR LESSONS LEARNED?

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I. INTRODUCTION

The debate concerning whether elections or the appointment process yields better judges has waged for years and is unlikely to be conclusively answered. Whether an individual might be predisposed in their opinion about the best selection method likely involves several factors distinct to the person. One factor may be whether someone has knowledge of a judge who has been involved in unethical conduct. Studies of judicial discipline records have shown that about two-thirds of judges sanctioned in Florida since 1970 gained office by election rather than appointment.¹ Analyzing which process most often produces judges who adhere to high ethical standards is only one measure of determining which method best selects those whom the public considers “good” judges.

Another influence on whom the public considers good judges may be judicial campaign conduct. A rising tide of money flowing into these contests—matched by raucous, irresponsible campaign rhetoric and advertising in many states—risks becoming a major embarrassment to the one branch of government that is supposed

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1. Editorial, *The Herald Recommends Yes – For Judicial Reform*, THE MIAMI HERALD, Nov. 5, 2000, at 8L.

to be above politics.² In the aftermath of *Williams-Yulee v. The Florida Bar*,³ and from the public's perception of judicial fundraising and its effects on judicial elections, alternatives for picking trial court judges are again in the spotlight.⁴

Identifying the optimal method of selecting the highest quality judges has always been elusive. No single selection method premised upon accurate testing, evaluation, or benchmarks is likely to identify those persons possessing most or all the characteristics required to be a good judge. These criteria inherently involve a degree of subjectivity that is difficult to measure and, to the extent they can be quantitatively evaluated, have a separate set of limitations.

Americans have always had a heightened interest in obtaining quality members for their judiciary.⁵ Although judicial selection methods vary from state to state, all are intended to further society's legitimate interest in obtaining the most experienced, qualified, and ethical individuals for the bench.⁶ This includes identifying and selecting individuals who have demonstrated the proper demeanor, background, and ethical behavior, as well as those most likely to uphold their ethical obligations after being selected as judges.⁷

Consistent with the selection method historically employed by states, Florida has a long history of electing its trial court judges.⁸ With few exceptions, elections have been the customary manner for judges at any level of the judiciary to retain their seat without competing in a contested race.⁹ In 1998, Florida adopted an alternative judicial selection method called "merit selection,"

2. Brief of Amicus Curiae The American Bar Association in Support of Respondent at 16, *Williams-Yulee v. The Florida Bar*, 135 S. Ct. 1656 (U.S. Dec. 24, 2014) (No. 13-1499).

3. 135 S. Ct. 1656, 1659 (2015) (discussing whether "the First Amendment protects a judicial candidate's right to personally solicit campaign funds in an election").

4. See Michael E. DeBow & Brannon P. Denning, *Williams-Yulee v. The Florida Bar, the First Amendment, and the Continuing Campaign to Delegitimize Judicial Elections*, 68 VAND. L. REV. EN BANC 113, 114 (2015).

5. See Jona Goldschmidt, *Selection And Retention of Judges: Is Florida's Present System Still the Best Compromise?: Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 30 (1995).

6. See *id.*

7. See Scott G. Hawkins, *Perspective on Judicial Merit Retention in Florida*, 64 FLA. L. REV. 1421, 1431 (2012).

8. Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 FLA. L. REV. 529, 538-39 (1991).

9. *Id.* at 538.

which local voters could opt to implement in their counties and circuits.¹⁰ The popularity of choosing between judicial selection methods was put to the test when the option of changing to merit selection was presented to each county's voters.¹¹ This occurred when Florida's political ideology began shifting from what was a Democrat-controlled government, with a history of electing Democrat governors, to a more conservative legislature with the governorship firmly in Republican hands.¹² And in 1998, when the question of which political party would control the future of the governorship arose, the Florida Constitution was amended to allow counties and circuits to choose a local option for judicial selection.¹³ The following years, while Republicans maintained control of the legislative and executive branches, every jurisdiction roundly rejected the new selection method.¹⁴ This rejection continued through the 2000 election when Florida voters again struck down a proposal for a new judicial selection method.¹⁵

Whether any jurisdiction should adopt judicial merit selection or election is certainly a political question, but is it an ideological one? Anecdotal reports suggest that voters who identify as Republicans (holding predominantly conservative ideologies) have an aversion to merit selection and believe public officials should be directly accountable to the public and elected by popular vote.¹⁶ By contrast, Democrats (holding predominantly liberal ideologies) are considered more trusting of the government, and therefore more accepting of processes that give elected officials—i.e., the governor—more control over judicial selection. When it comes to whether citizens choose to *select* or *elect* trial court judges, do those assumptions necessarily hold true? Was the defeat of merit selection throughout Florida merely a reflection of the changing partisan nature of the Florida electorate between 1998 and 2000? Do voter preferences in the election versus selection debate

10. See Editorial, *The Herald Recommends: For Judicial Merit Retention*, THE MIAMI HERALD, Oct. 28, 1998, at 14A (discussing the 1998 proposed Florida constitutional amendment implementing merit selection).

11. *Id.*

12. Drew Noble Lanier & Roger Handberg, *In the Eye of the Hurricane: Florida Courts, Judicial Independence, and Politics*, 29 FORDHAM URB. L.J. 1029, 1039 (2001).

13. *Id.* at 1043.

14. *Id.*

15. *Id.*

16. This anecdotal information comes from the Author's many years of discussion on this topic. See also Seth Anderson, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 796 (2004) (discussing why some oppose merit selection).

essentially boil down to partisan ideologies, or are other factors also in play? If so, what are they?

Part II of this Article analyzes the history of judicial selection and the debate resulting in the dichotomy between how Florida selects federal judiciary members and how most states choose their judiciary. Part III reviews Florida's history regarding judicial selection at the appellate and trial court levels and how the laws have evolved. Part IV examines the statewide election of 1998, including the issues and debates about merit selection that led to approval of a state constitutional amendment creating the availability of a "local option" for circuits and counties to change how their trial court judges are selected.

Parts V–XII compare the 1998 voting results (obtained from a sampling of Florida counties) with the state and local voting results from 2000 (where voters in each circuit and county chose whether to implement the proposed change or retain status quo). These parts also examine whether voting patterns in select counties were reflective of, and consistent with, assumptions about their local electorates' political makeup. These parts observe whether any conclusions can be discerned from those results. Parts XII, XIII, and XIV of this Article evaluate those factors that may have influenced the outcome of the 2000 election—including the judiciary's role in that debate—and what issues must be addressed if merit selection will be presented to Florida voters again. From this evaluation, the future viability of judicial merit selection in Florida is considered. Part XV concludes this Article.

II. *HISTORY OF STATE JUDICIAL ELECTIONS THROUGHOUT THE UNITED STATES*

The debate regarding judicial independence is a peculiarly American phenomenon. In medieval times, kings delegated their dispute-resolving authority for judges to exercise under the king's direct supervision.¹⁷ During this time, attributes such as experience, knowledge, or integrity played little or no role in selection; instead, judicial candidates were qualified so long as they were loyal to the king.¹⁸ After the creation of the American colonies, the British Crown continued to hold complete control over

17. See McClellan, *supra* note 8, at 532–33.

18. *Id.* at 533.

judicial appointment and removal.¹⁹ The subservience of these early-American courts to the British Crown was one of the precipitating factors that caused the American Revolution.²⁰

Because the colonial courts were the king's faithful agents after the Revolution,²¹ courts throughout the thirteen colonies enjoyed little confidence among the citizenry while the elected state legislatures garnered great respect.²² Based on previous experience as English colonies, the original thirteen states were reluctant to delegate complete power over judicial selection to someone outside the legislature—especially to a single individual.²³ As a result, the colonies abolished judicial appointment conducted by executive officers.²⁴ With its newly acquired independence, these new states placed the appointment process in their legislatures' hands with most of the first state constitutions making state judges directly responsible to state legislatures.²⁵ The majority of these states placed judicial appointment power in the hands of one or both legislative chambers,²⁶ while others “provided for [either] joint appointment by the governor and a council . . . [or] gubernatorial appointment

19. *Id.*; see also Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1104 (1976) (describing the king's control over colonial judges).

20. McClellan, *supra* note 8, at 533. The Declaration of Independence, among its grievances, refers to King George III's treatment of colonial judges: “[H]e has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” *Id.*; DECLARATION OF INDEPENDENCE ¶ 9 (1776).

21. McClellan, *supra* note 8, at 533.

22. See F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEG. STUD. 431, 445 (2004).

23. McClellan, *supra* note 8, at 533–34. The idea of a strong and independent state judiciary overseeing legislative activity was not even a consideration when the first state constitutions were drafted. WALTER F. DODD, *STATE GOVERNMENT* 81 (2d ed. 1928). Instead, in the earlier state governments the courts occupied a relatively subordinate position. *Id.*

24. McClellan, *supra* note 8, at 533–34.

25. *Id.*

After 1776, the states adopted constitutions replete with checks against executive control of the judiciary. Remarkably, however, the state constitutions contained little or no regulation of the legislative power. Under most state constitutions, the legislature was established as the dominant force in government and played a central role in the appointment and removal of judges.

Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 683 (1980).

26. See Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1970 (1988). The eight majority states were Connecticut, Rhode Island, New Jersey, Delaware, North Carolina, South Carolina, Virginia, and Georgia. *Id.* at 1970 n.3.

subject to confirmation by a council.”²⁷ Most of those states also adopted the federal model of life tenure for judges during good behavior, while ensuring continuing legislative discretion and control over the sitting judges with impeachment as the removal tool.²⁸

Two factors led to state legislatures having such substantial power over the courts: (1) fundamental distrust of colonial judges; and (2) failure to define the judiciary’s role.²⁹ Shortly after the Revolution, there was a substantial mixing of legislative, executive, and judicial duties where legislatures functioned as courts of final appeals and the governor sat as chancellor.³⁰ During this period, rather than implementing a system comparable to the system existing under the English monarchy—where the state courts were subservient to the crown—the states intentionally made the courts and judges subservient to elected state legislatures and, by extension, to the will of the people.³¹

The debate over the proper role of the judiciary and the appropriate judicial selection and retention method continued with Alexander Hamilton and Thomas Jefferson, who became the primary proponents of two competing views.³² Jefferson once remarked, “It’s a very dangerous doctrine to consider the judges as the ultimate arbiters of all constitutional questions.”³³ Hamilton,

27. Goldschmidt, *supra* note 5, at 5; *see also* Grodin, *supra* note 26, at 1970 n.4. These five other states were New Hampshire, Massachusetts, New York, Pennsylvania, and Maryland. *Id.*

28. *See* Grodin, *supra* note 26, at 1971.

29. *See* Hanssen, *supra* note 22, at 443; G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 66 (1998) (“During the first wave (immediately prior to and following independence), a reaction to abuses by the Crown led constitution-makers to concentrate power in state legislatures.”).

30. Hanssen, *supra* note 22, at 443. This corresponded to English practice. KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 17–21 (1989).

31. Hanssen, *supra* note 22, at 444. Legislatures were the Revolutionary heroes and were considered an authentic expression of the public voice. *Id.* at 440. By contrast, judges were essentially the British Crown’s agents. *Id.*; *see also* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 378 (1999) (“Judges remained essentially Crown officers whose duty was to apply British policies and British law within the colonies. Not surprisingly, this conception of their duties brought judges in frequent and acrimonious conflict with the colonists.”).

32. Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 149; Paul Nejelski, *The Jeffersonian-Hamilton Duality: A Framework for Understanding Reforms in the Administration of Justice*, 64 JUDICATURE, May 1981, at 450, 451–52.

33. Donald C. Wintersheimer, *Judicial Independence Through Popular Election*, 20 QUINNIPIAC L. REV. 791, 803 (2001); Letter from Thomas Jefferson to William C. Jarvis, in

however, did not share Jefferson's view of judicial power, believing the judicial branch was the weakest of all the government institutions under the newly created Constitution.³⁴ In fact, Hamilton described the judiciary as the least dangerous branch of government, while also noting the need for complete judicial independence.³⁵

Undoubtedly, both Jefferson and Hamilton focused their attention on the federal bench, but their observations applied to state jurists as well. Ultimately, Hamilton's concept of the judiciary prevailed at the federal level. Under the Constitution's model, the President appoints judges, and the Senate confirms them.³⁶ Those judges have life tenure, whether they serve on trial courts (district courts), appellate courts (courts of appeal), or the Supreme Court.³⁷

While the battle over the federal judiciary's construct appeared settled, these same arguments were renewed in the debate about the make-up of state courts. Concerns emerged about judges being selected in smoke-filled rooms, with a lack of both public accountability and independence from the political branches.³⁸ This growing dissatisfaction with legislative performance hastened a shift in both public perception and power.³⁹ As new states joined the Union, they increasingly rejected Hamilton's federal judiciary model when constructing their state courts, opting to provide for greater state control over judges.⁴⁰

This change began in the 1830s with a movement toward increasing "suffrage and broader popular control of public office," inspired by Andrew Jackson's populist democratic ideologies.⁴¹ This "Jacksonian Democracy"⁴² movement began as a result of President Jackson's anger over John Quincy Adams' perceived "theft" of the election of 1824," fueling a broader anger over the

THE WRITINGS OF THOMAS JEFFERSON 227 (Andrew A. Lipscomb & Andrew Bergh eds., 1904) (Sept. 28, 1820).

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

35. *Id.*

36. U.S. CONST. art. II, § 2.

37. *Id.* art. III, § 1.

38. McClellan, *supra* note 8, at 534–35.

39. *Id.* at 533–34.

40. *Id.* at 534–35.

41. Goldschmidt, *supra* note 5, at 5.

42. *Id.*

degradation of America's political processes.⁴³ Jackson resigned from the Senate and prepared for an 1828 presidential bid, hoping to restore the people's voice in the election process.⁴⁴ Accordingly, during and after the election, Jackson pledged to "increase the [electorate's] direct political power" by amending the Constitution.⁴⁵

To that end, Jackson "suggested that all federal judges, including members of the Supreme Court, should be popularly elected."⁴⁶ This democratization movement became focused on the judiciary, since governors and legislators were already elected by the public.⁴⁷ Yet, the growing distrust of state legislatures adduced widespread belief that a check on legislative behavior was required.⁴⁸ Checks on legislative power were routinely "written into state constitutions with no obvious candidate to enforce them other than the courts."⁴⁹

Historically, most states adopted judicial elections to establish judicial independence from the legislatures. Additionally, they adopted various reforms to curb abuses and threats to both the reality and perception of judicial integrity.⁵⁰ Largely, the concept of electing judges evolved from "a feeling that judges were being appointed too frequently from the ranks of the wealthy and privileged."⁵¹ Popularly elected judicial officers would have an independent base of power enabling them to withstand legislative pressure and curtail overreaching.⁵² In this way, a court could act as a neutral third party and oversee the legislatures' actions.

43. *Politics in The Jackson Era*, SHMOOP, <https://www.shmoop.com/jackson-era/politics.html> (last visited Mar. 9, 2019).

44. *Id.*

45. *Id.*

46. *Id.*

47. McClellan, *supra* note 8, at 534.

48. H.W. Dodds, *Procedure in State Legislatures*, 77 ANNALS AM. ACAD. POL. & SOC. SCI., May 1918, at 1, 2.

49. Hanssen, *supra* note 22, at 446. According to one scholar, the answer to the increasingly heartfelt question of who would enforce legislative checks was "[e]ither no one or the courts," suggesting that, given the opportunity, judges simply "leaped to the bait." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 361 (Simon and Schuster 2d ed. 1985).

50. Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J 31, 35-36 (1986).

51. Goldschmidt, *supra* note 5, at 5 (quoting Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966)).

52. HALL, *supra* note 30, at 350.

Judicial elections were thought to not only enhance the prestige of the judicial office, but were also more likely to instigate reform in pleading and procedure—enhancing the efficient administration of justice, reducing backlogs of court cases, and stimulating greater productivity of those serving on the bench.⁵³ According to the true Jacksonian Democracy model, the citizens themselves would ultimately perform the judicial oversight function that was previously liberally delegated to the legislatures.⁵⁴

The *Dred Scott* decision, which upheld a federal law requiring people to return escaped slaves to their masters in the South, caused a widespread negative public reaction to the idea of an unelected judiciary.⁵⁵ New states increasingly viewed the federal judicial appointment system as inadequate because there was no accountability for the judges after they were given life tenure.⁵⁶ However, reformers did not want to make judges too susceptible to popular will.⁵⁷ As a result, various measures addressing those concerns were implemented. These included staggered judicial elections (ensuring that no sudden surge in party feelings would result in one party taking over a state court); appellate court elections held within a district or circuit rather than statewide; fixed judicial terms of various lengths (averaging 9.7 years); and eliminating the “good behavior” clauses that gave sitting officials so much discretion over judicial tenure.⁵⁸ Judges also could not run for other offices while on the bench.⁵⁹

Then, in 1832, Mississippi became the first state with an entirely elected judiciary.⁶⁰ And by the beginning of the “Civil War, twenty-two of [thirty-four] states elected their judges.”⁶¹ From Iowa in 1846 to Arizona in 1912, most states established an elected judiciary.⁶² At one point, over seventy percent of the states in the

53. *Id.* at 344–45.

54. *Id.* at 338–39.

55. See *Dred Scott v. Sandford*, 60 U.S. 393, 395–96 (1857); HALL, *supra* note 30, at 349–51.

56. Judicial Appointments White Task Force, *The Case for Judicial Appointments*, THE FEDERALIST SOCIETY (Jan. 1, 2003), <https://fedsoc.org/commentary/publications/the-case-for-judicial-appointments>.

57. Hanssen, *supra* note 22, at 446; HALL, *supra* note 30, at 352.

58. See HALL, *supra* note 30, at 352.

59. *Id.*

60. Wintersheimer, *supra* note 33, at 793–94.

61. Goldschmidt, *supra* note 5, at 5.

62. Wintersheimer, *supra* note 33, at 794.

Union used popular judicial elections.⁶³ In fact, only the older states continued using the appointive method in which judicial selection is subject to legislative approval.⁶⁴ Between 1870 and 1930, political parties began exerting considerable influence over identifying, electing, and retaining judicial candidates.⁶⁵ Widespread dissatisfaction arose with the perception that election results were subject to manipulation and elected offices could be captured by partisan forces.⁶⁶ And the public began seeing “the corrupt workings of party machines [that] led to the search for new approaches to ensure publicly interested policy outcomes.”⁶⁷ The major, late nineteenth-century legal journal, the *American Law Review*, complained in 1871 that “a great democratic flood’ had filled ‘the bench with political partisans, the minor legal offices with political hacks, and the bar with an indiscriminate herd of camp followers. . . .”⁶⁸ Growing dissatisfaction with the judiciary and the legal profession was rampant, including widespread publication of complaints about court delays, corruption, and bad laws.⁶⁹

Moreover, in the mid-1880s, the rural Populism phenomenon began rising, and an urban national movement known as “Mugwumps” materialized.⁷⁰ Supporters of both movements sought to reform the political process by eliminating partisan pressure on policymaking.⁷¹ The groups’ ultimate goal was placing “political control in the hands of the ‘best men’” and stressing the value of independence and expertise.⁷² Other progressive reforms included adopting the Australian ballot (which listed all candidates and permitted ticket-splitting), adopting voter registration requirements or nonpartisan ballots, and implementing “the direct party primary and other devices

63. *Id.*

64. Goldschmidt, *supra* note 5, at 5.

65. *Id.* at 6.

66. *Id.* at 5–6.

67. Hanssen, *supra* note 22, at 448.

68. John A. Matzko, *The Best Men of the Bar: The Founding of the American Bar Association*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 75, 78 (Gerard Gawalt ed., 1984).

69. Jennifer Widner, *How Some Reflections on the United States’ Experience May Inform African Efforts to Build Court Systems and the Rule of Law*, in *DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES* 27, 32 (Siri Gloppen, Roberto Gargarella & Elin Skaar eds., 2004).

70. Hanssen, *supra* note 22, at 449.

71. *Id.*

72. *Id.*

intended to eliminate restrictions on suffrage and to weaken party machines.”⁷³

This overwhelming opposition to partisan power over the legal process led to establishing the first formal bar associations.⁷⁴ Upon its founding in 1878, the American Bar Association (ABA), later joined by other bar associations, made the effort to restore public confidence in the courts.⁷⁵ At the 1906 annual ABA meeting, Roscoe Pound, founder of the American Judicature Society (AJS), made a famous speech titled *The Causes of Popular Dissatisfaction with the Administration of Justice*, in which he proposed that “[p]lutting courts into politics and compelling judges to become politicians in many jurisdictions had almost destroyed the traditional respect for the bench.”⁷⁶ Further, Pound pointed out that the country’s experience demonstrated that an elected court lost independence from incumbent politicians and “simply became responsive to the same political forces that dominated the legislatures.”⁷⁷

This caused further attempts to create state judiciaries independent of the other government branches.⁷⁸ Regardless, voters remained unable to monitor judicial policy decisions—just as they were unable to monitor elected legislators’ policy decisions.⁷⁹ And it was clear that additional reforms were needed. Thus, the Progressive Era, from 1900 through 1917, saw the promotion of several partisan-election alternatives such as: “[n]onpartisan elections, direct judicial primaries, shortened ballots, and nominating committees were proposed and adopted in many states. . . .”⁸⁰

The goal of each reform was to promote efficiency.⁸¹ However, the public soon learned that nonpartisan elections of public

73. *Id.*

74. *Id.* at 450 n.27. For example, during the aftermath of the Erie Canal scandal, where judges paid by the Tweed ring were tainted, New York established its City Bar Association. *Id.* at 473 n.27. The goal of this association “was to restore ‘honor, integrity, and fame of the profession in its two manifestations of the Bench and Bar.’” *Id.* (quoting Matzko, *supra* note 68, at 80).

75. Goldschmidt, *supra* note 5, at 6.

76. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445, 450 (1906).

77. Hanssen, *supra* note 22, at 450.

78. *Id.* at 450–51.

79. *Id.* at 451.

80. Goldschmidt, *supra* note 5, at 6.

81. *Id.*

officials also failed to deliver expected results, as party machines proved nearly as adept as before at identifying, capturing, and electing desirable candidates.⁸² Elections were also considered increasingly inefficient because of the growing expense to candidates running a political campaign.⁸³

In Pound's famous address, "he called for reforms to *state court* systems to limit political influences on *state judges*."⁸⁴ To solve this and other problems associated with judicial elections, Albert Kale, AJS co-founder, suggested forming a judicial council consisting of the chief judge and other justices tasked with finding the most qualified candidates.⁸⁵ Kale's plan was inspired by the idea of selecting judges based not on political savvy or connections, but on merit.

Kale's merit selection plan required a decision-maker, usually the governor, to make a judicial appointment from a list generated by a nonpartisan nominating commission comprised of lawyers and nonlawyers.⁸⁶ Further, the governor appointed lay commission members while the state bar association appointed the lawyers.⁸⁷ It was not necessary for the nominating commission to be chaired by a sitting member of the judiciary.⁸⁸ And instead of reappointment, the plan subjected the appointed, incumbent judge to a noncompetitive retention election.⁸⁹ Under this model, opposing candidates were not permitted; instead, voters replied either yes or no when asked, "[S]hould judge X be retained in office?"⁹⁰

Almost twenty-five years after Kale's proposal, the ABA adopted its own version in 1937.⁹¹ And Missouri was the first state to adopt the system for its appellate courts in 1940—known as the "Missouri Plan."⁹² The AJS' ongoing efforts to promote such plans

82. See Hanssen, *supra* note 22, at 451.

83. See Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, WIS. L. REV. 1, 21.

84. Hanssen, *supra* note 22, at 451 (emphasis added).

85. *Id.* at 452; Goldschmidt, *supra* note 5, at 8.

86. Hanssen, *supra* note 22, at 452.

87. *Id.*

88. See *id.*

89. *Id.*

90. *Id.*

91. Goldschmidt, *supra* note 5, at 2.

92. *Id.* at 2.

were successful, prompting fourteen states between 1940 and 1980 to adopt the Missouri Plan.⁹³

In all, about twenty-five states either adopted the Missouri Plan or implemented some of its features.⁹⁴ This was the Plan's high-water mark, but support for merit selection "has declined significantly over the past three decades."⁹⁵ The Missouri Plan has proved unattractive to voters, suffering from several setbacks "including Nevada voters' rejection of the Plan by referendum in 2010."⁹⁶ More recently, two other states have either abolished or significantly revised their Missouri Plan selection systems.⁹⁷ Specifically, the Kansas legislature abandoned its version of the Missouri Plan (including the nominating committee) in 2013 to adopt gubernatorial appointment, with senate confirmation, of intermediate appellate court judges.⁹⁸ Tennessee followed Kansas' model but went even further by adopting a policy for all appellate judgeships.⁹⁹

In Florida, the state bar campaigned for a merit selection plan that permitted its own participation in the judicial candidate selection process and implemented mandatory nominating commissions.¹⁰⁰ Most supporters of the plan believed it provided the best opportunity to promote judicial independence and insulate the state judiciary from partisan political pressure,¹⁰¹ while the appointment process was thought to hold state court judges accountable to the local electorate.

93. DeBow & Denning, *supra* note 4, at 123.

94. *Id.*

95. *Id.*

96. *Id.*; see *Official Results as Canvassed by the Nevada Supreme Court on November 23, 2010*, NEV. SEC'Y OF STATE, <http://www.nvsos.gov/SilverState2010Gen/Ballots.aspx> (last visited Mar. 9, 2019). The vote was 57.74 percent against, 42.26 percent in favor. *Id.*

97. DeBow & Denning, *supra* note 4, at 123.

98. *Id.* at 123–24; *Nominating Commissions*, KAN. JUD. BRANCH APP. CLERK, <http://www.kscourts.org/Appellate-Clerk/nominating-commission/default.asp> (last visited Apr. 10, 2019).

99. DeBow & Denning, *supra* note 4, at 124; *Tennessee Judicial Selection, Amendment 2 (2014)*, BALLOTEDIA, [http://ballotpedia.org/Tennessee_Judicial_Selection,_Amendment_2_\(2014\)](http://ballotpedia.org/Tennessee_Judicial_Selection,_Amendment_2_(2014)) [<http://perma.cc/6GY3-29B4>] (last visited Apr. 14, 2019) (explaining that the vote was 60.92 percent in favor, and 39.08 percent opposed).

100. McClellan, *supra* note 8, at 539–40 (describing the Florida Bar's leadership of the campaign to institute the merit appointment process).

101. Dubois, *supra* note 50, at 163 (stating, "They have no constituency of contributors, supporters, or voters whose support they must cultivate by their own on-the-bench behavior."); *but see* Hanssen, *supra* note 22, at 212 n.19 (quoting G. ALAN TARR, *JUDICIAL PROCESS AND JUDICIAL POLICYMAKING* 67 (1999), who notes "lack of information virtually guarantees that judges will be returned to office").

III. FLORIDA'S HISTORY OF STATE JUDICIAL ELECTION

The judicial selection process in Florida has evolved over time, taking multiple forms before the adoption of the current system. Florida's first constitution was created in 1838 and became effective upon statehood in 1845.¹⁰² Under Florida's 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."¹⁰³ Two subsequent changes were made to the process under Florida's 1838 Constitution.¹⁰⁴

In 1845, when Florida was admitted to the Union, circuit court judges, who also served on the Florida Supreme Court, were elected by the legislature.¹⁰⁵ Judges served initial five-year terms, followed by life tenure if reelected.¹⁰⁶ In 1868, the term of office for circuit court judges was reduced to eight years.¹⁰⁷ In 1851, an independent supreme court was created, with three members elected by the legislature to eight-year terms.¹⁰⁸ In 1852, the Florida Constitution was amended to increase voters' role in judicial selection by including the election of circuit court judges for six-year terms.¹⁰⁹

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."¹¹⁰ This changed in 1868 when another new constitution created county courts (with judges appointed by the governor for four-year terms) and circuit judges (appointed by the governor with Senate consent) serving eight-year terms (later reduced to six years in 1885).¹¹¹ This eliminated elections as the mechanism for selecting circuit court judges.¹¹²

102. 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).

103. FLA. CONST. OF 1838, art. V, § 11.

104. See Little, *supra* note 102, at 6.

105. *Id.* at 3.

106. *Id.*

107. *Id.* at 9–10.

108. *Id.* at 6.

109. *Id.*

110. FLA. CONST. OF 1865, art. V, § 10.

111. *Id.* art. VI, §§ 7, 9; see Little, *supra* note 102, at 16–17.

112. FLA. CONST. OF 1868, art. VI, § 9.

The Florida Constitution of 1885 introduced another approach to judicial selection.¹¹³ It gave voters the ability to elect both supreme court justices¹¹⁴ and county judges,¹¹⁵ but it reserved selection of circuit court judges to gubernatorial appointment subject to senate confirmation.¹¹⁶ In 1942, a state constitutional amendment reinstated popular elections for circuit court judges; the first popular election for judges was held during the 1948 general election.¹¹⁷

According to Florida columnist Martin Dyckman, in the mid-twentieth century, “Florida’s trial courts were a patchwork of individually cobbled local jurisdictions – some 16 different ‘systems’ in all.”¹¹⁸ Further, it was widely known that “[m]unicipal courts and justices of the peace practiced cash register justice.”¹¹⁹ In other words, judges were not required to be licensed to practice law—or even know the law—to serve on the court.¹²⁰ The 1968 Constitution left this system untouched, although two years later voters “rejected the Legislature’s belated attempt to deal with [such problems].”¹²¹

Judicial elections in Florida remained partisan until 1971, when Florida’s Legislature made all judicial elections nonpartisan throughout the state.¹²² That same year, Governor Reubin Askew took the first step toward instituting a merit selection system by signing an executive order implementing nominating commissions to help fill judicial vacancies.¹²³

During this time, there were several highly publicized episodes of judicial misconduct in the Florida courts.¹²⁴ For example, “in the late 1960s, a judge facing reelection pressured the lawyers appearing before him to make campaign contributions to

113. See Little, *supra* note 102, at 16.

114. FLA. CONST. OF 1885, art. V, § 2.

115. *Id.* art. V, § 16.

116. *Id.* art. V, § 8.

117. Little, *supra* note 102, at 23.

118. Martin Dyckman, *A Victory for Court Reform Remembered*, ST. PETERSBURG TIMES, Dec. 14, 1997, at 3D, 1997 WLNR 2501764 [hereinafter Dyckman, *A Victory for Court Reform*].

119. *Id.*

120. *Id.*

121. *Id.*

122. *Board Issue Paper—Merit Selection and Retention*, FLA. BAR, <https://www.floridabar.org/news/resources/issue-02> (last updated Feb. 21, 2017) [hereinafter *Merit Selection and Retention*].

123. Hawkins, *supra* note 7, at 1426.

124. *Id.* at 1427.

his bailiff before they would be permitted to plead their cases in court.”¹²⁵ Moreover, in the early 1970s, three directly elected Florida Supreme Court Justices resigned; one was discovered on a gambling trip to Las Vegas “paid for by a greyhound track owner with a case pending before the court,” while the other two resigned after case-tampering allegations arose in matters involving campaign supporters.¹²⁶

In 1972, Florida voters amended Article V of the Florida Constitution to create a unified state-court system, transforming Florida’s “gaggle of courts” into a consolidated, seamless four-tiered system of trial and appellate courts.¹²⁷ This statewide court system was intended to bring “more-consistent, even-handed justice to Florida residents.”¹²⁸ Article V contained vague language about court funding without specifically stating how this new system would be financed, even though some taxpayers believed the state would pay the costs associated with it.¹²⁹ That did not happen.¹³⁰ As it turned out, over the next thirty years, these funding issues helped set the stage for other proposals to revamp Florida’s court system.

In 1974, the ABA advocated for abolishing all judicial elections.¹³¹ It did so because of the potential conflict of interest created by committees established to manage judicial candidates’ election campaigns, which were accepting significant amounts of money.¹³² In 1976, after intense debate, Florida voters approved a constitutional amendment eliminating direct election of appellate judges and formally establishing nominating commissions to fill

125. See Gerald F. Richman, *Merit Retention of Trial Judges Takes Politics Out of Courtroom*, PALM BEACH POST, May 17, 1998, at 1E, 1998 WLNR 1786128.

126. Editorial Board, *Judges, With Hat in Hand*, N.Y. TIMES (Jan. 19, 2015), <https://www.nytimes.com/2015/01/19/opinion/judges-with-hat-in-hand.html>.

127. TALBOT D’ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE* 72 (1991).

128. Editorial, *The Herald Recommends: On Revisions of the Florida Constitution*, THE MIAMI HERALD, Oct. 21, 1998, at 12A.

129. Amy Driscoll, *Courts Await Judgment Day*, THE MIAMI HERALD, Oct. 19, 1998, at 1A.

130. *Id.*

131. AM. BAR ASS’N JUDICIAL ADMIN. DIV., *REPORT TO THE HOUSE OF DELEGATES* 39 (1989).

132. AM. BAR ASS’N, *AN INDEPENDENT JUDICIARY: REPORT OF THE COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, REPORT WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES* 1, 63 (1997).

vacancies at all judiciary levels.¹³³ The problems at the trial court level previously discussed were not, however, addressed by the 1976 revision.¹³⁴ In 1978, voters rejected a proposed constitutional amendment (1978 Amendment) that would have extended merit selection and retention to trial court judges.¹³⁵ The failed constitutional amendment subjected circuit and county judges to an election every six years to determine if the judges would remain on the bench; it also increased the terms of county court judges from four to six years.¹³⁶ The 1978 Amendment failed after a 50.9

133. Hawkins, *supra* note 7, at 1426. Under a merit retention and selection system, contrasted with direct elections, judges are appointed by the governor from a list of at least three candidates, all of whom have been selected by a JNC. *Id.* at 1425–27. The commission advertises for applicants when there is a judicial vacancy and then screens all or some of them, including by conducting interviews. *Id.* at 1427. The commission is composed of nine people, all appointed by the governor or the Florida Bar; the group also includes non-lawyers. *Id.* at 1426. A judge appointed by the governor from applications received by the nominating commission must then face the voters in a merit retention election at the next general election, and then every six years without opponents thereafter, at which time the electorate votes “yes” or “no” on retaining the judge. *Id.* at 1427.

134. *Merit Selection and Retention*, *supra* note 122. The ballot language appeared as follows:

CONSTITUTIONAL AMENDMENT ARTICLE V, SECTIONS 3, 10, 11

Proposing an amendment to the State Constitution to provide that each appellate district shall have at least one supreme court justice selected from the district to the supreme court and that justices of the supreme court and judges of district courts of appeal submit themselves for retention or rejection by the electors in a general election every six years, and that failure to submit to a vote for retention or rejection, or a vote of rejection by the electors, will result in a vacancy in the office upon expiration of the current term; and to provide that the governor fill vacancies on the supreme court or on a district court of appeal by appointing a person nominated by the appropriate judicial nominating commission for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of appointment.

Inter-univ. Consortium for Political and Soc. Res., *Referenda and Primary Election Materials Part 25: Referenda Elections for Florida*, BALLOTPEDIA 16 (June 2002), https://cdn.ballotpedia.org/images/5/5a/Referenda_Elections_for_Florida_1968-1990.pdf [hereinafter Inter-univ. Consortium for Pol. and Soc. Res.]. Spearheaded by Governor Askew, Chief Justice Benjamin Overton, and State Representative Talbot D'Alemberte—who later served as an ABA president—the amendment was approved with an average affirmative vote of 75.2 percent. D'ALEMBERTE, *supra* note 127, at 127.

135. Inter-univ. Consortium for Pol. and Soc. Res., *supra* note 134, at 22.

136. *Id.* The ballot language appeared as follows:

Proposing a revision of the Florida Constitution to provide that circuit and county court judges submit themselves for retention for rejection by the electors in a general election every six years; to provide that the governor shall fill vacancies occurring by rejection or otherwise from a list of at least three names submitted by the appropriate nominating commission; and to increase the terms of county court judges from four to six years.

percent statewide “no” vote.¹³⁷ Florida was not alone in maintaining its election system. As of 1998, “[a] total of 39 states [held] elections—whether partisan, nonpartisan, or uncontested retention elections—for trial courts of general jurisdiction” or appellate judges.¹³⁸ That number remained unchanged as of 2015.¹³⁹

IV. THE 1998 ELECTION

Despite the 1978 Amendment’s defeat, the idea of merit-selecting trial judges was not abandoned. In his address at the 1997 annual Askew Institute meeting, former Florida Chief Justice Gerald Kogan urged Florida to “stop electing judges who have to seek campaign contributions from the very lawyers who appear before them in court.”¹⁴⁰ Further, Chief Justice Kogan urged that this practice “create[d] a horrible perception of justice.”¹⁴¹

The system did not permit voters, particularly in a large county with many judges, to know enough to make informed decisions.¹⁴² In urban counties, such as Dade, “there are more

Id.

137. *Id.*

138. *Fact Sheet on Judicial Selection Methods in the States*, AM. B. ASS’N 1 (Feb. 16, 2002), http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf.

- Eight (8) states have partisan elections for all general jurisdiction trial court judges (AL, IL, LA, NY, PA, TN, TX, WV)
- Twenty (20) states have nonpartisan elections for all general jurisdiction trial court judges (AR, CA, FL, GA, ID, KY, MD, MI, MN, MS, MT, NV, NC, ND, OH, OK, OR, SD, WA, WI)
- Seven (7) states have uncontested retention elections for all general jurisdiction trial courts (AK, CO, IA, NE, NM, UT, WY)
- Four (4) states use different types of elections—partisan, nonpartisan, or retention—for general jurisdiction trial courts in different counties or judicial districts (AZ, IN, KS, MO)
- Eleven (11) states grant life tenure or use reappointment of some type for all general jurisdiction trial courts (CT, DE, HI, ME, MA, NH, NJ, RI, SC, VT, VA)

Id. (internal citations omitted).

139. *See Williams-Yulee v. The Fla. Bar*, 135 S. Ct. 1656, 1662 (2015).

140. Martha W. Barnett, *Merit Retention for Trial Judges: It’s an Idea That Works*, FLA. B. NEWS (Jan. 15, 2000), <https://www.floridabar.org/the-florida-bar-news/merit-retention-for-trial-judges-its-an-idea-that-works/>.

141. *Id.*

142. *See* Noreen Marcus, *Judge Selection Merits a Closer Look by Voters*, SOUTH FLA. SUN-SENTINEL, Sept. 22, 1998, at 1B, 1998 WLNR 6837518. According to Third District

county judges than even conscientious voters can keep track of.”¹⁴³ Proponents of merit retention suggested “that the public [was] not astute enough to sort out the issues and make informed decisions about who ought to serve as a judge.”¹⁴⁴ Since judicial campaigns in Florida were nonpartisan, “down-ballot” races seldom generated active attention by the news media.¹⁴⁵ This also occurred, in part, because lawyers were so reluctant to run against sitting judges that few were ever challenged.

This reluctance remained generally unchanged over the years. Less than half of all trial judges in 2000 were elected and, of 160 circuit judgeships up for election that year, 142 incumbents were automatically reelected with no opposition.¹⁴⁶ Only seventeen judicial seats were contested, with thirteen of those contests settled in the primary election.¹⁴⁷ As a result, voters in just four judicial circuits voted for a circuit judge on Election Day 2000.¹⁴⁸ Further, “[s]ince 1986, more than 80 percent of Circuit Court

Court of Appeal Judge Robert Shevin (a former Florida Attorney General), on top of being expensive and ethically disturbing, these campaigns are “basically meaningless campaigns and the public has no way of gauging who’s qualified and who’s not. . . . In the last two decades more than two-thirds of all judges disciplined or removed from office were first elected and not appointed. . . .” *Id.*

143. Editorial, *Judicial Selection Needs to Change*, DAYTONA NEWS J., Dec. 9, 1997, at 04A, 1997 WLNR 6388965.

144. Kenneth L. Connor, *Merit Retention for Trial Judges: A Bad Idea Gets Worse*, FLA. B. NEWS (Jan. 15, 2000), <https://www.floridabar.org/the-florida-bar-news/merit-retention-for-trial-judges-a-bad-idea-gets-worse/>. Commenting on what he saw as the flawed logic of this argument, “A. Wellington Barlow, a respected lawyer who testified before the 1997-98 Constitution Revision Commission in Jacksonville, asked, ‘If the public is not intelligent enough to put a judge on the bench, is the public intelligent enough to remove a judge from the bench?’” *Id.*

145. Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1101–04 (2007). Numerous studies have documented the low levels of information voters have about judges and judicial performance, which are especially worse in retention elections than contested races. Charles A. Johnson, Roger C. Shaefer & R. Neal McKnight, *The Salience of Judicial Candidates and Elections*, 59 SOC. SCI. Q. 371, 371 (1978); Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Contested, Nonpartisan Judicial Elections: A Responsible Electorate or a Problematic Public?*, 36 W. POL. Q. 241, 243 (1983); Kenyon N. Griffin, & Michael J. Horan, *Merit Retention Elections: What Influences the Voters?*, 63 JUDICATURE, Aug. 1979, at 78, 79; G. Toohey, *Informing the Voters in Missouri’s Retention Elections*, 76 JUDICATURE, Feb.–Mar. 1993, at 264, 271.

146. Gary Blankenship, *Candidates Qualify for Florida’s Judicial Races*, FLA. B. NEWS, (Aug. 15, 2000), <https://www.floridabar.org/the-florida-bar-news/candidates-qualify-for-floridas-judicial-races/>; Martin Dyckman, *Judicial Referendums Need Clarity*, ST. PETERSBURG TIMES, Sept. 14, 2000, at 1, 2, 2000 WLNR 8804519 [hereinafter Dyckman, *Judicial Referendums Need Clarity*].

147. Dyckman, *Judicial Referendums Need Clarity*, *supra* note 146.

148. Jackie Hallifax, *Voters to Pick Between Election and Appointment of Judges*, THE ASSOCIATED PRESS, Oct. 27, 2000.

judges faced no opposition in elections,”¹⁴⁹ and as of 2000, more than fifty percent of Florida’s circuit and county judges were appointed, not elected.¹⁵⁰

The statewide debate that ensued about amending the judicial selection process commenced with each side highlighting the faults of the other.¹⁵¹ One of the arguments centered on the election system’s efficacy and the extent of public awareness about the candidates, or the lack thereof.¹⁵² Although the public may benefit from investigative media reporting, this typically only happens in high-profile cases.¹⁵³ While local papers may publish abbreviated biographical sketches of judicial candidates, they rarely provide details about the candidates’ demeanors or judicial philosophies—areas that might be just as important to voters as qualifications.¹⁵⁴

Further, although the results of local bar polls—anonymous surveys where lawyers rate the characteristics of judicial candidates before whom they appear—aid the electorate to some extent, not all bar associations conduct them.¹⁵⁵ While such polls may assist voters who work outside the legal community in knowing the candidate, there is no evidence to suggest such polls greatly influence voters.¹⁵⁶ In fact, some “populist” candidates may even run for office against the bar poll, portraying themselves as the “people’s candidate.”¹⁵⁷ These problems were considered less pronounced in rural counties with a smaller number of judges on the ballot and “where every candidate’s life is an open book. . . .”¹⁵⁸ As described by Martin Dyckman of the St. Petersburg Times:

149. Editorial, *End Election of Trial Judges*, SOUTH FLA. SUN-SENTINEL, Oct. 28, 2000, at 16A, 2000 WLNR 8572695.

150. Anita Kumar, *Judges’ Selection in Hands of Voters*, ST. PETERSBURG TIMES, Oct. 30, 2000, at 1A [hereinafter Kumar, *Judges’ Selection in Hands of Voters*]. The appointment process has seemingly helped make the judiciary more diverse: In 2000, more than 82 percent of black judges and 71 percent of Hispanic judges were appointed. *Id.* (noting that in 2000, the bench’s demographics included: 753 Florida circuit, county judges of which 58 percent were appointed; 172 women judges of which 49 percent were appointed; forty-five black judges of which 82 percent were appointed; and thirty-eight Hispanic judges of which 71 percent were appointed).

151. Martin Dyckman, *Please, Vote for Revision 7*, ST. PETERSBURG TIMES, Aug. 16, 1998, at 3D, 1998 WLNR 2584464 [hereinafter Dyckman, *Please, Vote for Revision 7*].

152. *Id.*

153. Richman, *supra* note 125.

154. Dyckman, *Please, Vote for Revision 7*, *supra* note 151.

155. Richman, *supra* note 125.

156. *Id.*

157. *Id.*

158. Dyckman, *Please, Vote for Revision 7*, *supra* note 151.

The all-too-typical ballot contest comes down to who has the most yard signs, the most attractive face, the catchiest slogan, the most appealing names (Miami's judicial wanna-bes have been known to change theirs for ethnic advantage), the right gender or simply, by virtue of the alphabet, first place on the ballot.¹⁵⁹

For example, in an election for Escambia County judge, Judge William Green lost to a former state prosecutor¹⁶⁰—despite serving eleven years as an administrative judge, having established a stellar judicial reputation,¹⁶¹ being appointed by the chief justice of the Florida Supreme Court to mentor new county judges in Northwest Florida, being a leader in computerizing elements of the court system,¹⁶² and being rated first as a county judge in a local newspaper poll.¹⁶³ According to Professor James Witt, a government professor at the University of West Florida:

The strategy used to oust Green was: ample funding, securing the endorsement of a highly visible associated group, which in this instance was law enforcement, utilizing charlatanism to vilify the incumbent's record and inundating the community with yard signs, because the most dominant factor in judicial elections is name recognition. Green contributed to his defeat, because on principle he refused to solicit campaign funds or take contributions from attorneys.¹⁶⁴

Abolishing judicial elections would also eliminate a form of “blackmail,” or ethnic targeting, especially common in larger urban areas where political consultants threaten judicial candidates and others, claiming, “If you don't hire me, and three others who work with me, you're going to have an opponent.”¹⁶⁵ And (some might

159. *Id.* Miami-Dade judicial elections are notorious for their acrimony. Driscoll, *supra* note 129. Alan Sundberg, a Constitution Revision Commission (CRC) member and former Florida Supreme Court Justice, once observed, “You all have some very funny judicial elections down there in Dade.” *Id.* In 2000, Terri-Ann Miller, a Miami-Dade judge, “decided to move to, and run in, Broward [County] . . . because she was facing a Cuban-American challenger in Dade.” Sue Reisinger, *Better Way Needed to Choose Judges*, THE MIAMI HERALD (BROWARD EDITION), July 27, 2000, at 1B. Her reasoning: “This was not the year of Miller; it was the year of the Hispanics.” *Id.*

160. James Witt, *Appoint Judges to Bench*, VERO BEACH PRESS J., Sept. 26, 1998, at A8, 1998 WLNR 6000296.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Marcus, *supra* note 142.

argue favorably) newspaper editorial boards would have a lot less influence on who becomes a judge if elections were eliminated.¹⁶⁶

Another issue in the judicial election debate, of course, was money. Electing judges inexorably “create[s] a system that favors the judicial candidates with the most campaign contributions for getting their names across to voters.”¹⁶⁷ Invariably, candidates with the highest donations raise funds from lawyers who appear before them in court.¹⁶⁸ Elections can, therefore, cause encroachment on judicial independence—i.e., judges essentially become politicians, and “elect[ed] judges are inhibited in their freedom to make rulings free of popular control.”¹⁶⁹ As a result, elections “can threaten to force judges to contemplate the temporary whims of the public” or their base of contributors when making decisions, rather than protecting the principle of law.¹⁷⁰ Critics also say that “[f]orcing judicial candidates to raise large campaign war chests has an erosive effect on the public’s perception of judicial independence.”¹⁷¹ Accordingly, judicial

166. Gary Blankenship, *Miami Has its Say at Bar’s Merit Selection Hearing*, 27 FLA. B. NEWS, Feb. 1, 2000, at 1 [hereinafter Blankenship, *Miami Has its Say*]; see also *The Herald Recommends Yes – For Judicial Reform*, *supra* note 1. The media also plays “a significant role in judicial appointments by editorializing about prospective appointees.” Connor, *supra* note 144. Additionally,

[t]he media often have their own preferences regarding who should be appointed to the bench. Media coverage can make or break an incumbent politician, and the media’s role in the political process cannot be overstated. Because of a sitting Governor’s sensitivity to press coverage, media opinions often play a significant role in deciding appointments.

Id.

167. *Judicial Selection Needs to Change*, *supra* note 143.

168. *Id.* The Florida Supreme Court has held that an attorney’s financial contributions and/or participation on a judicial campaign without more is not legally sufficient grounds for disqualification since, under our present elective system, it is the only way judges can finance their campaigns. *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1335, 1340 (Fla. 1990) (holding a \$500 campaign contribution alone was insufficient to warrant disqualification). The Supreme Court noted:

[L]eading members of the state bar play important and active roles in guiding the public’s selection of qualified jurists. Under these circumstances, it would be highly anomalous if an attorney’s prior participation in a justice’s campaign could create a disqualifying interest, an appearance of impropriety or a violation of due process sufficient to require the justice’s recusal from all cases in which that attorney might be involved.

Id. at 1337–38.

169. Witt, *supra* note 160.

170. *Id.*

171. *Id.*

appointment would free judges from the ethical dilemmas and high costs of judicial campaigns.¹⁷²

Opponents also viewed the appointment system as flawed. In fact, some believed that an appointive system could be “skewed toward applicants from large firms,” with a mixed record on elevating women and minorities to the bench resulting from that process.¹⁷³ These opponents also expressed a desire to “retain the right to vote for the judges who [are charged with the duty to] interpret state laws, just as they vote for the legislators who make

172. *Id.*

173. Dyckman, *Please, Vote for Revision 7*, *supra* note 151. One common argument is that a merit system will help women and minorities become judges. Debbie Salamone Wickham, *Appoint Judges? Let State Pay Court Bill? Some Think Revision 7 Proposals Are ‘Trojan Horse,’* ORLANDO SENTINEL, Oct. 19, 1998, at B3, 1998 WLNR 6691028. Although almost fifty percent of “Florida’s trial judges get to the bench by election, 75 percent of minority Circuit Court judges and 69 percent of minority county court judges owe their careers to appointment.” Martin Dyckman, *Judges by Appointment is Better*, ST. PETERSBURG TIMES, Oct. 15, 2000, at 3D, 2000 WLNR 8821597 [hereinafter Dyckman, *Judges by Appointment*]. However, “many minorities have [traditionally] opposed merit selection.” Wickham, *supra* note 173. In fact, Representative Willie Logan, D-Opa-Locka, claims that “most judges still are white men, and switching . . . to a merit system now would lock in the imbalance.” *Id.* Accordingly, Logan, who does not want minorities “to be at the mercy of governors[,] . . . [did] not want to sanction the makeup of the court.” *Id.* However, Gerald F. Richman, a past Florida Bar president and Board of Governors member, has rhetorically asked, “What is the best way to get a fair representation of minorities on the bench? Stated differently, hasn’t recent historical precedent shown that more minority candidates in Dade County have been appointed initially rather than elected?” Gerald F. Richman, *Opting for Merit Selection of Trial Judges is Best Move*, 26 FLA. B. NEWS, Aug. 15, 1999, at 4. Continuing, he remarked:

I am also informed that some leaders of the African-American bar and the Hispanic bar have voiced objections to changing the current system. Ironically, it is unquestioned they have made the most gains through judicial appointments, and will continue to do so, particularly if our new Governor keeps his pledge to the African-American and Hispanic communities. Consider also from past experience the potential for ethnic division if ethnic groups band together and block-vote for a particular ethnic candidate. Consider also the expense, for example, of an African-American candidate in a county-wide race running against a Hispanic or so-called Anglo candidate. Consider also the expense of a county wide race in Miami-Dade, which is larger than two congressional districts, for any minority candidate.

Id. Moreover, studies conducted in the 1990s found that under the merit selection system, the number of African-Americans and Hispanics appointed to the bench increased. John A. DeVault III, *Do We Want Politicians or Judges?*, 70 FLA. B.J., Feb. 1996, at 8, 10. Accordingly, “in December 1990, only 5.5 percent of the state’s judges were minorities,” and by 1995 “the number ha[d] increased to approximately 7.5 percent, and most [came] to the bench by appointment.” *Id.* Further, “statistical evidence reveal[ed] that more [African-Americans] and women [were appointed to the bench] in Florida though merit than through competitive election.” McClellan, *supra* note 8, at 550.

them.”¹⁷⁴ Merit selection, they argued, “deprives citizens of the opportunity to vote for their officials, [thus] insulating them from accountability.”¹⁷⁵

Though recognized as imperfect, the merit retention system in place for appellate judges removed some overt politics from judicial selection. Therefore, upon its creation in 1997, it was no surprise that the Constitution Revision Commission (CRC)¹⁷⁶ immediately began rehearing arguments for judicial appointment “at all levels of the court system.”¹⁷⁷ Indeed, when the Commission met on December 9, 1997, a judicial appointment plan was the first proposal on its agenda.¹⁷⁸

As a compromise to the reintroduction of the statewide proposal defeated in 1978, the CRC proposed a local option merit retention system where “judges would be appointed only in counties that vote to approve appointed judgeships [for] their area.”¹⁷⁹ A local-option system would address concerns of those wary of a less democratic judicial selection system.¹⁸⁰ It would also address the objections of those in rural counties who did not want to change their system because of abuses elsewhere in the state.¹⁸¹ Rather than provide for a one-time vote on the issue, subsequent

174. Marcus, *supra* note 142 (“As an African-American, I think about the people who died so I could have the right to vote,” said Lynn Whitfield, a West Palm Beach lawyer and . . . past president of the Florida chapter of the National Bar Association.”).

175. Barnett, *supra* note 140.

176. *Id.* Florida’s unique CRC is a “37-member group . . . formed only once every 20 years.” *The Herald Recommends: On Revisions of the Florida Constitution*, *supra* note 128. The CRC “is broadly representative and includes a mix of . . . business people, educators, lawyers, and public officials.” *Id.* And the mere existence of the CRC is considered “a safeguard against blockages in Florida’s [various] other routes to constitutional change [including action by the] Legislature, for instance, [which] is unlikely to submit any amendment that curbs its own powers.” *Id.*

177. *Judicial Selection Needs to Change*, *supra* note 143.

178. *Id.* Throughout the year, the CRC held twelve public hearings to discuss the proposed changes. Editorial, *Slim Down, Consolidate Agencies, Preserve Declaration of Rights*, S. FLA. SUN-SENTINEL, Nov. 12, 1997, at 24A, 1997 WLNR 6073574.

179. *Judicial Selection Needs to Change*, *supra* note 143.

180. See generally Fla. Const. Rev. Comm’n 1997–1998, *Meeting Proceedings for Feb. 24, 1998*, at 219:12–14, 226:24–227:4, <https://fall.fsulawrc.com/crc/minutes/crcminutes022498.html> [hereinafter CRC 1997–1998, *Meeting Proceedings for Feb. 24, 1998*] (arguing that the local option was the compromise best lending itself to democratic values because it allows the people of each county and circuit to determine the mode of judicial selection best serving their interests).

181. See *id.* at 229:11–230:2 (explaining the changes sweeping larger metropolitan areas which have rendered inept the previous judicial selection mechanisms).

referenda could be held in any area when ten percent of the voters wanted to vote again to opt in or opt out.¹⁸²

Although a uniform judicial selection system might have made more sense, voters previously rejected that proposal.¹⁸³ Some CRC members, who favored appointment as the system most likely to produce highly competent judges, still argued that any revision to the system should either apply statewide or not at all.¹⁸⁴ However, as others pointed out, appointed judges (those appointed to mid-term vacancies) sat beside elected judges in the same jurisdictions. Thus, if the CRC's plan is implemented, it could improve the current system.¹⁸⁵ Also, neither merit retention nor selection guaranteed a solution to the inherent problem of selecting the right person for judicial office. Similarly, neither option completely eliminated politics from the process, and nominating commissions might still be subject to political influence.¹⁸⁶

The local option plan was considered viable "because it was felt that," unlike in smaller counties,

merit selection would be more effective in large urban areas where the electorate [might not be familiar with the judicial candidates.] [A]dding the local option aspect, the commission intended to offer merit selection of trial judges to all circuit[s] and counties in the hope that circuits and counties could determine which method of selecting trial judges best suited their needs. Interestingly . . . it was the local option aspect of this proposal which convinced CRC commissioners opposed to merit selection to vote for this proposal because they believed that each county and circuit should decide what was best for itself.¹⁸⁷

182. Fla. Const. Rev. Comm'n 1997–1998, *Local Option for Selection of Judges and Funding of State Courts, Revision 7*, <https://fall.fsulawrc.com/crc/ballot.html#rev7> [hereinafter CRC 1997–1998, *Revision 7*]; Fla. Const. Rev. Comm'n 1997–1998, *Meeting Proceedings for Dec. 10, 1997*, at 28:17–21, <https://fall.fsulawrc.com/crc/minutes/crcminutes121097.html> [hereinafter CRC 1997–1998, *Meeting Proceedings for Dec. 10, 1997*].

183. CRC 1997–1998, *Meeting Proceedings for Dec. 10, 1997*, *supra* note 182.

184. *Id.* at 55:9–18.

185. *Id.* at 67:8–19.

186. See CRC 1997–1998, *Meeting Proceedings for Feb. 24, 1998*, *supra* note 180, at 218–23 (discussing the shortcomings of both options).

187. Robert A. Butterworth & Ana Cristina Martinez, *Revision 7: Updating the Judicial Branch; Florida Constitution Revision Commission*, 72 FLA. B.J., Oct. 1998, at 40; CRC 1997–1998, *Meeting Proceedings for Feb. 24, 1998*, *supra* note 180, at 227:15–228:23, 229:12–230:21 (showing Commissioners Morsani and Langley, respectively, considering the

The CRC approved the proposal for placement on the ballot by a thirty-to-five vote.¹⁸⁸

As a result, voters were once again given the chance to adopt another constitutional amendment altering Articles V and XII of the Florida Constitution.¹⁸⁹ Two decades prior, the CRC proposed “a similar amendment to merit select and retain circuit and county court judges[, which was rejected] by a very narrow margin.”¹⁹⁰ The only difference between the CRC’s 1978 proposed amendment and 1998’s proposed amendment was the new local option.¹⁹¹

The Florida Local Option for Selection of Judges and Funding of State Courts Amendment, commonly known as Revision 7, contained several amendments.¹⁹²

The first amendment . . . [was] the local option for circuits and counties to vote on whether they want[ed] to continue electing their trial court judges (both circuit and county) or whether they want[ed] to change to a system of merit selection and retention.¹⁹³ The second amendment would increase county court judges terms from four to six years.¹⁹⁴ The [third] amendment correct[ed] the term of office for a member of the Judicial Qualifications [Commission].¹⁹⁵ The [fourth] . . . of the proposed amendments would shift the majority of the costs of the state courts system from the counties to the state.¹⁹⁶

local option compromise the best solution to address the problem of voters lacking the opportunity—when various regions across the state were less populated—to become familiar with the judges up for election).

188. Fla. Const. Rev. Comm’n 1997–1998, *History of Proposals 51-100* Proposal No. 66 (May 1998), <https://fall.fsulawrc.com/crc/proposals/history100.html>.

189. CRC 1997–1998, *Revision 7*, *supra* note 182. The ballot language read:

Local Option For Selection Of Judges And Funding Of State Courts—Provides for future local elections to decide whether to continue electing circuit and county judges or to adopt system of appointment of those judges by governor, with subsequent elections to retain or not retain those judges; provides election procedure for subsequent changes to selection of judges; increases county judges’ terms from four to six years; corrects judicial qualifications commission term of office; allocates state courts system funding among state, counties, and users of courts.

Id.

190. Butterworth & Martinez, *supra* note 187.

191. See CRC 1997–1998, *Meeting Proceedings for Dec. 10, 1997*, *supra* note 182, at 29:10.

192. Butterworth & Martinez, *supra* note 187.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

Further, proponents of the local option for merit selection and retention of trial judges argued that merit selection produced the strongest candidates “because [it allowed for] the candidate’s legal experience and merit [to be expressly] considered.”¹⁹⁷ Proponents also found that merit selection judges consistently received higher bar poll rankings and were subject to “substantially fewer disciplinary actions than elected judges.”¹⁹⁸ Moreover, attention was brought to the fact that judicial candidates for election must raise significant amounts of campaign funds.¹⁹⁹ Because these campaign funds come primarily from self-interested attorneys, judges may run into ethical dilemmas presiding over cases with these attorneys. Thus, proponents argue, merit selection avoids this ethical conflict and “protect[s] the independence and impartiality of the candidates and consequently, the judicial system.”²⁰⁰ Specifically, the argument is that appointed judges can avoid campaigning for reelection and devote more time to other judicial duties.²⁰¹ Finally, Revision 7 also allowed any county or circuit to “revert to electing its trial judges if the voters [found] that merit selection did not produce good results.”²⁰²

Revision 7 opponents urged that the merit selection and retention proposal “[did] not guarantee that [appointed] state trial judges [would] be more competent than if elected.”²⁰³ Further, they argued merit selection eliminated citizens’ opportunity to vote for local officials who should be more accountable to the public than appointees.²⁰⁴ Opponents also argued that in states requiring appointed judges to face merit retention votes, rarely was a judge ever removed.²⁰⁵ Thus, nomination by a commission and gubernatorial appointment was tantamount to a lifetime appointment. Finally, opponents urged that the local option aspect of the proposal would “decrease uniformity in the state courts

197. *Id.*

198. *Id.* In fact, “70 percent of judges receiving reprimands from the JQC first came to the bench by election rather than appointment and an astounding 83 percent of those removed, or who resigned with charges pending, were elected to their position.” DeVault, *supra* note 173, at 8.

199. Butterworth & Martinez, *supra* note 187. One scholar also notes that “[s]ome campaigns for circuit judgeship have cost more than \$500,000.” Barnett, *supra* note 140.

200. Butterworth & Martinez, *supra* note 187.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

system by resulting in different judicial selection processes from county-to-county and circuit-to-circuit.”²⁰⁶ The considerations making merit selection at the appellate court level a good idea—namely, preserving the judiciary’s independence and impartiality—did not necessarily make it a good idea for trial courts.²⁰⁷

Several organizations publicly supported Revision 7 because it included the provision that the state will fund the court system—a promise never actually implemented by the legislature.²⁰⁸ Opponents such as Ax the Tax, Citizens for Judicial Reform, and Christian Coalition focused on the merit selection language and claimed it “[e]liminate[d] the opportunity for voters to elect judges who are responsive to public attitudes.”²⁰⁹ These groups also argued that requiring the shift to near-total state funding of the court system was a needless addition to an already complicated constitution, attempting to solve a problem that was not serious enough for constitutional solutions.²¹⁰ Both sides rallied their

206. *Id.*

207. Susan Barbosa & Jenna Deopere, *Selection of Judges Divides Polk Officials*, THE LEDGER, Nov. 22, 1998, at B1.

Circuit Court Judge Bob Doyel, the only Polk County judge to defeat an incumbent judge in an election . . . [A]gre[ed] with the appointment of appellate judges because issue-oriented groups are more likely to support candidates and attempt to sway public opinion based on those issues.

“Appellate judges are more likely to be elected on viewpoints than on qualifications in a general election,” Doyel said. “I don’t think that’s true at the trial level, where there is a day-to-day caseload of individual disputes rather than generalized social legal issues.”

Id.

208. Editorial, *Local Option for Selection of Judges and Funding of State Courts (as Proposed by the Constitution Revision Commission)*, PALM BEACH POST, Oct. 15, 1998, at 17A. These organizations included: “Floridians for Fairness in Court Funding, the Florida Association of Counties, the Florida League of Cities, Florida Tax Watch, Common Cause of Florida and the Florida Chamber of Commerce.” *Id.*

209. *Id.* According to John Dowless, the Christian Coalition of Florida’s Executive Director, merit-retention supporters have “the most arrogant, elitist mentalities I’ve ever seen. They think they can make a better decision than the public can.” Wickham, *supra* note 173; see also Michael Peltier, *Court Reform by Amendment Controversial*, STUART NEWS, Oct. 21, 1998, at A1, 1998 WLNR 5781368 (“Activist judges are increasingly substituting politics for the law while they remain unaccountable to the citizens whose lives their politicized rulings ultimately affect.”). On a related note, John Dallas, President of the Christian Coalition of Florida, said, “They say there is less politics in the appointment process . . . It’s all political, but I would prefer politics in the sunshine any day compared to politics in the back room.” *Id.*

210. Peltier, *supra* note 209.

troops. “The Christian Coalition [went] to churches and plan[ned] to circulate 2.5 million fliers” opposing the measure; another group, calling itself Citizens for Judicial Reform, also opted to implement its own grass-roots campaign.²¹¹ On the other side, the Florida Association of Counties began its own ad campaign supporting the package.²¹²

The proposal ultimately attracted the interest—and support—of another stakeholder in the process: The Florida Bar.²¹³ Although it took no position on the various other constitutional amendments and revisions offered that year, the Florida Bar (the Bar) enthusiastically supported Revision 7, which the Bar considered important to the administration of justice, and formally endorsed its passage.²¹⁴ To educate the general public on the issue, the Bar produced a ten-minute video for dissemination outlining the various amendments, including Revision 7, and urged citizens to vote knowledgeably.²¹⁵ The video was intended to be shown “to jury pools in counties throughout the state.”²¹⁶ The Bar also partnered with the CRC in planning publication of a twenty-page tabloid newspaper supplement to be inserted in all major daily newspapers, and over half of the other daily newspapers in Florida.²¹⁷ The Bar’s Speakers Bureau also engaged volunteer attorneys to give speeches on the topic to various civic, community, and educational groups around the state.²¹⁸ Ultimately, Revision 7 was approved as an amendment to the Florida Constitution on November 3, 1998, by an average statewide vote of 56.9 percent.²¹⁹

211. *Id.* Mr. Biddulph also remarked, “[Citizens for Judicial Reform will] have people at every precinct where we can find a volunteer.” *Id.*

212. *Id.*

213. Howard C. Coker, *Lawyers Must Publicly Promote the Values of the Constitution*, 72 FLA. B.J., Oct. 1998, at 8, 8.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *November 3, 1998, General Election Official Results Constitutional Amendment: Local Option for Selection of Judges and Funding of State Courts*, FLA. DEP’T OF ST., DIV. OF ELECTIONS, <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/3/1998&DATAMODE=> (last visited Mar. 30, 2019) [hereinafter *1998 Local Option Amendment Election Results*] (under “Select Office,” select “Const. Amendments,” then select “Local Option for Selection of Judges and Funding of State Courts”). Until 2006, only a simple majority vote was required to approve an amendment to the Florida Constitution. On November 7, 2006, Floridians passed Amendment 3 (a measure proposed by the Legislature), which increased the required approval for an amendment to the Florida Constitution to sixty percent. *November 6, 2006, General Election Official Results*

V. THE 2000 ELECTION

After Revision 7 passed in 1998, the issue of whether citizens wanted to switch to a system whereby circuit and county court judges would be appointed by the governor, rather than elected, headed to the ballot in each county during the 2000 general election.²²⁰ The proposals responding to this mandate were titled “the Selection of Circuit Court Judges Act” and “the Selection of County Court Judges Act.”²²¹ These two measures were scheduled to appear on the 2000 ballot in each of Florida’s sixty-seven counties.²²²

The debate preceding the 1998 election continued with the same arguments previously voiced in favor of or against the constitutional change—this time in favor of or against adopting the local option. Attorney Kenneth L. Connor of Tallahassee, a 1997–1998 CRC member, observed that those who would vote not to retain any particular judge in a retention election were essentially buying a “pig in a poke”—meaning they would have no say about who would be selected to replace the judge not retained and, as a result, would have no idea who might fill the vacancy.²²³ This scenario likely explains why not a single appellate judge was ever turned out of office during the years merit retention was in effect.²²⁴

Although the local option for merit selection was overwhelmingly endorsed by the Florida Bar’s Board of Governors

Constitutional Amendment: Requiring Broader Public Support for Constitutional Amendments or Revisions, FLA. DEP’T OF ST., DIV. OF ELECTIONS, <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/7/2006&DATAMODE=%20> (last visited Mar. 30, 2019) [hereinafter *2006 Amendment Requiring Broader Public Support Election Results*] (under “Select Office,” select “Const. Amendments, then select “Requiring Broader Public Support for Constitutional Amendments or Revisions”).

220. Connor, *supra* note 144.

221. *Florida Selection of Circuit Court Judges Act (2000)*, BALLOTPEDIA, [https://ballotpedia.org/Florida_Selection_of_Circuit_Court_Judges_Act_\(2000\)](https://ballotpedia.org/Florida_Selection_of_Circuit_Court_Judges_Act_(2000)) (last visited Mar. 30, 2019). The questions asked in each circuit and county read: “Shall Circuit Court Judges be appointed by the Governor with retention by vote of the people?” *November 7, 2000, General Election Official Results Constitutional Amendment, Shall Circuit Court Judges be appointed by the Governor with retention by vote of the people?*, FLA. DEP’T OF ST., DIV. OF ELECTIONS, <https://results.elections.myflorida.com/downloadresults.asp?ElectionDate=11/7/2000&DATAMODE=> (last visited Mar. 30, 2019) [hereinafter *2000 Amendment: Judicial Appointment and Retention Vote Election Results*] (from menu bar, select “2000 General,” then select “Const. Amendments”).

222. *Id.*

223. Connor, *supra* note 144.

224. *Id.*

the previous year, the Bar had yet to take a formal position pertaining to the 2000 election, which left the local bar associations divided on the issue.²²⁵ In Dade County, at the 1999 local bar association's annual retreat, various committee board and chair members listened to and participated in a passionate debate on the issue.²²⁶ Bench and bar members, including representatives of other local bar associations, trial judges, and appellate judges, "continued the discussion of earlier board meetings" on the "advantages and shortfalls of both judicial elections[]and the merit selection/retention process."²²⁷ These presentations incited continued debate until eventually the "board took a vote and endorsed a change to a merit selection/retention system for" the Eleventh Circuit of Florida—by one vote.²²⁸

The Florida Bar opted to create the Special Committee on Merit Selection and Retention charged with making a recommendation about what the Bar should do in supporting or opposing the November 2000 referendum in each circuit and county.²²⁹ A December 1999 public hearing on the issue in Miami was well attended and attracted numerous speakers who spent several hours testifying about the issue.²³⁰ Those who spoke universally "supported the Bar taking an active role toward educating the public, but split over whether the Bar should take no position or should aggressively support switching to all merit selection."²³¹ Former Third District Court of Appeal Judge and former Florida Attorney General Robert Shevin, as well as current Supreme Court Justice Gerald Kogan, agreed that while it would be easy for the Bar to take no position while pursuing a public education policy, "the Bar ought to take a position for merit selection because most [v]oters live in counties where the change

225. Dennis G. Kainen, *Dade Bar Considers Trial Court Merit Selection Question*, FLA. B. NEWS (Oct. 15, 1999), <https://www.floridabar.org/the-florida-bar-news/dade-bar-considers-trial-court-merit-selection-question/>.

226. *Id.*

227. *Id.*

228. *Id.*

229. Gary Blankenship, *Merit Selection Group Sets Stage for January Public Hearing*, FLA. B. NEWS (Jan. 1, 2000), <https://www.floridabar.org/the-florida-bar-news/merit-selection-group-sets-stage-for-january-public-hearing/> [hereinafter Blankenship, *Merit Selection Group*].

230. *Id.*

231. *Id.*

would be good. You've got to concentrate on those[] areas in which the great majority of people in this state live."²³²

The Florida Conference of Circuit Judges also declined to take a formal position on the ballot questions, though several chief judges from around the state indicated publicly that they were "leaning toward supporting merit selection," including Pinellas-Pasco Chief Judge Susan F. Schaeffer and Hillsborough Chief Judge F. Dennis Alvarez.²³³ To support her position, Chief Judge Schaeffer cited a "study that showed that 83 percent of Florida judges who were removed or resigned under pressure were originally elected."²³⁴ Further, Chief Judge Schaeffer said, "[i]n the final analysis (Pinellas) has never gotten a bad judge from merit selection[,] but we have through elections."²³⁵

Other judges, including Chief Circuit Judge Charles B. Curry of Bartow, opposed the referendum.²³⁶ Judge Curry, who was elected to both his circuit court judgeship and previous county court position, remarked, "I prefer the politics of the many to the politics of the few."²³⁷ Notably, this was a sentiment echoed by several judges in his circuit²³⁸ and throughout the state.²³⁹

The Bar's Special Committee on Merit Selection and Retention held a two-hour public hearing during its Midyear Meeting in

232. *Id.*

233. Anita Kumar, *Circuit Court, County Court Judge Referendums*, ST. PETERSBURG TIMES, Nov. 1, 2000, at G1, 2000 WLNR 2526336 [hereinafter Kumar, *Judge Referendums*].

234. *Id.*

235. *Id.*

236. Susan Barbosa, *Judge Selection Goes to Voter; Selected or Appointed*, THE LEDGER, Oct. 29, 2000, at A1.

237. *Id.*

238. *Id.* Circuit Judge Susan Roberts, who "was appointed to the Circuit Court in 1984 and was elected without opposition until 1996, when she was challenged but won," opposed the referenda: "Do you expect to know any more about your judges if you give up your right to vote for them?" Circuit Judge Ronald Herring also voiced his opposition, saying "People should have a choice. This is another step toward separating people from the government." It should be noted that Herring attained both his county and circuit court positions by election. *Id.*

239. Frank Stanfield, *The Choice: Elect or Appoint Our Judges That Question Will Be on Lake County Ballots on Election Day. There is a Separate Vote for Circuit and County Judges*, ORLANDO SENTINEL, Nov. 3, 2000, at 1, 2000 WLNR 8589468.

Some judges concede that a political campaign can be a bruising affair, but say it's all part of the democratic process. For one thing, it forces judges to get out and listen to the views of the public, said Circuit Judge Thomas Freeman of Seminole County in a recent interview.

Id.

Miami on January 14, 2000.²⁴⁰ This meeting foreshadowed the battle to come, as it “was largely a forum for [several] Cuban American Bar Association members and other Miami-Dade County lawyers to urge the Bar not to endorse switching to all merit selection and retention for trial judges.”²⁴¹ And “[s]everal representatives of Hispanic bar associations, including . . . the Florida Chapter of the Hispanic National Bar Association, urged the committee to recommend that the Bar only educate the public without taking a position” either for or against any candidate.²⁴² These groups argued that “the present hybrid system of elections and appointments serve[d] as a check and balance, preventing abuse in either [process].”²⁴³

Additionally, any abuses that occurred could be greatly ameliorated by simply implementing a proposal for partial public financing of judicial races and by providing resources to voters to better educate them on the workings of judicial elections.²⁴⁴ Many speakers also argued that preserving judicial elections would expose judges to a wide range of opinions “as they campaign in diverse areas of Dade County,” which would familiarize them with ideas they might not have encountered or considered before.²⁴⁵ And “[a] judge has to have certain humanity and he should know the community he serves,” posited Richard Friedman.²⁴⁶ He continued, “I don’t think a judge should be in some kind of chamber where he’s totally antiseptic[,] where he doesn’t know what’s out there in the human race and the human condition.”²⁴⁷ Michael Band voiced a similar sentiment: “The role of being a judge is a lot more than calling balls and strikes. Especially in criminal cases, a judge must understand the community, where someone grew up. [Many judges] have no real understanding of what goes on out there in the real world.”²⁴⁸

In contrast, on February 13, 2000, the Florida Bar’s Board of Governors voiced its support for appointing judges instead of

240. Blankenship, *Merit Selection Group*, *supra* note 229.

241. Blankenship, *Miami Has its Say*, *supra* note 166.

242. Blankenship, *Merit Selection Group*, *supra* note 229.

243. *Id.*

244. *See id.* (countering the view that the election process is too dependent on money).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

electing them.²⁴⁹ The Board members cited several advantages of merit selection and retention, such as facilitating diversity within the judiciary itself.²⁵⁰ Members also “point[ed] to the fact that 75 percent of the judges reprimanded by the [state’s] Judicial Qualifications Commission came to the bench by election rather than merit selection.”²⁵¹ However, the Board left undecided the issue of how vocal it would be in expressing its stance to voters.²⁵²

Although the Bar’s support for this initiative was also supported by many local judges, it was not universally welcomed by other stakeholders in the system, including some state attorneys, public defenders, and local bar presidents.²⁵³ During the public debate, some proffered the theory that the legislature “rigged the ballot language against appointment.”²⁵⁴ Some, such as Professor Joseph Little from the University of Florida Levin College of Law, were so committed to preserving the democratic process and the right to elect judges that they formally petitioned the Florida Supreme Court to prevent the Florida Bar from lobbying in support of merit selection.²⁵⁵ According to Kenneth Connor, however, “Bar and other professional associations of lawyers should consider encouraging lawyers to voluntarily forbear giving campaign contributions to judges before whom they were likely to appear” rather than take a side in this dispute.²⁵⁶ Connor also suggested that lawyers support increased and more-

249. Mary Kelli Bridges, *Board Favors Merit Selection of Judges*, NAPLES DAILY NEWS, Feb. 14, 2000, at A01, 2000 WLNR 11308397.

250. *Id.* “According to statistics provided by the State Court Administrator’s Office [and relied on by the Board], of the 50 circuit[] and county-level black or Hispanic judges, 38 were appointed. Of the 164 female county and circuit court judges, 74 were appointed.”)

251. *Id.*

252. *Id.*

253. *Id.*; see also Chris Hack, *Some Seek a New Way to Select Judges*, FORT PIERCE TRIB., May 29, 2000, 2000 WLNR 7870436.

254. Dyckman, *Judges by Appointment*, *supra* note 173.

255. Howard Troxler, *High Court Should Drop its Gavel on the Bar*, ST. PETERSBURG TIMES, Oct. 4, 2000, at 1B, 2000 WLNR 8790978; see also Kumar, *Judge Referendums*, *supra* note 233. Their arguments were:

(1) The Bar [had no authority to] do this, legally or constitutionally, [and was essentially] using the power of the government in an attempt to influence an election; [and]

(2) Even if the Bar can do this, it shouldn’t. The rhetoric being used is unprovable, if not downright misleading. As the Bar’s boss, the Supreme Court ought to rein in [these actions].

Troxler, *supra* note 255; see also Kumar, *Judge Referendums*, *supra* note 233.

256. Connor, *supra* note 144.

educated participation in elections.²⁵⁷ Rather than amending the selection process, implementing these measures would “mitigate concerns about the propriety of such contributions and help assuage concerns about undue lawyer influence on the judiciary.”²⁵⁸

The question regarding the extent and scope of the Bar’s involvement was finally answered in April 2000. The Florida Bar, upon receiving input from its membership and local bar associations, decided to publicly and actively support merit selection and retention.²⁵⁹ A statement released after the vote touted merit selection, stating it would help “maintain the independence of the judiciary by eliminating much of the politics surrounding judicial elections, including judges raising campaign funds from lawyers who practice before them and other undesirable election tactics.”²⁶⁰

Recognizing its support, the Board of Governors signed off on a fifty-thousand dollar education campaign and even thought about coordinating its efforts with outside organizations.²⁶¹ A ten-point plan was then drawn up by two Bar committees—the Communications Committee, with input from the Bar’s Citizens Forum—“to educate the public about merit selection and retention for trial judges and to urge them to support [the proposed Amendment] on November’s general election ballot.”²⁶²

The Bar’s Merit Selection and Retention Implementation Special Committee oversaw the education campaign.²⁶³ Its “plan include[d] preparing an educational videotape, appointing team captains in all parts of the state to oversee the campaign, and using the Bar’s Speakers Bureau” to spread the message.²⁶⁴ This required the distribution of a half million brochures²⁶⁵ and two

257. *Id.*

258. *Id.*

259. Hack, *supra* note 253.

260. *Id.*

261. Gary Blankenship, *Bar Panels Work on Merit Selection Educational Campaign*, 27 FLA. B. NEWS (May 15, 2000), <https://www.floridabar.org/the-florida-bar-news/bar-panels-work-on-merit-selection-educational-campaign/> [hereinafter Blankenship, *Merit Selection Educational Campaign*].

262. *Id.*

263. Gary Blankenship, *Bar Launches Merit Campaign*, 27 FLA. B. NEWS (Oct. 1, 2000), <https://www.floridabar.org/the-florida-bar-news/bar-launches-merit-campaign-2/> [hereinafter Blankenship, *Bar Launches Merit Campaign*].

264. Blankenship, *Merit Selection Educational Campaign*, *supra* note 261.

265. *Id.*

videos: one fifteen-minute video that could be presented by itself, and a nine-minute supplement.²⁶⁶ The video contained an explanation of the judicial election process, “an explanation of merit selection and retention,” and the arguments from both sides over which judicial selection method is better.²⁶⁷ The video also featured former Bar President Herman Russomanno, who explained why the Bar was “urging voters to support switching to pure merit selection and retention for trial judges” and included comments from members of the Bar’s Citizens Forum explaining the reasons for their support.²⁶⁸

The plan approved by the Bar also included:

- (1) Media releases explaining the Bar’s opinion.
- (2) Interviews with local newspaper editorial boards before Election Day to present the Bar’s position.
- (3) Distributing information collected by the Bar on merit selection to the media.
- (4) Creating sample letters for lawyers to send clients.
- (5) Making Bar leaders available for local TV appearances.
- (6) Utilizing the Citizens Forum in assorted advocacy efforts.²⁶⁹

To provide updated information to the public, the Bar’s Board of Governors received such information from the Judicial Qualifications Commission on actions “against judges who were appointed versus elected to the trial courts.”²⁷⁰ One member felt the figures “could be important in the upcoming debates on merit selection.”²⁷¹

266. *Id.* The shorter, nine-minute version did not include the section with then-Bar President Herman Russomanno “explaining why the Bar supports the merit referenda.” *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

Uncoincidentally, the cover story of the ABA's August 2000 issue focused "on Florida in exploring the pros and cons of electing judges rather than having them appointed."²⁷² The article highlighted the troubling fact that trial court judicial merit selection was a long-standing idea that had not gained any real traction.²⁷³ And it noted that "[o]nly 15 states and the District of Columbia use[d] [merit selection] for all levels of judgeships."²⁷⁴ Further, "[a]mong the states that still allow[ed] voters to pick their trial judges [were] Illinois, New York, and California—states usually considered the most forward-thinking on judicial and legal issues."²⁷⁵

The ABA article called for new judicial selection standards and, for the first time in three decades, also dropped its suggestion for abolishing elections and implementing merit selection for trial judges.²⁷⁶ These new standards fit various models—including elections—and focused on the screening and selecting of qualified

[F]igures . . . showed [that] 269 (58 percent) of 466 circuit court judges were originally appointed and 197 (42 percent) were originally elected. For county judges, the figures were 117 (45 percent) appointed and 145 (55 percent) were elected. Overall for all trial judges, 53 percent were appointed and 47 percent were elected.

Brewer said of 64 judges disciplined since 1977, 18 (28 percent) were first appointed to the bench and 46 (72 percent) were elected. Of the 40 disciplined since 1990, the same percentage held—11 were appointed and 29 were elected. "Two significant conclusions can be drawn from these figures," [board member Carol Brewer] wrote:

"First, the figure of 47 percent of Florida judges having been elected to the bench is materially greater than the 10 to 20 percent number guessed at by various board members [in the board's February debate]. Thus a shift to merit selection and retention process will affect a greater percentage of future judicial applicants than the board [had thought]—nearly half—if historical numbers hold true.

Second, now that we know the number of elected and appointed judges, we learn that 13 percent of all elected judges are disciplined (46 of 342), while only 4.5 percent of appointed judges are disciplined (18 of 386) . . . This statistic translates to a likelihood of almost three to one that an elected judge will be disciplined compared to an appointed judge."

Id.

272. See Reisinger, *supra* note 159.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Qualifications Are Key: ABA Rethinks its Strategy and Shows Merit Selection the Door*, ABA J., Aug. 2000, at 111, 111.

candidates.²⁷⁷ The ABA article also cited a study showing that more than half of all trial judges in elective states were first appointed by the governor to fill a seat vacated mid-term.²⁷⁸ Similarly, “in Florida, 53% of . . . trial judges were initially appointed.”²⁷⁹ The article recounted that “many women and minorities . . . opposed the merit selection system as another ‘good ol’ boy’ process” while arguing that Florida’s current system of electing and appointing judges is fairest and supports diversity in the profession.²⁸⁰

The battle turned bitter in the Eleventh Judicial Circuit, covering Miami-Dade County. The “legal establishment” (described by The Miami Herald as “mostly white”),²⁸¹ with the support of twenty former bar association presidents, challenged the ballot’s language in court.²⁸² The dispute arose from language crafted by legislators in 1999 soliciting voters’ opinions of merit selection and retention for trial court judges.²⁸³ However, political pressure beginning in 2000 forced lawmakers to amend “the ballot question . . . [to ask voters] whether selecting judges should be changed ‘from election by a vote of the people to selection by the judicial nominating commission and appointment by the governor with subsequent terms determined by a retention vote of the people.’”²⁸⁴ As a result, “the term ‘merit selection and retention,’

277. *Id.*

278. John Gibeaut, *Trial Judges Often Keep Their Seats Without Facing Direction So When a Florida Lawyer Challenged an Incumbent, He Rocked the De Facto Merit Selection System*, ABA J., Aug. 2000, at 42, 43.

279. Reisinger, *supra* note 159. “Of 160 circuit judgeships up [for election in 2000], only 17 were contested. Of 138 incumbents seeking re-election, all but eight drew byes, and only one lost.” Dyckman, *Judicial Referendums Need Clarity*, *supra* note 146.

280. See Reisinger, *supra* note 159.

281. Jay Weaver, *Judicial Selection Question Challenged Suit Filed Over Ballot Language*, THE MIAMI HERALD, Sept. 11, 2000, at 3B.

282. Dyckman, *Judicial Referendums Need Clarity*, *supra* note 146. “The Dade County Bar Association and Florida Bar formally support[ed] doing away with the current system of electing judges.” Weaver, *supra* note 281. However, “the Cuban American Bar Association, Black Lawyers Association and Florida Association for Women Lawyers want[ed] those choices to remain with the electorate.” *Id.*

283. Weaver, *supra* note 281.

284. *Id.* Five Miami-Dade attorneys and the former editor of the editorial page for The Miami Herald

sued the secretary of state because they want[ed] the Florida Supreme Court to reinstate the 1999 legislative language. “The word ‘merit’ is not in the new language,” said [Dennis] Kainen, past president of the Dade County Bar Association. “The ballot language misstates the facts because the judicial nominating commission doesn’t select judges, it nominates them.”

which appear[ed] five times in the constitutional provision establishing the referendums,” was no longer part of the actual question appearing on the ballot.²⁸⁵ During oral arguments on September 12, 2000, in a lawsuit over the ballot language, the Florida Supreme Court (clearly conflicted as to how to resolve the issue) denied a petition to reword the ballot in a record three hours—something the Florida Supreme Court had never before done.²⁸⁶ One month later, the Florida Supreme Court also rejected the petition filed by Gainesville lawyer Joe Little, asking the Court to block the Florida Bar from supporting the measure.²⁸⁷

Despite gaining the support of nonpartisan groups, such as The League of Women Voters of Florida,²⁸⁸ both measures were overwhelmingly rejected on November 4, 2000 in every circuit and county in Florida with an overall average affirmative vote of only 30 percent.²⁸⁹ In some counties, the defeat was so resounding that the “no” votes were as high as 85 percent or more.²⁹⁰ This crushing rejection occurred even though two years earlier, in 1998, the vote approving the initiatives for ballot placement passed by an overall vote average 26 percent *higher* than the vote in 2000.²⁹¹

VI. METHODOLOGY

While analyzing the 2000 election results, the electorates used the labels “Republican” and “Democrat” for the self-identification of their general philosophy and beliefs. Those labels were also used as placeholders to identify voting groups with certain generalized beliefs about the proper role of government and judicial behavior. Because party and ideology are so highly correlated, this Article uses political parties as a proxy for ideology.²⁹²

Id.

285. Dyckman, *Judicial Referendums Need Clarity*, *supra* note 146.

286. *See id.* (discussing the unprecedented moves made by the Florida Supreme Court).

287. *Bar Can Campaign for Ballot Measure, High Court Rules*, ST. PETERSBURG TIMES, Oct. 20, 2000, at 5B, 2000 WLNR 8809317.

288. Editorial, *Vote to Take Politics Out of Judicial Races*, TALLAHASSEE DEMOCRAT, Oct. 19, 2000.

289. *See 2000 Amendment: Judicial Appointment and Retention Vote Election Results*, *supra* note 221.

290. *Id.*

291. *See 1998 Local Option Amendment Election Results*, *supra* note 219.

292. This seems to be the preference of other scholars as well; for example, some explicitly say that they incorporate the judge’s political party membership as a proxy in their research for ideology. *See, e.g.*, CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 17–22 (2006).

One of the fundamental differences existing between Democratic and Republican party ideals centers around the government's role. In 1996, Republicans usually favored smaller government—regarding both the number of people employed by the government and its limited role and responsibility in society.²⁹³ Demonstrating this sentiment, 71 percent of Republicans surveyed believed government was wasteful and inefficient.²⁹⁴ Democrats tend to favor a more active role for government in society and believe greater government involvement can help achieve larger goals relating to opportunity and equality.²⁹⁵ Compared with Republicans, only fifty-seven percent of Democrats polled saw government as wasteful and inefficient.²⁹⁶

The two political parties were sharply divided by ideology in 2011. However, the share of Republicans who self-identified as “conservative” was much larger than the share of Democrats who self-identified as “liberals.”²⁹⁷ In Florida, sixty-eight percent of Republicans self-identified as conservatives, with twenty-six percent calling themselves moderates and only six percent as liberals.²⁹⁸ “Among Democrats, 37 percent consider[ed] themselves liberals, while 42 percent identifi[ed] as moderates and 20 percent as conservatives.”²⁹⁹ These voting groups were not uniformly spaced throughout Florida, nor are they “homogeneous demographically or ideologically.”³⁰⁰ Republicans are generally conservative voters who believe judges are to apply constitutions and statutes by discerning and applying the original understanding of the language used by the documents' drafters.³⁰¹

293. *Republicans: A Demographic and Attitudinal Profile*, PEW RES. CENTER (Aug. 7, 1996), <http://www.people-press.org/1996/08/07/republicans/>. According to Pew Research, “Republicans under 30 are much less critical of government than their elders: 59% say government is almost always wasteful and inefficient compared to 76% of 30-49 year olds, and 74% of those 50 and over.” *Id.*

294. *Id.* at tbl. C.

295. *See id.* at tbls. C, D.

296. *Id.* at tbl. C.

297. Ronald Brownstein, *Democrats, Republicans Have Mirror-Image Views*, THE ATLANTIC (Nov. 8, 2011), <https://www.theatlantic.com/politics/archive/2011/11/democrats-republicans-have-mirror-image-views/248100/>.

298. *Id.*

299. *Id.*

300. Micah Cohen, *The Political Geography of Florida*, N.Y. TIMES (Jan. 31, 2012, 11:57 AM), http://fivethirtyeight.blogs.nytimes.com/2012/01/31/the-political-geography-of-florida/?_r=0.

301. *See* D. Jason Berggren et al., *The New Politics of Judicial Selection in Florida: Merit Selection Redefined*, 27 JUST. SYS. J., Nov. 2, 2006, at 123, 127.

They also generally believe the legislature, not judges, should decide social policy issues.³⁰²

Democrats are generally liberal voters who favor a more active role for judges.³⁰³ They tend to think judges can make policy or sometimes cripple legislative policy in politically contentious areas such as tort reform, medical malpractice reform, affirmative action, abortion, and marriage.³⁰⁴ These objectives are accomplished through interpretive vehicles such as living constitutions and unenumerated rights. Democrats would also propose morphing the venerable rational basis test into, as they describe it, “rational basis with teeth,” giving unlimited power to state supreme courts to second-guess the legislature’s rationale, declare its enactments insufficient, or invalidate statutes as unconstitutional.³⁰⁵

In recent polling, only one-third of Americans had a favorable opinion of the *federal* government, the lowest positive rating in fifteen years.³⁰⁶ Conversely, opinions by both Republicans and Democrats remain favorable toward *state and local* governments—although those views can be negatively impacted whenever the state or local government is controlled by the opposing party.³⁰⁷

302. *See id.*

303. *See id.* at 124.

304. *Id.* at 124, 128, 130.

305. *See, e.g.,* *Romer v. Evans*, 517 U.S. 620 (1996) (discussing rational basis scrutiny).

306. *See Growing Gap in Favorable Views of Federal, State Governments*, PEW RES. CENTER (Apr. 26, 2012), <http://www.people-press.org/2012/04/26/growing-gap-in-favorable-views-of-federal-state-governments/4-26-12-1/>.

307. *Id.* Interestingly, voters who consider themselves independent appear to have even lower regard for elected government officials than members of the two parties. *See Republicans: A Demographic and Attitudinal Profile*, *supra* note 293.

**REPUBLICANS MORE POSITIVE TOWARD STATE
GOVERNMENTS IN GOP STATES³⁰⁸**

<i>Live in state where governor and majority in both legislative chambers are...</i>	<i>State government favorability among...</i>		
	Total	Rep/ lean R	Dem/ lean D
All Republican (21 states)	%	%	%
Favorable	56	70	43
Unfavorable	39	27	52
No opinion	<u>5</u>	<u>3</u>	<u>5</u>
	100	100	100
All Democratic (11 states)			
Favorable	47	33	55
Unfavorable	48	64	40
No opinion	<u>5</u>	<u>3</u>	<u>5</u>
	100	100	100
Mixed (18 states)			
Favorable	53	55	55
Unfavorable	40	40	40
No opinion	<u>7</u>	<u>5</u>	<u>5</u>
	100	100	100

PEW RESEARCH CENTER Apr. 4-15, 2012.
See appendix for full list of states.

In light of these benchmarks, the first step the Author undertook was identifying the predominant political affiliation of voters in various counties. First, the Florida Department of Elections (FDOE) records were consulted to identify data regarding voter registration by party affiliation for each of Florida's sixty-seven counties.³⁰⁹ The registration totals for each county were examined, and each county was designated as either "Democrat" or "Republican" based upon the number of registered voters in that county with a party affiliation.³¹⁰ Every Florida county during the 2000 election year was designated as either Democratic or Republican in terms of voter registration.³¹¹

308. *Growing Gap in Favorable Views of Federal, State Governments*, *supra* note 306, at fig. 5.

309. *See supra* pt. IV.

310. *See supra* pt. V.

311. *Id.*

Although some counties had a similar amount of registered Republican and Democratic voters, to definitively designate a county, the party with the highest number of registrations—even if the registration differential was small—became the designated party for that county.

Then, election results were obtained from FDOE regarding the 1998 constitutional ballot revision question.³¹² Statewide vote totals were obtained from each county, and the total “yes” and “no” votes were calculated in comparison with the total votes cast. From those totals, county-by-county percentage calculations were made of those voters supporting the constitutional change compared to those voters preserving the status quo. Additional information was also obtained from FDOE regarding the 2000 election results from each Florida county and used to calculate a percentage comparison between the number of “yes” votes and “no” votes.³¹³

After completing this process, the Author looked at the counties with the ten highest percentages of “yes” votes in favor of amending the Florida Constitution in 1998 to allow local option selection, and the counties with the highest percentages of “no” votes in favor of preserving statewide judicial elections. After these calculations, each of these counties was also designated as Republican or Democratic. The same methodology was used to identify the top ten counties in 2000 with the highest percentage of “yes” and “no” votes. Finally, a comparison was made between those counties that showed the highest percentage change in voting on this matter, comparing their 1998 vote in favor of the 1998 Amendment with the percentage of affirmative votes for the amendments in the 2000 election.³¹⁴

An analysis of voter registrations for the [single and] multi-county [judicial] circuits . . . reveal[ed] that all but one county and one circuit have had more registered Democrats than registered Republicans throughout 1998 to 2003 period, and that the Democratic edge in these counties historically exceeded the statewide margin. One exception [was] Orange County, where Republicans enjoyed a slight electoral advantage in 1998, but by 2004, that advantage shifted significantly to the Democrats. The Democratic margin in the multicounty Fourth

312. 1998 Local Option Amendment Election Results, *supra* note 219.

313. See *supra* pt. IV.

314. 2000 Amendment: Judicial Appointment and Retention Vote Election Results, *supra* note 221.

Circuit in the northeast region of the state (Duval, [C]lay, and Nassau counties) eroded during the same period, so that by 2004 Democrats held only a slim (1.5 percent) registration advantage over Republicans.³¹⁵

VII. CAVEATS

This Article considered the 2000 vote by reviewing and tabulating each county's approval or rejection of the local option for county court judges. As previously indicated, a similar measure was also on the 2000 ballot to approve the option for circuit court judges as well.³¹⁶ The local option for county court judges was defeated in all sixty-seven counties, as was the option for circuit court judges.³¹⁷ Although there were minimal discrepancies between the votes cast on these two measures, this Article analyzes the votes in each individual county as to the county court judges under the presumption that the vast majority of voters either favoring or rejecting the local option in county races would vote similarly on the local option choice for circuit courts.

Unfortunately, no information could be located about exit polling conducted after the 2000 election to gauge the demographics of voter preferences or to assess the various impacts certain issues may have had on voters regarding these ballot measures. Similarly, any polling conducted of those voters now, nineteen years after the 2000 election, would be both untenable and unreliable. Therefore, certain assumptions and inferences were made based upon vote totals, percentages, and partisan political identification of the voting electorate in the counties at that time.

Additionally, because the proposal was soundly rejected in all counties, it is also difficult to precisely determine which specific pre-election actions could have been taken, but were not, which may have reversed the outcome. Since no county approved the local option, we cannot identify specific actions that took place in a successful area to compare what took place in an area where the proposal was unsuccessful. However, voting percentages can be

315. Berggren et al., *supra* note 301, at 126.

316. *2000 Amendment: Judicial Appointment and Retention Vote Election Results*, *supra* note 221.

317. *Id.*

examined in certain areas by considering the extent of various influences on the electorate and, thus, the voting outcome.

VIII. PERCENTAGE YES AND NO VOTES IN 1998

Highest Percent YES Vote in 1998³¹⁸

	County	Percent (%)
1.	Miami-Dade (D)	66.5
2.	Palm Beach (D)	65.8
3.	Flagler (R)	65.8
4.	Broward (D)	65.0
5.	Monroe (D)	62.9
6.	Hernando (R)	62.3
7.	Highlands (R)	61.7
8.	St. Lucie (D)	60.8
9.	Lee (D)	59.5
10.	Volusia (D)	59.5

By way of background, Republicans gained control of the Florida House of Representatives in 1994 when they had not previously controlled it since Reconstruction, and they gained control of the Florida Senate in 1996.³¹⁹ For the first time since the 1860s, a Republican majority in the legislature immediately began implementing a reform agenda that touched all areas of Florida politics.³²⁰ However, with the exception of two Republican governors (Claude Kirk from 1967 to 1971 and Bob Martinez from 1987 to 1991), Florida's governorship had a long history of being reliably under the Democratic Party's control.³²¹ Around this time, conservatives across Florida and the nation also started attacking the judiciary and the court system generally for being too liberal, too political, and too eager to take over the legislature's lawmaking

318. 1998 Local Option Amendment Election Results, *supra* note 219. The Author obtained the data for the chart below from this web site, and the actual chart is of his own creation.

319. Lanier & Handberg, *supra* note 12, at 1039.

320. *See id.* at 1039-42.

321. *See id.* at 1035, 1038, 1040.

job to thwart popular will.³²² Republicans viewed the Florida Bar as complicit in entrenching a liberal, activist bench.³²³

During his 1998 electoral campaign, Democratic Governor Lawton Chiles was completing his second term controlling the executive branch and, therefore, had the responsibility to appoint judges to vacancies.³²⁴ In the 1998 election, the Florida executive branch's future was in doubt, with a hotly-contested gubernatorial race between republican challenger Jeb Bush and Democrat Lieutenant Governor Buddy McKay slated for the November ballot.³²⁵ Bush lost his previous race for governor in 1994 when Governor Chiles defeated him and won his second term.³²⁶ While all indications showed Bush was likely to win the Governor's Mansion in the 1998 election, the outcome was far from certain. With this uncertainty looming over which political party would gain control of the Governor's Office, election results from the vote on Revision 7 demonstrate that liberal voters supported judicial appointment. This is reflected by the composition of "yes" counties: Seven of the top ten were Democratic, with three of the top four "yes" percentage counties being metropolitan, urban counties.³²⁷

Highest Percent NO Vote in 1998³²⁸

	County	Percent (%)
1.	Lafayette (D)	65.9
2.	Dixie (D)	63.6

322. See Jim Saunders, *Governor Can Start to Reshape High Court His Judicial Pick Will Be Scrutinized*, THE FLA. TIMES UNION (Apr. 22, 2002), <https://www.questia.com/newspaper/1G1-85019098/governor-can-start-to-reshape-high-court-his-judicial>.

323. See Lanier & Handberg, *supra* note 12, at 1037. This view was echoed by Terry Kemple, Executive Director of the Christian Coalition of Florida, who said:

[J]udges who are appointed too often cross the line and engage in "liberally leaning social activism. . . ." He pointed to the U.S. Supreme Court's ruling against a Nebraska law banning certain abortions that critics call "partial-birth abortions." "That's the kind of social activism we can continue to expect from non-accountable appointed judges."

Hallifax, *supra* note 148.

324. Lanier & Handberg, *supra* note 12, at 1040 n.60.

325. See *id.* at 1039.

326. *Id.* at 1039, 1040 n.60.

327. See *1998 Local Option Amendment Election Results*, *supra* note 219.

328. *2000 Amendment: Judicial Appointment and Retention Vote Election Results*, *supra* note 221.

3.	Taylor (D)	62.7
4.	Washington (D)	62.2
5.	Holmes (D)	62.1
6.	Calhoun (D)	62.0
7.	Gulf (D)	60.8
8.	Okaloosa (R)	60.1
9.	Walton (D)	60.0
10.	Suwannee (D)	58.7

Urban areas, such as Florida's major metropolitan areas, are arguably more likely to have greater population diversity and organizational support for advancing issues considered favorable to minorities and women.³²⁹ Florida's urban areas are also generally considered home to voters who are considered more ideologically liberal.³³⁰ A general "rule" of Florida politics is that the farther north one goes in the state, the more homogeneous the culture and politics among the largely native-born, religious, and conservative population.³³¹ Conversely, the farther south in the state one travels, the people and culture become more heterogeneous, and the politics become more competitive and ideologically moderate.³³² This was demonstrated during the 2000 debate that raged in Miami-Dade County over merit selection.³³³

If conventional wisdom surrounding either support or opposition to reforming the merit selection process is valid, one would expect stronger support for merit selection in predominantly liberal counties—or certainly those counties with a more liberal bent than rural Florida's more conservative areas. In more rural, politically homogeneous counties, especially the "Old South" regions of northern Florida and the panhandle, one would expect stronger support for keeping judges elected.³³⁴ In 1998, the voting results proved these conclusions correct, with all of the top ten "no" percentage counties being rural.³³⁵

329. See Kim Parker et al., *Demographic and Economic Trends in Urban, Suburban and Rural Communities*, PEW RES. CENTER (May 22, 2018), <http://www.pewsocialtrends.org/2018/05/22/demographic-and-economic-trends-in-urban-suburban-and-rural-communities/>.

330. *Id.*

331. See Lanier & Handberg, *supra* note 12, at 1034.

332. See *id.*

333. See *supra* pt. IV.

334. See Lanier & Handberg, *supra* note 12, at 1034.

335. *1998 Local Option Amendment Election Results*, *supra* note 219.

IX. PERCENTAGE YES AND NO VOTES IN 2000

Highest Percent YES Vote in 2000³³⁶

	County	Percent (%)	1998 top ten NO vote rank
1.	Sarasota (R)	37.4	NR
2.	Martin (R)	37.1	NR
3.	Pinellas (R)	35.1	NR
4.	Palm Beach (D)	34.4	2
5.	Pasco (R)	34.4	NR
6.	St. Lucie (D)	33.2	9
7.	Flagler (R)	32.4	3
8.	Escambia (D)	32.2	NR
9.	Hernando (R)	31.9	6
10.	Indian River (R)	31.8	NR

During the 2000 election, Republican Jeb Bush was halfway through his first term as governor.³³⁷ Governor Bush indicated that one of his priorities while in office was reshaping Florida's judicial system philosophically from the perceived liberal ideology that permeated the judiciary, resulting from the appointment of liberal judges throughout decades of Democratic governors.³³⁸ The number of Republican majority counties on this list of top ten highest "yes" votes in 2000 might reflect a degree of confidence by Republican voters in areas where the state had a Republican governor both able and willing to transform the judiciary by appointing like-minded conservative individuals to the bench.

336. *Id.*

337. Lanier & Handberg, *supra* note 12, at 1039, 1051.

338. See Saunders, *supra* note 322. "Gov. Lawton Chiles, for example, used judicial posts to reward old friends, some of whom don't deserve to be there." *There is a Strong Case for Preserving the Popular Election of Trial Judges*, TAMPA TRIB., Oct. 14, 2000, at 14, 2000 WLNR 652608. Governor Bush's "plan drew criticisms by those who feared politics would come into play, and Bush abandoned the idea but said he would choose judges who reflect his values." Kumar, *Judges' Selection in Hands of Voters*, *supra* note 150. Regardless, Governor Bush's office said that between 1998 and 2000 he "appointed more women and minorities to the bench than his predecessors." *Id.*

Highest Percent NO Vote in 2000³³⁹

	County	Percentage (%)	1998 top ten NO vote rank
1.	Holmes (D)	88.5	5
2.	Calhoun (D)	86.9	6
3.	Liberty (D)	86.0	NR
4.	Washington (D)	84.8	4
5.	Lafayette (D)	82.5	1
6.	Gulf (D)	82.3	7
7.	Jackson (D)	82.3	NR
8.	Volusia (D)	81.8	NR
9.	Suwannee (D)	81.6	10
10.	Baker (D)	81.2	NR

Looking at votes cast in Florida's major metropolitan areas—including the circuits covering Duval County (Jacksonville), Orange and Osceola counties (Orlando), Miami-Dade County, Hillsborough County (Tampa), Palm Beach County, and Broward County (Ft. Lauderdale)—that are home to 46.5 percent of the state's residents, it appears that none of these counties were in the top ten largest "no" vote percentages in 2000.

Even before the 2000 election, the measure was expected to do poorly at the polls in smaller, rural counties.³⁴⁰ The chart above confirms this was indeed what happened. In fact, Polk County "Supervisor of Elections Helen Gienau, Court Administrator Nick Sudzina and County Manager Jim Keene all [gave newspaper interviews and] said they had heard of no interest in Polk County [before the election] to switch to the merit selection process."³⁴¹ Keene also said, "I don't see Polk County people giving up their right to elect judges."³⁴²

Their assessments ultimately proved accurate and mirrored the sentiments of others around the state. "I can't tell you how I voted, but I can tell you the fundamental question for me was why

339. *2000 Amendment: Judicial Appointment and Retention Vote Election Results*, *supra* note 221.

340. See Editorial, *Making Improvements to Our State Constitution*, ST. PETERSBURG TIMES, Oct. 18, 1998, at 2D.

341. Barbosa & Deopere, *supra* note 207.

342. *Id.*

I would want to give up my right to vote,” said Collier Circuit Judge Hugh Hayes.³⁴³ Judge Hayes also noted that it was significant to consider how the original idea of placing the referenda on the ballot started in Dade County—an area “where judicial races can become very expensive.”³⁴⁴ However, that is not the case in a more conservative part of the state; Southwest Florida’s voters chose to keep having their voices heard in judicial elections.³⁴⁵

In the rural “Old South” regions of the state—in particular northern Florida and the panhandle—strong support for keeping judicial elections continued in 2000 as in 1998.³⁴⁶ In 2000, six of the top-ten highest-percentage “no” counties were also in the top ten highest “no” counties in 1998.³⁴⁷

X. CHANGE FROM 1998 TO 2000

Counties with Greatest Percent Change from 1998 to 2000³⁴⁸

	County	Percent Change (%)
1.	Miami-Dade (D)	-38.4
2.	Monroe (D)	-37.5
3.	Flagler (R)	-33.4
4.	Highlands (R)	-33.2
5.	Charlotte (D)	-32.6
6.	Okeechobee (D)	-31.9
7.	St. Johns (R)	-31.8
8.	Bradford (D)	-31.7
9.	Lee (D)	-31.5
10.	Palm Beach (D)	-31.4

343. Chris W. Colby, *Voters’ Decision is to Retain Authority to Elect County, Circuit Judges*, NAPLES DAILY NEWS, Nov. 9, 2000, at A11, 2000 WLNR 11326180.

344. *Id.*

345. *Id.*

346. See *2000 Amendment: Judicial Appointment and Retention Vote Election Results*, *supra* note 221; *1998 Local Option Amendment Election Results*, *supra* note 219; see also Anita Kumar, *Floridians Keep Right to Elect Judges*, ST. PETERSBURG TIMES, Nov. 8, 2000, at 4B, 2000 WLNR 8792609 [hereinafter Kumar, *Floridians Keep Right to Elect Judges*] (elaborating on the strong support for keeping judicial elections).

347. See *2000 Amendment: Judicial Appointment and Retention Vote Election Results*, *supra* note 221; *1998 Local Option Amendment Election Results*, *supra* note 219.

348. See *2000 Amendment: Judicial Appointment and Retention Vote Election Results*, *supra* note 221; *1998 Local Option Amendment Election Results*, *supra* note 219.

Comparing the 1998 and 2000 election results, many counties had large “yes” to “no” vote swings, some with a more than 30 percent swing from “yes” votes in 1998 to “no” votes in 2000.³⁴⁹ There are several possible explanations for this outcome. One is the suggestion that “Revision 7’s local option on judicial selection . . . received less attention” statewide in 1998 than other parts of the measure.³⁵⁰ Revision 7 was an amalgam of various separate and distinct measures, all intending to address disparate problems in the judicial system, yet rising and falling together in a consolidated vote.³⁵¹ Support for the 1998 proposal from various quarters dried up after previously interested parties—including county governments—no longer had a stake in the residual 2000 ballot measure.³⁵² This was especially true regarding Revision 7’s funding component.

Some considered the funding change, not the local option, to be the most significant part of Revision 7 in 1998, and the part that garnered interest from local governments in rural areas.³⁵³ That provision was intended to solve the longstanding funding problem for courts that was especially problematic for smaller counties by shifting most of the state court funding to the state and out of the hands of the counties.³⁵⁴ “In 1972, when Florida voters amended Article V of the Florida Constitution to create a state courts system, the [A]mendment was largely promoted and adopted with the promise that local governments would be relieved of costs of operating courts.”³⁵⁵

However, Florida’s state government has yet to completely assume those operating expenses.³⁵⁶ “As a result, in fiscal year 1995-96, 1996 counties spent nearly \$614 million on the state court system, compared to the state’s expenditure of \$513 million.”³⁵⁷

349. See *2000 Amendment: Judicial Appointment and Retention Vote Election Results*, *supra* note 221; *1998 Local Option Amendment Election Results*, *supra* note 219.

350. Editorial, *Making Improvements to our State Constitution*, ST. PETERSBURG TIMES, Oct. 18, 1998, at 2D.

351. See *id.*

352. See Marcus, *supra* note 142 (discussing the support from “Miami-Dade, Broward, and Palm Beach Counties” in 1998).

353. See Butterworth & Martinez, *supra* note 187.

354. Marcus, *supra* note 142.

355. Butterworth & Martinez, *supra* note 187.

356. *Id.*

357. *Id.*

The appeal to [support Revision 7 to address the funding discrepancy was] both emotional and financial: “How can a convicted killer get off easy in Florida? Because of the loophole in how we pay for our courts,” campaign literature thunders to voters. “Revision Seven: Making sure criminals get the punishment they deserve.”³⁵⁸

One funding pamphlet dealt with the unequal justice issue, stating, “Until the state starts picking up the bill for prosecuting and defending crimes, poor counties will be forced to make such decisions based on how much money is in the till that year. Many counties simply can’t afford to fully prosecute every criminal.”³⁵⁹ The pamphlet continued, “That means many criminals are getting off easy.”³⁶⁰

To correct the funding issue, Revision 7 required the state to fund its “courts system, state attorneys’ offices, public defenders’ offices, and court-appointed counsel.”³⁶¹ Revision 7 was supposed to save taxpayers about \$250 million each year, and the plan was for Florida to pay for the judicial system through sales tax and various court fees.³⁶² Under this proposal, those revenues would become available for local uses or tax relief, even though “[c]ounties would continue to pay for infrastructure costs such as court buildings and for special programs designated by the Legislature.”³⁶³ If Revision 7 failed and a funding alternative was not presented, smaller counties could devastate their budgets with one lengthy murder trial.³⁶⁴

358. Driscoll, *supra* note 129.

359. *Id.*

360. *Id.*

361. See Butterworth & Martinez, *supra* note 187.

362. Marcus, *supra* note 142.

363. *Id.*

364. See *id.* The strain on small counties is illustrated by several cases:

For example, as a result of several multiple defendant capital cases, in fiscal year 1997–98, rural Wakulla County (population 18,660) expect[ed] to incur \$ 384,682 in conflict attorneys’ fees and costs. [Those] expenditures [would have] far exceed[ed] the \$ 56,000 budgeted for conflict attorneys’ fees in that year and Wakulla County’s entire 1997 court budget of \$ 326,223. As a result, Wakulla County [and counties similarly situated would face] a financial emergency.

Butterworth & Martinez, *supra* note 187 (internal citations omitted). In the trial for the murder of several Gainesville students, “[t]he Legislature had to appropriate emergency funds to ensure adequate legal resources for” Alachua County due to “the enormous expenses.” Editorial, *The Herald Recommends: On Revisions of the Florida Constitution*, *supra* note 128. And yet again in “the 1993 murder of Gary Colley, a British tourist killed

Although the funding proposal itself garnered no opposition and was “strongly backed” by virtually every county government, some people opposed the companion merit selection proposal so strongly that they were concerned opposition to it could doom the entire ballot proposal and all of its measures, including the one that dealt with court funding.³⁶⁵ This fear appeared well founded when “[a] July [1998] poll of 800 registered voters indicate[d] Revision 7 [was] no more likely to pass than to fail.”³⁶⁶ Even when poll takers explained the measure, the same percentage of respondents—forty-five percent—said they would vote against it.³⁶⁷ Some people criticized counties of over-emphasizing the financial benefits to passing Revision 7 while de-emphasizing the fact that merit retention was also part of the package.³⁶⁸

Counties throughout the state went on a publicity offensive throughout 1998 to pass Revision 7 and collectively contributed to a campaign that featured television advertisements, radio commercials, and direct mailings.³⁶⁹ In all, fifty-four of the state’s sixty-seven counties made contributions to the effort to pass Revision 7, including large contributions from Miami-Dade (\$551,000) and Broward (\$306,000).³⁷⁰ Floridians for Fairness in Court Funding, a political action committee, also “collected \$3.5 million in pledges, with almost one-third of it [coming from donors in] Miami-Dade, Broward and Palm Beach counties.”³⁷¹

Another group had a keen interest in quietly lobbying in favor of Revision 7 on the 1998 ballot: Florida’s county court judges.³⁷² This is because a lesser publicized aspect of Revision 7 gained both their attention and support: the lengthening of county judges’ term of office from four to six years, making these term lengths identical

in a robbery attempt at a rest stop along Interstate 10 in Jefferson County.” See Peltier, *supra* note 209. Also, “[t]he Florida Association of Counties cite[d] Union County’s settling for a life term, because of the costs of defending the death penalty on appeal, for a murderer whom a jury had recommended be executed.” Editorial, *The Herald Recommends: On Revisions of the Florida Constitution*, *supra* note 128.

365. Marcus, *supra* note 142 (opining that “[t]o scuttle a proposal that means justice and fairness and all those good things because you don’t want to even give people the option of voting on merit selection just wouldn’t be fair”).

366. *Id.*

367. *Id.*

368. See Stan Bainter, *Revision 7 Isn’t the Answer*, ORLANDO SENTINEL, Oct. 25, 1998, at 6, 1998 WLNR 6696916.

369. Marcus, *supra* note 142.

370. Driscoll, *supra* note 129.

371. Marcus, *supra* note 142.

372. *Id.*

to Florida circuit judges.³⁷³ Although this group was certainly less visible in the fray, it was no less influential.

Something else happened that helps explain the difference between the 1998 and 2000 votes. Between 1998 and 2000, some merit selection committees came under fire for allegations of political abuse and partisanship.³⁷⁴ One example was a highly publicized incident in a First District Court of Appeal's Judicial Nominating Commission's (JNC) Tallahassee meeting, where one applicant was asked by a Commission member "whether he had a sexually transmitted disease" and other personal questions derived from information culled from his divorce court file.³⁷⁵ The applicant claimed that all of these questions were answered or otherwise resolved by other documents contained in the court file, which were not given to the other Commission members.³⁷⁶ As a result, a formal investigation commenced, which ultimately found no wrongdoing by the Commission.³⁷⁷ However, some observers believed that the Commission asked the applicant these questions because of his opinions on the death penalty and prayer in schools.³⁷⁸

Some local option merit retention system supporters, including then-ABA President Martha Barnett feared this episode would jeopardize the 2000 merit selection effort.³⁷⁹ Even state legislators saw this occurrence as demonstrating a "good old boy" network that needed to be dismantled.³⁸⁰ Additionally, some nominating commission chairs in other districts openly questioned whether a situation similar to the one in Tallahassee could happen in other commissions throughout the state.³⁸¹

The 2000 campaign for merit selection of trial judges also hit political roadblocks in the large, metropolitan area of Dade

373. *Id.*

374. Lucy Morgan, *Critics Ask Why Panels Pick Judges*, ST. PETERSBURG TIMES, Oct. 2, 2000, at 3B, 2000 WLNR 8773223.

375. *Id.*

376. *Id.*

377. Gary Blankenship, *Panel Clears First DCA JNC*, 28 FLA. B. NEWS, Mar. 1, 2001.

378. Morgan, *supra* note 374.

379. *Id.*

380. *Id.* "This is a broken-down system," said Tallahassee lawyer Peter Antonacci. "It needed something really horrible like this to expose how petrified the whole system is. It needs a thorough airing out by someone other than the Bar." *Id.*

381. *Id.*

County, partly due to the ethnic politics of the area.³⁸² The opposition level in Dade to the two referenda on the November 2000 ballot surprised supporters of the measure and was so vociferous that it “raised questions about the feasibility of calls for appointive systems nationally.”³⁸³ Some supporters observed that the difficulties of the 2000 campaign showed the judicial election system maintained deep support, even among people who also believed the courts were susceptible to influence by political contributions.³⁸⁴

Initially, the group “‘had gotten incredible signs of support among lawyers who thought the status quo was unacceptable,’ said Keith Donner,” campaign manager of Citizens for Judicial Integrity, a committee that supported merit selection.³⁸⁵ Unfortunately, “when it came time to write checks, it became painfully clear that those people like the current system and they like writing checks to judges.”³⁸⁶ Proving that point, the Miami supporters “of merit selection” did engage in fundraising, accruing about thirty-thousand dollars, but that was not even close to the amount they would have needed to lead a successful campaign.³⁸⁷

XI. OTHER FACTORS AFFECTING THE OUTCOME

Clearly, the election results showed that the proposal for implementing merit selection for trial judges—showing some promise for passage in 1998—became wildly unpopular statewide in 2000. In the majority of counties, the switch to merit selection was rejected by at least seventy percent of voters, and in many

382. William Glaberson, *Florida Voters to Decide Judicial Selection*, N.Y. TIMES (Oct. 25, 2000), <https://www.nytimes.com/2000/10/25/us/florida-voters-to-decide-judicial-selection.html>.

383. *Id.* The vote was considered a “‘test [of] the continuing viability of merit selection as a political proposition and as an institution of government,’ said Seth S. Andersen, director of the Hunter Center for Judicial Selection at the American Judicature Society in Chicago, which works to limit political influence over judicial selection.” *Id.*

384. *Id.*

385. *Id.*

386. *Id.* Dennis G. Kainen, an attorney from Miami who served as the chairman of Citizens for Judicial Integrity and former president of the Dade County Bar Association, said “he was particularly disappointed that lawyers who had complained regularly about the current system were slow in offering support for measures aimed at getting better judges. ‘I thought,’ he said, ‘people would be more enthusiastic about something they’ve been talking about for years.’” *Id.*

387. Glaberson, *supra* note 382.

cases the “no” vote topped eighty percent.³⁸⁸ The highest “no” vote percentage came in rural Holmes County, where 88.5 percent of the voters rejected the option to appoint their local judges.³⁸⁹ In no county did the percentage of voter support for switching to merit selection reach forty percent, although Broward County came the closest, garnering a 39.9 percent “yes” vote.³⁹⁰

In short, while judicial elections—including partisan elections—are not flawless, the public did not believe that this alternative to judicial elections was a panacea. It seems here that “ordinary people” were less prone to succumb to the “Nirvana fallacy—the comparison of an actual, flawed reality with an imagined, perfect alternative.”³⁹¹ In 2000, voters were clearly more interested in retaining direct control over the choice for judges than implementing an ideal designed to achieve “elitist perfection.”

Besides the factors previously discussed to explain the differences between the 1998 and 2000 voter outcomes, there were certainly many other factors that help explain this overwhelming defeat. Although merit selection had strong supporting arguments—and may have been the best option to objectively achieve true judicial independence—it also appears that merit selection was presented to voters at the worst possible time, with several factors combining to create a perfect storm of dissent.

A. The Perception That the Proposal Was Anti-Democratic

Seth Andersen of the American Judicature Society (AJS), a nonpartisan legal group based in Chicago, acknowledged that “‘merit selection is a very hard sell’ because it seems anti-democratic, especially in states that have grown accustomed to electing their judges.”³⁹² Americans highly value democratic processes; thus, they “tend to disfavor proposals that would take away their vote—in whole or in part.”³⁹³ Nonetheless, because of

388. *Florida Selection of County Court Judges Act (2000)*, BALLOTPEdia, [https://ballotpedia.org/Florida_Selection_of_County_Court_Judges_Act_\(2000\)](https://ballotpedia.org/Florida_Selection_of_County_Court_Judges_Act_(2000)) (last visited Feb. 26, 2019).

389. *Id.*

390. *Id.*

391. DeBow & Denning, *supra* note 4, at 126; see also Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969).

392. Tony Mauro, *Judges Shouldn't Have to Please Voters*, USA TODAY, Oct. 18, 2000, at 17A.

393. DeBow & Denning, *supra* note 4, at 125–26.

the proposal's strength and the support garnered from certain interests, Andersen predicted a mixed outcome: "[S]ome counties [would] stick with the current process of electing judges," while "others [would] opt for an appointment and retention system."³⁹⁴ Andersen said, "It will be patch-quilt, with some jurisdictions voting for it and some voting against it."³⁹⁵ His prediction was well off the mark, and the

bottom line is notwithstanding the yeoman effort by the [Florida] Bar and numerous members of the Bar in making presentations, visiting newspaper editorial boards, passing out pamphlets and other activities, the voters have spoken,' said Board of Governors member Alan Bookman, who chaired the committee that oversaw the Bar's campaign.³⁹⁶

Bookman also got the sense that citizens in Pensacola valued the opportunity to vote for trial court judges.³⁹⁷ He said,

I think what the Bar should do right now — since from my standpoint it is a very critical Bar issue — is to look into the election process, work with the Judicial Ethics Advisory Committee and discuss potential campaign reform and get the word out in a better fashion to potential judicial candidates about basically what the existing rules are.³⁹⁸

Voters perceive that those elected to office generally share their collective sense of values. When the choices are left to politicians, voters do not perceive the resulting nominees will be middle of the road, moderate, or apolitical. Therefore, voters perceive such a system as being long on "selection," but short on "merit." Said more pointedly, self-interest politics—practiced underground with loud claims of good government echoing across the state—was being proposed as a replacement for the old-fashioned politics where the people themselves got to sort it all out in elections.³⁹⁹

394. Weaver, *supra* note 281.

395. *Id.*

396. *Bar Considers Judicial Election Task Force: Merit Selection Rejected*, FLA. B.J., Dec. 1, 2000, at 1 [hereinafter *Bar Considers Judicial Election Task Force*].

397. *Id.*

398. *Id.*

399. See DeBow & Denning, *supra* note 4, at 125–26.

Studies have validated the view that those who select the members of these nominating commissions seek people who they expect to protect their own interests, and who, it was anticipated, would bring that perspective to selecting judicial nominees.⁴⁰⁰ Those selectees may or may not share the majority values of the local electorate. Thus, an anti-democratic, anti-majoritarian process such as merit selection may be more palatable to some—or more distasteful to others—depending on whether they are philosophically aligned with those ultimately doing the choosing.

B. The Public's Low Opinion of Lawyers

When the public's low opinion of lawyers in general is superimposed over the general preference for electoral accountability,⁴⁰¹ the weakness of merit selection as a political matter is made readily apparent since merit selection (as proposed) relies on nominating commissions likely to be dominated by lawyers. When viewed in this context, it is easy to see why placing judicial selection exclusively in the hands of these "elites" would not sway the electorate's majority.

Recent public opinion polls appear to corroborate this view. For example, a 2001 poll conducted in Pennsylvania found that seventy-five percent of voters rejected the idea that adopting a merit selection plan over that of judicial elections would "remove politics from judicial selection," and seventy percent agreed that it would give "politicians and trial lawyers' the power to pick judges."⁴⁰² While judicial elections may lessen the perception that there is judicial independence from influence, with judges accountable only to lawyers and elites, any alternative to judicial election can be seen as effectively lessening judicial accountability to the public at large—to the extent any such real accountability exists. One researcher has concluded that while some judicial campaign activities do indeed harm the public's perception of

400. RICHARD A. WATSON & RONALD G. DOWNING, *POLITICS OF THE BENCH AND BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* 45–48 (1969).

401. See Debra Cassens Weiss, *Only 25% of Americans Have a Positive Image of Lawyers*, ABA J. (Aug. 21, 2009, 1:44 PM CDT), http://www.abajournal.com/news/article/only_25_of_americans_have_a_positive_image_of_lawyers/.

402. Colleen Pero, *Justice Hijacked: Your Right to Vote is at Stake*, AM. JUST. PARTNERSHIP, Sept. 2010, at 9, https://bwcentral.org/wp-content/uploads/2011/06/Justice_Hijacked_Report.pdf.

judicial legitimacy, the overall effect of judicial elections is beneficial to public feelings of the judiciary's legitimacy.⁴⁰³

C. The Belief that the Proposal for Change Was Rooted in Political Ideology

The concept of merit selection in Florida came under increasing criticism, with claims that the suggested change was being proposed for ideological reasons rooted in the recent shift in partisan political power.⁴⁰⁴ The political machine that dominated Florida politics until the late 1980s was nominally Democratic.⁴⁰⁵ These same forces were also considered to control “the Florida Bar, a so-called integrated bar, in which membership is mandatory for all practicing attorneys in the state.”⁴⁰⁶ Moreover, “[t]raditional political practice . . . was that [an] incumbent judge[] would resign [their] office a year or so prior to retirement” to allow the governor (who, with one exception, was always a Democrat until the mid-1980s) to “fill that vacancy based on recommendations from the Bar and other political associates.”⁴⁰⁷

When Republicans began to take power in the state in the late 1980s and early 1990s, they generally viewed the judges who were “serv[ing] on the bench as leftovers from the days of Democratic dominance in the state.”⁴⁰⁸ They thought the Florida Bar was elite and liberal, and that those in control of the Bar were content with the status quo because of their own self-interest.⁴⁰⁹ “Whether these perceptions were correct is largely irrelevant; that they were believed and repeatedly linked to the ideological rhetoric of governmental accountability, decreased public spending, and the call for citizen involvement in governing provid[ed] ready

403. James L. Gibson, *Electing Judges: Future Research and the Normative Debate About Judicial Elections*, 96 JUDICATURE, Mar./Apr. 2013, at 231.

404. See Glaberson, *supra* note 382.

405. *Partisan Composition of State Legislatures 1978–1988*, NAT'L CONF. S. LEGIS., http://www.ncsl.org/documents/statevote/legiscontrol_1978_1988.pdf (last visited Mar. 31, 2019); *Florida: Past Governors Bios*, NAT'L GOVERNORS ASS'N, https://classic.nga.org/cms/home/governors/past-governors-bios/page_florida.html (last visited Mar. 31, 2019).

406. Lanier & Handberg, *supra* note 12, at 1037.

407. *Id.* at 1037, 1040, 1040 n.60.

408. Rebecca Salokar & Kimberly Shaw, *The Impact of National Politics on State Courts: Florida After Election 2000*, 23 JUST. SYS. J. 57, 59–60 (2002).

409. *Id.*

justification for wholesale change in Florida's mechanisms of judicial selection."⁴¹⁰

Adding fuel to this view, the Florida Supreme Court (often at odds with the Republican-controlled Florida Legislature), struck down a 1998 voter-approved amendment regarding the death penalty—in September 2000, two months before the 2000 election. This issue was supported by over seventy percent of Florida voters.⁴¹¹ This was consistent with what was viewed as a pattern of judicial activism by judges at various levels of the court system, attempting to stymie Republican efforts on issues like tuition vouchers, limitations on abortions, criminal process, and sentencing.⁴¹² As a result, the entire judiciary, especially unelected appellate court judges, were branded by many conservatives as little more than unaccountable activists promoting a liberal social agenda.⁴¹³

'YES' and 'NO' Editorials by County⁴¹⁴

	YES Editorials	Counties Served	% YES Vote	% NO Vote
	Statewide average		30.6	69.4
	County-by-County average		25.7	74.3

410. *Id.*

411. *Armstrong v. Harris*, 773 So. 2d 7, 26 (Fla. 2000) (Wells, C.J., dissenting). This amendment sought to "close a potential loophole by changing the Florida Constitution's prohibition of 'cruel or unusual punishment to match the U.S. Constitution's 'cruel and unusual punishment.'" Roger Roy, *Ballot Measure Taken to Great Lengths*, S. FLA. SUN-SENTINEL, Oct. 15, 2002, at 5B, 2002 WLNR 12765935 (emphasis added). This change was proposed and supported by the Republican-controlled state legislature to reduce court delays in carrying out these sentences. *Id.*

412. See Canes-Wrone & Clark, *supra* note 83, at 22 n.62, 27.

413. See Jeffrey Dubner, *An Interview with Thomas M. Keck, Author of The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism*, UNIV. CHIC. PRESS, Dec. 17, 2004, <https://www.press.uchicago.edu/Misc/Chicago/428850in.html> (noting that the Supreme Court struck down thirty-three federal statutes from 1995 to 2004—an unprecedented amount).

414. See *2000 Amendment: Judicial Appointment and Retention Vote Election Results*, *supra* note 221; Fla. Dep't of State, *Voter Registration Reports*, FLA. DIVISION OF ELECTIONS (Jan. 29, 2003), <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/> [hereinafter *Florida 2000 Voter Registration by County*] (under "Archived Monthly Reports," select "2000 - Zip - 2.3 MB" in the Zip folder, then select "2000," "November," and "YTDTotal").

1.	Miami Herald	Miami Dade (D)	28.1	71.9
2.	Stuart News	Martin (R)	37.1	62.9
3.	St. Petersburg Times	Pinellas (R)	35.1	64.9
4.	Ft. Lauderdale Sun-Sentinel	Broward (D)	39.9	60.1
5.	Daytona News Journal	Volusia (D)	29.5	70.5
6.	Palm Beach Post	Palm Beach (D)	34.4	65.6
7.	Tallahassee Democrat	Leon (D)	26.1	73.9
8.	Gainesville Sun	Alachua (D)	28.3	71.7
9.	Sarasota Herald-Tribune	Sarasota (R)	37.4	62.6
10.	Orlando Sentinel	Orange (D)	5.0	75.0
	NO Editorials	Counties Served	% YES Vote	% NO Vote
	Statewide average		30.6	69.4
	County-by-County average		25.7	74.3
1.	Tampa Tribune	Hillsborough (D)	28.0	72.0
2.	Vero Beach Journal	Indian River (R)	31.8	68.2

Although newspaper editorials are often viewed by conservatives as a mouthpiece for promoting liberal interests,⁴¹⁵ their general support of the proposal did not seem to align with the theory that the planned change was all a Republican political ploy. Regardless, newspapers' support for the measure had no effect on persuading the electorate, even though nearly ten newspapers around Florida editorially endorsed changing Florida's election

415. See Dan Backer, Commentary, *Liberal Media Unrelenting in Their Bias Against President Trump*, ORLANDO SENTINEL (Sept. 26, 2017), <https://www.orlandosentinel.com/opinion/os-ed-media-bias-against-trump-unrelenting-20170926-story.html>.

system to merit selection for trial judges,⁴¹⁶ while two called for the rejection of the proposal in their readership areas.⁴¹⁷ One newspaper, while touting the measure and advocating its approval, proclaimed that “Broward County voters supported putting this issue on the ballot in 1998 by a 2-[to-]1 margin,” yet completely failed to mention that the court funding measure was also tied to the 1998 initiative.⁴¹⁸ Despite strong editorial support in both Miami-Dade and Palm Beach Counties in 1998, there was more than a thirty-percent swing the other way in the 2000 vote.⁴¹⁹

However, the most interesting revelation from the 2000 election was that counties where one might have anticipated the proposal to be the most ideologically unpopular were actually the areas which garnered the highest percentage of “yes” votes.⁴²⁰ In fact, seven of the ten counties with the highest percentage of “yes” votes in 2000 were in Republican-controlled counties.⁴²¹ Therefore, this outcome reflects the view that Republicans, although anecdotally distrustful of government intrusion and by extension unsupportive of merit retention, may have been influenced to some extent by the fact that a Republican governor would be choosing

416. Editorial, *Are Billboard “Beauty Contests” Really the Best Way to Select Our Judges?*, GAINESVILLE SUN, Oct. 18, 2000; Editorial, *Fate of Key Ballot Issues Rests on Vote of Yes or No*, DAYTONA NEWS J., Nov. 6, 2000, at 4A, 2000 WLNR 9079019; Editorial, *Give State Better Judges By Reducing the Politics Judge State FL Election Vote*, PALM BEACH POST, Oct. 29, 2000, at 2E, 2000 WLNR 1664747; Editorial, *Judicial Amendments: Yes*, STUART NEWS, Oct. 24, 2000, at A6, 2000 WLNR 7583325; Editorial, *State and Local Ballot Questions for All Voters: Vote Yes to Appoint Judges*, ST. PETERSBURG TIMES, Oct. 25, 2000, at 16A, 2000 WLNR 8757529; Editorial, *Vote to Take Politics Out of Judicial Races*, TALLAHASSEE DEMOCRAT, Oct. 19, 2000; Dyckman, *Judicial Referendums Need Clarity*, *supra* note 146; *The Herald Recommends Yes – For Judicial Reform*, *supra* note 1; Thomas Tryon, *Conspiracy Theories: Governments for the Gullible*, SARASOTA HERALD TRIB., Nov. 5, 2000, at F1, 2000 WLNR 1623857.

417. Editorial, *Don’t Fix It: The Judge-Selection Amendment to the Florida Constitution That Will Appear on the Nov. 7 Ballot Would Not Improve the Quality of the Florida Judiciary*, VERO BEACH PRESS J., Oct. 30, 2000, at A9, 2000 WLNR 7877331; *There is a Strong Case for Preserving the Popular Election of Trial Judges*, *supra* note 338. Incidentally, in 1998 the *Naples Daily News* endorsed the constitutional change offering the local option to voters on the November 3, 2000 ballot, but later opposed its approval in 2000. Bridges, *supra* note 249, at A01.

418. Editorial, *End Election of Trial Judges*, *supra* note 149. Accordingly, “[v]oters in South Florida strongly supported putting these referenda questions on the ballot two years ago. Now they need to follow up and just say yes for a second time.” *Id.*

419. *Compare 2000 Amendment: Judicial Appointment and Retention Vote Election Results*, *supra* note 221 (displaying the 2000 results), with *1998 Local Option Amendment Election Results*, *supra* note 219 (displaying the 1999 results).

420. See *2000 Amendment: Judicial Appointment and Retention Vote Election Results*, *supra* note 221.

421. *Id.*

potential jurists who would presumably share his conservative political ideology and judicial philosophy.

The reverse also appeared true. Counties in which one might anticipate the proposal to be the most popular from an ideological standpoint were actually the areas which garnered some of the highest percentage of the “no” votes. In fact, the ten counties with the highest percentage of “no” votes were areas where the Democratic party was the most predominant in voter registration. And seven of the ten counties with the highest percentage swing from “yes” votes in 1998 to “no” votes in 2000 were in Democratic counties.⁴²² While Democratic voters may have initially been more receptive to the proposal in 1998, when the gubernatorial election was undecided and a democratic Governor was in office, they became highly opposed to the proposal in 2000 when Republican Governor Jeb Bush was in office controlling the selection process.

Therefore, while the local option’s success or defeat probably did not hinge upon a perception that it would benefit one political party or another, partisan influences certainly played some role in explaining why some counties seemed, relatively speaking, more inclined to favor the merit selection option versus others. The 2000 voting results support the proposition that “some liberals across the state who pressed for an appointive system for decades [were likely] unenthusiastic about [any measure giving] Governor Jeb Bush and his republican allies added control over the judiciary.”⁴²³

D. The Potential for Inconsistency Among Counties and Within Circuits

The merit selection local option potentially served to create an unwieldy patchwork electoral system throughout the state. For example, a county could vote to keep its elected county judge while, at the same time, the entire judicial circuit could make its judges appointed, and meanwhile a neighboring county or circuit could have the opposite setup. One of the known and recognized flaws in the measure was its failure to uniformly apply the new system throughout the state.⁴²⁴ Supporting this theory as a factor in the

422. *Id.*

423. Glaberson, *supra* note 382.

424. Kumar, *Judge Referendums*, *supra* note 233. “‘To me, that’s odd,’ [Hillsborough Chief Judge F. Dennis] Alvarez said. ‘I hate to think of Pasco going one way and Pinellas another way.’” *Id.*

ultimate outcome, people most familiar with the issue statewide were initially predicting those scenarios to come to fruition, that some of the larger metropolitan counties—like Miami-Dade and Broward—might vote to change the appointment and retention process, while the smaller, rural counties were most likely to reject it.⁴²⁵

E. There Were No “Coat Tails” Helping to Attract “Yes” Votes

“Coupling the popular financial measure with the controversial judge-selection issue” in 1998 served as a point of frustration for many in the legal community.⁴²⁶ Because the two elements—court financing and judicial elections—were bound together in one amendment, 1998 financial component supporters did not necessarily lend their full-throated support to the merit retention debate in 2000 after the issues were no longer a package deal. “Revision 7 is a Trojan horse,” said Orange-Osceola State Attorney Lawson Lamar, vice president of the Florida Prosecuting Attorneys Association,⁴²⁷ one of several high profile elected officials opposing judicial appointment but supporting the financial measure.⁴²⁸

As previously indicated, the local option appointment proposal submitted to voters in 1998 was bundled with the proposal to change the state courts’ funding structure from a local matter to one funded by the state. This funding change was designed to benefit the smaller, rural counties by presumably lessening the tax burden on those citizens. When the funding option was stripped away and voters in those counties could only vote for the local option on judges, it highlighted how popular the change in funding proposal was, while also highlighting the unpopularity of the local option for merit selection. This is demonstrated by the vote results in 2000 compared to 1998, where six of the ten counties with the highest vote percentage-swings from “yes” to “no” were in rural counties.

425. See *Bar Considers Judicial Election Task Force*, *supra* note 396, at 11.

426. See Wickham, *supra* note 173.

427. *Id.*

428. *Id.*

F. There Was No Consensus of Opinion Within the Bench and the Bar on the Issue

Although the ABA and Florida Bar thought the local option was a good idea and collectively “spent about \$70,000 lobbying for the change around the state,”⁴²⁹ it was hard to find a lawyer or a judge, especially in central Florida, who approved of changing the way trial judges were chosen.⁴³⁰

The Florida Association for Women Lawyers (FAWL) “opposed switching to pure merit selection and retention,” and Barbara Eagan, then-President of FAWL, attributed the referenda’s defeat to “the public reluctance to give up the ability to elect judges and perhaps to a lack of understanding.”⁴³¹ Many believed the proposal meant “[g]iv[ing] up your vote’ and voted no,” she said.⁴³² She also thought people “didn’t understand the issue generally.”⁴³³ President Eagan also noted that, while judicial campaigns [sometimes] attract public disgust [and] have a spillover effect on the perception of the legal profession as a whole,” the referenda should not be thought of as the campaign’s ending; instead, as the beginning of an ongoing conversation about improving the system.⁴³⁴

Additionally, judges were divided on the issue. Although central Florida judges seemed opposed to any change, “[t]wenty-nine judges in Miami-Dade County have contributed \$6,575 to a political action committee” called Citizens for Judicial Integrity that backed the referendum—a proposal that might “eliminate the very election system that enabled most of them to win their jobs.”⁴³⁵ Their support for the change was somewhat undermined by

429. Kumar, *Floridians Keep Right to Elect Judges*, *supra* note 346.

430. Susan Jacobson, *Voters Set to Judge Proposal*, ORLANDO SENTINEL, Nov. 5, 2000, at 1, WLNR 8597290 “I’d have never been a judge if it had been an appointed system,’ said County Judge Carol Draper, who ran unopposed for re-election [in 2000]. ‘I don’t know anybody in Tallahassee.’ . . . ‘It’s definitely in the best interest of the public to have an election,’ said County Judge Ronald Legendre, who easily bested challenger John Quinones in [the 2000 election].” *Id.*

431. *Bar Considers Judicial Election Task Force*, *supra* note 396.

432. *Id.*

433. *Id.*

434. *Id.*

435. Jay Weaver, *Judges: Eliminate Election System Nov. 7 Referendum Gets Their Dollars*, THE MIAMI HERALD, Oct. 29, 2000, at 1B.

criticism that they were acting solely with self-interest, which the Dade County judges wholeheartedly denied.⁴³⁶

G. A Deliberate Misinformation Campaign About the Proposal Was Undertaken

Rumors circulated that the issue was a conspiracy against voting rights, which supported Eagan's claim regarding the public failing to understand it.⁴³⁷ Before the election, an email was distributed which "claimed 'the governor has placed' two referendums concerning the selection of circuit and county court judges on [the] ballot at 'the last possible moment so voters are unable to discuss and think about what they mean to future voters and to the state.'"⁴³⁸ Realistically, Governor Bush was not responsible for the initiatives being placed on the ballot. And rather than being last-minute additions, the proposals were put on the ballot because of the statewide "yes" vote in 1998, two years earlier.

436. All current trial judges would be "grandfathered" in, and "would not have to endure the scrutiny of the Judicial Nominating Commission" or stand for a possibly contested reelection when their terms expired. *Id.*

Circuit Judge Victoria Platzer, a former police officer who was first elected in a contested race in 1994 and re-elected [in 2000] without opposition . . . [said,] "The way I look at retention, I think we're taking a bigger risk, not less of a risk, because our names are always going to be on the ballot." [The opposition disagreed:] "In effect, it's life tenure for them," said Miami lawyer Victor Diaz, who is behind the opposing Citizens for an Open Judiciary PAC, which has raised \$64,723. That's almost twice as much as Citizens for Judicial Integrity's [total fundraising of] \$34,205.

Id.

437. Tryon, *supra* note 416.

Another theory—that secret forces are trying to change the way judges are selected in Florida—needs to be debunked before Tuesday, however, so it doesn't affect the outcome of voting. Simply put: Rumor and innuendo to the contrary, there is no conspiracy to take away the right of voters to elect circuit court and county court judges in Florida.

Id.

438. *Id.*

H. There Were Racial and Ethnic Perceptions and Influences Adverse to the Proposal

Some correctly “predicted that the merit selection referendum [would ultimately] fail in Miami-Dade County because the Hispanic community opposed the change.”⁴³⁹ At one point during the 2000 campaign, prominent Miami attorney Victor M. Diaz Jr., chair of Citizens for an Open Judiciary, “equated the appointment proposals to socialism, which opponents said was a way of signaling to Cuban voters that the proposals threatened their growing political power.”⁴⁴⁰ Diaz effectively acknowledged that racial motives did exist on both sides in South Florida.⁴⁴¹ Even though “[i]n a Dade County legal poll, 80 percent of the highest-rated 20 judges were appointed and 70 percent of the lowest rated 20 judges were elected.”⁴⁴²

“By their record voter turnout and their resounding rejection of these referendums, voters sent a strong message of how much we value the most precious right of any American citizen, which is the right to vote,” said Diaz, who testified against going to pure merit selection at the Bar public hearings.⁴⁴³ However, he agreed with then-Bar President Bookman that, while “citizens were not willing to give up their right to directly elect judges[,] . . . more need[ed] to be done, to improve the elective and appointive process.”⁴⁴⁴

I. Confusion over the Ballot Language

Terry Russell, President-elect of the Florida Bar at the time, later blamed the defeat of the proposal on what he deemed “confusing ballot language,” saying voters may have voted against the change because they did not understand the questions.⁴⁴⁵

439. Blankenship, *Miami Has its Say*, *supra* note 166.

440. Glaberson, *supra* note 382.

441. *See id.* “The knee-jerk reaction is that this is about cleaning up the judiciary.’ . . . It is not about that. It is about the judicial establishment that feels threatened by the changing political dynamics and demographics of this community, and this is an effort to protect themselves.” *Id.* Mr. Diaz later attributed his reference to socialism as “an unfortunate choice of words.” *Id.*

442. Editorial, *Appoint, Don’t Elect, Trial Judges*, SUN-SENTINEL, Feb. 18, 2000, at 24A, 2000 WLNR 8566006 (emphasis added).

443. *Bar Considers Judicial Election Task Force*, *supra* note 396.

444. *Id.*

445. Kumar, *Floridians Keep Right to Elect Judges*, *supra* note 346.

Voters may have been confused about a 2000 legislative amendment to the ballot language removing the word “merit” from the text attempting to emphasize that voters would be giving up their votes and instead allowing a committee of local lawyers and civic leaders to recommend judicial candidates to the governor for making the final decision.⁴⁴⁶ The Florida Bar challenged this change in wording in court but did not prevail.⁴⁴⁷ “We did the best we could,” Russell said.⁴⁴⁸ “We’re very disappointed. I think we’re stuck with a lousy way of picking judges. It’s too bad.”⁴⁴⁹

XII. THE FUTURE OF MERIT SELECTION IN FLORIDA

The voters’ rejection of merit selection and retention in Florida was unequivocal, although it did little to change the widely held perception that there were faults in the system.

Although initial efforts at reform failed, the Republican-controlled Legislature later succeeded in adopting legislation in 2001 impacting judicial selection.⁴⁵⁰ Under the modified merit selection system adopted that year, the governor received near-total control in shaping the entire membership of Florida’s JNCs.⁴⁵¹ Under the adopted changes, the governor can appoint four members of the Florida Bar to each JNC from a list of names submitted to him by the Board of Governors of the Florida Bar, but can also reject those nominees and request that the Board submit another list of names.⁴⁵² The governor also appoints the other five members of each JNC at his discretion, with at least two of those appointees being lawyers.⁴⁵³ The result is that Florida’s judicial selection process has shifted away from a joint Bar-Governor process to a system that functions much closer to that of a pure gubernatorial appointment process.

Despite having won the day, and because of the problems inherent in the judicial election process, supporters of judicial

446. Weaver, *supra* note 281.

447. Mary Ellen Klas, *Voters Retain Election Process for Trial Judges*, PALM BEACH POST, Nov. 8, 2000, at 2B, 2000 WLNR 1661858.

448. Kumar, *Floridians Keep Right to Elect Judges*, *supra* note 346.

449. *Id.*

450. *Merit Selection and Retention*, *supra* note 122; *Bar Considers Judicial Election Task Force*, *supra* note 396.

451. *Id.*

452. *Id.*

453. *Id.*

elections should continue to seek reasonable reforms. However, because of the overwhelming 2000 merit selection defeat, any future initiatives will likely require both the Florida Legislature and Florida Bar to formulate a plan that includes establishing acceptable standards for judicial candidates, and an established method of informing voters of the candidates' qualifications. One consideration could include a platform incorporating a recommendation approved by the ABA House of Delegates in 2000 that states can create judicial eligibility commissions to determine minimum standards for potential judicial candidates.⁴⁵⁴

The ABA's plan suggests implementing a variation of the JNCs that Florida uses for all appellate judgeships and mid-term appointments to the trial bench.⁴⁵⁵ As proposed, these commissions would not only interview candidates but also review their resumes and submit their recommendations to the governor, just as the current JNCs do.⁴⁵⁶ Beyond that, these "eligibility commissions" (for lack of a better term) would be comprised of both laymen and lawyers and would investigate all candidates on the ballot according to established criteria.⁴⁵⁷ Candidates would then be rated as "qualified" or "not qualified," much the same way the ABA rates candidates for federal judgeships.⁴⁵⁸ Although this would not prevent anyone who fails to meet established minimum requirements from running for a judgeship, it would inform voters for due consideration about each candidate's qualifications as assessed against established benchmarks.

These eligibility commissions could be created by either amending the state constitution or passing legislation. Commission members would also be appointed under some established framework, either by the Governor, the Florida Supreme Court, the Florida Legislature, the Bar, or some combination. Judicial campaign-finance reform and enacting

454. See generally American Bar Association, *Standards on State Judicial Selection*, ABA STANDING COMMISSION ON JUD. INDEPENDENCE, <https://www.americanbar.org/content/dam/aba/administrative/judicialindependence/reformat.authcheckdam.pdf> (last visited Mar. 30, 2019) (explaining that the ABA Standing Committee on Judicial Independence explores "minimum standards for the qualifications of those who seek appointment or election to the bench").

455. See *id.* at 2, 12.

456. See *id.* at 7, 13, 14.

457. *Id.* at 9.

458. See *id.* at 9–10.

fair-campaign practices and procedures for judicial elections would also supplement the process.

If any future reform proposals are to be acceptable to both the electorate and state lawmakers, any proposed merit selection and retention system—where voters chose either “yes” or “no” on granting another term for the incumbent judge—should at a minimum also include:

- (1) increased public awareness and participation in the non-deliberative aspects of the process, including possibly opening deliberations to public scrutiny, with nominating committees made up of a broader membership than currently exists;
- (2) adopting mandatory conflict of interest rules, lobbying restrictions, and disclosure requirements;
- (3) amendments to the election process whereby filing deadlines are earlier in the election year so that incumbent judges cannot be ambushed at the last minute by last-minute filers; raising the qualifications for becoming a circuit court judge beyond a mere “years of practice” requirement; and implementing partial public campaign financing on a local option basis for judicial elections that includes caps on spending and a rigorous code of campaign ethics; and
- (4) a design whereby the occasional defeat of a sitting judge is a realistic possibility, thereby addressing the public’s belief that a “merit selection” process is the equivalent to granting “lifetime appointment” to state judges.

Any such proposals should have the endorsement of both the executive and legislative branches, as they would likely be dictating the make-up of these restructured nominating committees. Accordingly, while input from the Florida Bar would be welcomed, it is unclear whether an endorsement by the Bar would be vital to successfully amending the process.

Any future attempt to establish merit selection and retention for trial judges in Florida might also borrow heavily from those systems now used in a growing number of states designed to give voters information about the judges up for election to new terms. Five states—Alaska, Arizona, Colorado, Tennessee, and Utah—have responded to the problem of low voter information by adopting official performance evaluation mechanisms for judicial

retention election candidates.⁴⁵⁹ Strategies for the public dissemination of such reports prior to elections vary from state to state.⁴⁶⁰ For example, in Alaska and Utah, evaluations are mailed to all registered voters as a part of a voter guide compiled for each election cycle.⁴⁶¹ In Alaska and Arizona, those findings are also placed on various webpages.⁴⁶² Moreover, Alaska places the results of these evaluations in local newspaper advertisements.⁴⁶³

To provide an example of how this process might work, drawing on the process used by the Alaska Judicial Council, an independent agency charged with conducting these evaluations, the eligibility commission would: “screen all judicial applicants for vacant seats, evaluate[] the performance of judges and recommend[] whether voters should retain judges for another term. . . .”⁴⁶⁴ As part of this mission, the commission would mail information about those judges up for retention directly to voters, including the results of any surveys given to lawyers, witnesses, jurors, staff, and other judges.⁴⁶⁵ The mailings might also include pertinent information like the judge’s record on appeal, a personal statement provided by the judge, and reference to any public records of disciplinary actions taken against that judge.⁴⁶⁶

Each local committee could use its discretion to disseminate other information and statistics.⁴⁶⁷ For example, how often a criminal court judge departs upward or downward from the state’s sentencing guidelines, and whether statistics show that a family law judge rules for either men or women in divorce and custody cases with greater frequency, might be relevant in any given area. The commission could also disclose if, or whether, its members recommended retention or term limitation for the subject judge.

459. See CITIZENS FOR INDEPENDENT COURTS, *UNCERTAIN JUSTICE: POLITICS AND AMERICA’S COURTS: THE REPORTS OF THE TASK FORCES OF CITIZENS FOR INDEPENDENT COURTS* 99 (2000), http://constitutionproject.org/pdf/uncertain_justice.pdf.

460. Seth A. Andersen, *Judicial Retention Evaluation Programs*, 34 *LOY. L.A. L. REV.* 1375, 1385–86 (2001).

461. *Id.*

462. KEVIN M. ESTERLING & KATHLEEN M. SAMPSON, *JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS* 21, 29 tbl. III-4 (1998).

463. See Andersen, *supra* note 460, at 1382.

464. Alaska Judicial Council, *Frequently Asked Questions About Retention*, <http://www.ajc.state.ak.us/about/index.html> (last visited Mar. 30, 2019).

465. *Id.*

466. *Id.*

467. *Id.*

In another example, the Arizona Commission on Judicial Performance Review (JPR) operates under a similar setup to that in Alaska.⁴⁶⁸ Judicial performance reviews involving data collection, reporting, self-evaluation, and improvement are conducted in Arizona two times in “a judge’s term—once at midterm and once at the end of the term just before the general election.”⁴⁶⁹ Additionally, the Commission uses public opinion to assess whether a judge meets judicial performance standards.⁴⁷⁰ These assessments are published by the Commission both “in the [Arizona] Secretary of State Voter Information Pamphlet and on [the JPR] website.”⁴⁷¹ These reports are publicly available and often help voters determine how to vote during a judicial retention election.⁴⁷²

The Missouri Bar also sponsors a twenty-one-member committee that reviews judicial performance.⁴⁷³ The review process works like this: Lawyers, jurors, and litigants are surveyed about their experience with judges standing for retention.⁴⁷⁴ They answer questions about a judge’s fairness, neutrality, and preparation and knowledge of the law.⁴⁷⁵ The surveys, along with opinions written by the judge, are submitted to the twenty-one-member committee—comprised of lawyers and nonlawyers, as well as one current and two retired judges—and identifying information is

468. See Ariz. Judicial Council, *Home*, <https://www.azcourts.gov/jpr/> (last visited Mar. 30, 2019).

469. Ariz. Judicial Council, *JPR Process*, <https://www.azcourts.gov/jpr/About-JPR/JPR-Process> (last visited Mar. 30, 2019).

470. *Id.*

471. *Id.*

472. *Id.*

473. Mo. Bar Ass’n, *Review Committee*, <http://www.yourmissourijudges.org/reviews/committees/> (last visited Mar. 30, 2019).

The Missouri judicial performance review process was developed after a committee studied model rules and best practices from the American Bar Association and more than 20 judicial performance evaluation systems in the nation. The current judicial performance review process in Missouri was adopted June 15, 2016, when the Supreme Court of Missouri issued an order making revisions to Rule 10 which expand[ed] the voices of non-lawyers in the review process, [left] judging the judges to the voters, and foster[ed] consistency in the process with the implementation of one statewide review committee.

Mo. Bar Ass’n, *Reviews*, <http://www.yourmissourijudges.org/reviews/> (last visited Mar. 30, 2019).

474. Mo. Bar Ass’n, *Review Process*, <http://www.yourmissourijudges.org/reviews/process/> (last visited Mar. 30, 2019) [hereinafter *Review Process*].

475. See *id.*

blacked out.⁴⁷⁶ The committee members then vote on their recommendations, which are later disseminated for public review.⁴⁷⁷ The methods used by states such as Alaska, Missouri, and Arizona providing official performance evaluation mechanisms for judicial retention election candidates can form the starting template for any such process as part of the continuing debate about improving the judicial selection system in Florida.

XIII. CONCLUSION

Whatever one's view of the efficacy of merit selection versus judicial election, Florida had the rare experience of putting the measure directly to voters, allowing the opportunity for both an objective and subjective evaluation of both sides to identify the strengths and weaknesses of each toward implementing needed improvement to the process. Many factors converged to cause the defeat of the local option measure for merit selection of trial judges. Although Republicans did not overwhelmingly support the initiative, surprisingly neither did Democrats. But more than the proposal's ideological implications, a virtual perfect storm of several factors—including bitter opposition by interest groups and lukewarm support from the judiciary—helped doom the change despite organized Bar support and widespread newspaper endorsements.

Despite the loss, the reformers are undaunted. As Florida's Fifth Circuit Judge Richard Tombrink noted about merit selection after the 2000 defeat, "It's been up (on referendum) before, and it will be up again."⁴⁷⁸ Much was learned from the 2000 election, and should those reforms suggested in this Article be considered and further vetted for viability, a future attempt to implement changes to the judicial selection and retention process for trial judges might be more successful. If so, the Miami Herald's July 2000 prediction may come to fruition: "This November could be the last time that Broward voters are allowed to choose trial judges."⁴⁷⁹

476. Mo. B. Ass'n, *Frequently Asked Questions*, <http://www.yourmissourijudges.org/reviews/frequently-asked-questions/> (last visited Mar. 30, 2019).

477. *Id.*; *Review Process*, *supra* note 474.

478. Jamie Malernee, *Hernando, Area Voters Rule against Appointed Judges*, ST. PETERSBURG TIMES, Nov. 10, 2000, at 1, 2000 WLNR 8767864.

479. *See* Reisinger, *supra* note 159.

Toward the recent United States Supreme Court's ruling on judicial fundraising referenced in the introduction to this Article, Chief Justice John Roberts touched upon appointing versus electing judges, which he called an "enduring debate." On that point, it is only fitting that he be given the last word:

The desirability of judicial elections is a question that has sparked disagreement for more than 200 years. Hamilton believed that appointing judges to positions with life tenure constituted "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." Jefferson thought that making judges "dependent on none but themselves" ran counter to the principle of "a government founded on the public will." The federal courts reflect the view of Hamilton; most States have sided with Jefferson. Both methods have given our Nation jurists of wisdom and rectitude who have devoted themselves to maintaining "the public's respect . . . and a reserve of public goodwill, without becoming subservient to public opinion."⁴⁸⁰

480. *Williams-Yulee v. The Fla. Bar*, 135 S. Ct. 1656, 1672–73 (2015) (internal citations omitted).