SPRING 2021

STETSON LAW REVIEW FORUM

Judicial Selection in a Hyper-Politicized Democracy

Louis J. Virelli III*

I am grateful to the *Stetson Law Review* for providing me this opportunity to comment on Judge Mark Klingensmith's recent, thought-provoking article on judicial selection practices in Florida.[1] Judicial selection is always an important issue, but in these highly politicized times concepts like judicial independence, political accountability, and public confidence in our governmental institutions are particularly salient. My comments are not meant as a critique of Judge Klingensmith's article, but rather what I would describe as thoughts about the next steps in his analysis.

The article focuses, among other things, on the apparent discrepancy in outcome between two votes: 1) Florida voters' choice in 1998 to amend the state constitution to allow counties to choose whether to elect or appoint local judges,[2] and 2) a round of votes in 2000 in which individual counties exercised their choice voted for two years earlier to endorse judicial elections.[3] The article goes to great lengths to discuss the various factors relevant to, and potential explanations for why, the 1998 and 2000 votes came out the way they did, and I have neither inclination nor space to take issue with any of that discussion. I would, however, offer a slightly different perspective on the debate over judicial selection in Florida that took place at the turn of the last century, and suggest that this perspective has relevance for the current manifestation of that debate.

Independent of considerations such as political affiliations, coattails, and ideology, there is at least one view of the 1998–2000 judicial selection discussion that explains the two votes as part of a coherent event. The 1998 constitutional referendum in Florida asked voters whether they want to be afforded the *choice* to

 Professor of Law, Stetson University College of Law. J.D., University of Pennsylvania, 2000; M.S.E., University of Pennsylvania, 1997; B.S.E., Duke University, 1996.

[1] Hon. Mark W. Klingensmith, *Merit Selection for Florida's Trial Judges: Opportunity Lost, or Lessons Learned?*, 48 STETSON L. REV. 473 (2019).

[2] *See id.* at 490–501 (describing 1998 referendum granting voters in individual counties the power to choose whether their local trial judges would be appointed or elected).

[3] *See id.* at 502–11 (describing the statewide vote in 2000 rejecting the appointment of county and circuit court (trial) judges in Florida).

decide how their local judges are selected.[4] Almost three-fifths of the voters embraced that choice, causing the amendment to be adopted.[5] Two years later, when asked to exercise the choice they had voted for in 1998, the voters in each individual county again endorsed direct voter control over the judiciary, rejecting judicial appointments in favor of popular elections.[6] When viewed this way, the story becomes one of voters protecting their democratic authority, not changing course about judicial appointments. Assuming that voters choosing to protect their own electoral power is a logical and unsurprising result, we are left with a more procedural—and less ideological—view of judicial selection. This makes sense to the degree that support for judicial elections versus appointments does not necessarily coincide better with a particular view of judging than with whether the judges one prefers are more likely to be selected by appointment or the voters.

Once we cast the Florida voters' decision to maintain an elected judiciary as an exercise in protecting the power of the electorate, we can better compare the circumstances in 2000 with those in 2020 to see if—viewing the decision through a vote-maximizing lens—there is additional reason today to favor one mode of judicial selection over another. In this short essay, I attempt to outline some reasons why the decision of Florida voters to maintain judicial elections in 2000 is less persuasive today due to the changing nature of elections and of the judiciary's role in the democratic process. Part I discusses how changing attitudes toward, and participation in, elections weigh against judicial elections. Part II argues that the judiciary's increasing role in the electoral process suggests that judicial selection should be separate from that process. Part III contends that a judicial appointments regime is better suited to address the challenges that American elections create for the judiciary, and Part IV briefly concludes.

I. ELECTIONS ARE CHANGING

The electoral process is under attack, at least as recently as the 2020 presidential election. Former President Donald Trump spent months predicting electoral malfeasance in advance of the election.[7] He continued to do so throughout

---

[4] Fla. Const. Rev. Comm'n 1997–1998, *Local Option for Selection of Judges and Funding of State Courts, Revision 7*, *Proposal 74,* https://fall.law.fsu.edu/new_crc/pdf/crc7.pdf [hereinafter CRC 1997–1998, *Revision 7*]

[5] *See* Klingensmith, *supra* note 1, at 501 ("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.").

[6] *See id*. at 511 ("[B]oth measures [allowing for judicial elections] were overwhelmingly rejected on November 4, 2000 in every circuit and county in Florida with an overall average affirmative vote of only 30 percent.").

[7] *See, e.g.*, David Siders, *Trump Sees a 'Rigged Election' Ahead. Democrats See a Constitutional Crisis in the Making.*, POLITICO (May 25, 2020),

the lame duck period between election day and the inauguration of President Biden, advancing wholly unsubstantiated claims of voter fraud and other irregularities that, he falsely claimed, amounted to a "rigged" election.[8] Although shocking and deplorable conduct for an elected official, and especially for a president, those comments alone do not necessarily amount to a crisis of confidence in the electoral process. When they are supported (explicitly or implicitly) by other public figures including members of Congress,[9] and opinion polls reflect that a majority of Republicans subscribe to the unsubstantiated notion that the election was somehow illegitimate,[10] there is more cause for concern. When those doubts lead to threats of violence across the country and to an actual violent uprising at the Capitol Building, however, concern borders on crisis.[11]

The stability of American elections reaches far beyond judicial selection. But for present purposes, it is worth noting that, as confidence in elections wanes in

---

https://www.politico.com/news/2020/05/25/donald-trump-rigged-election-talk-fears-274477; Meagan Vazquez & Donald Judd, *Trump Predicts 'Most Corrupt Election" in US History While Making False Claims About Mail-in Voting*, CNN (June 23, 2020), https://www.cnn.com/2020/06/23/politics/donald-trump-mail-voter-fraud-most-corrupt-election/index.html. In fact, Trump did the same thing before his first presidential election in 2016, although not after he won. Edward Helmore, *Donald Trump Predicts The Election Will Be Rigged*, GUARDIAN (Aug. 2, 2016), https://www.theguardian.com/us-news/2016/aug/02/donald-trump-us-election-rigged-hillary-clinton.

[8] Peter Baker & Maggie Haberman, *In Torrent of Falsehoods, Trump Claims Election Is Being Stolen*, N.Y. TIMES (Nov. 7, 2000), https://www.nytimes.com/2020/11/05/us/politics/trump-presidency.html; Jemima McEvoy, *Trump Claims FBI And Justice Department May Have Helped Rig Election*, FORBES (Nov. 29, 2020), https://www.forbes.com/sites/jemimamcevoy/2020/11/29/trump-claims-fbi-and-justice-department-may-have-helped-rig-election/?sh=7442c1c15c01.

[9] *See, e.g.*, Paul Kane & Scott Clement, *Just 27 Congressional Republicans Acknowledge Biden's Win, Washington Post Survey Finds*, WASH. POST (Dec. 5, 2020), https://www.washingtonpost.com/politics/survey-who-won-election-republicans-congress/2020/12/04/1a1011f6-3650-11eb-8d38-6aea1adb3839_story.html.

[10] *See, e.g.*, Brad Brooks, Nathan Layne & Tim Reid, *Why Republican Voters Say There's 'No Way In Hell' Trump Lost*, REUTERS (Nov. 20, 2020), https://www.reuters.com/article/us-usa-election-trump-fraud-insight/why-republican-voters-say-theres-no-way-in-hell-trump-lost-idUSKBN2801D4; Celine Castronuovo, *Half Of Republicans In New Poll Say Election Was 'Rigged,' Stolen From Trump*, THE HILL (Nov. 18, 2020), https://thehill.com/homenews/campaign/526464-half-of-republicans-in-new-poll-say-rigged-election-was-stolen-from-trump.

[11] *See, e.g.*, Philip Rucker, *Trump's Presidency Finishes In 'American Carnage' As Rioters Storm The Capitol*, WASH. POST (Jan. 6, 2021), https://www.washingtonpost.com/politics/trump-rioters-incite/2021/01/06/0acfc778-5035-11eb-bda4-615aaefd0555_story.html.

America,[12] it makes less and less sense to use that mechanism to choose all three branches of government. Electing the legislative and executive branches of government is critical to democratic government because those branches are explicitly tasked with setting public policy.[13] In order for representative government to be truly representative, it is important that the people making decisions about how to properly order our personal and social lives be accountable to the governed. That is why policymaking institutions are referred to as political branches of government, and why there is little that can be done to protect legislators and members of the executive from elections, no matter how controversial.[14] It is far less obvious that judges must be elected.

There are reasonable arguments in favor of judicial elections, including that judicial decisions impact individuals' lives sometimes as much or more than those of the political branches. Judging is not, however, synonymous with policy making. Even the broadest view of the judicial power in American law limits judges to deciding individual cases, rather than setting generally applicable rules.[15] Perhaps the most frequently cited proposition about the judicial branch is that judges are tasked with impartially applying the law to the facts of the case; they are supposed to actively avoid using their position to make broad policy judgments, deferring instead to the judgment of the political branches.[16] For trial judges, who are at the center of the

---

[12] Stephanie Kulke, *38% of Americans Lack Confidence in Election Fairness*, NORTHWESTERN NOW (Dec. 23, 2020), https://news.northwestern.edu/stories/2020/12/38-of-americans-lack-confidence-in-election-fairness/.

[13] James Madison, *Federalist No. 51*, *in* THE FEDERALIST PAPERS (McLean's ed., 1788).

[14] Elmer B. Staats, Who is Accountable? To Whom? For What? How?, Address at The Annual Conference of NCAC/ASPA in Washington, D.C. 2 (Dec. 6, 1979) (transcript at https://www.gao.gov/assets/190/185445.pdf).

[15] U.S. CONST. art. III, § 2 (limiting the power of federal judges to the resolution of "cases" and "controversies," which in turn has led to the concept of justiciability); Dep't of Revenue v. Kuhnlein, 646 So.2d 717, 720 (Fla. 1994) ("We do agree that . . . Florida recognizes a general standing requirement in the sense that every case must involve a real controversy as to the issue or issues presented.").

[16] Chief Justice Roberts echoed this idea at his confirmation hearing:

> Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. . . . I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat.

John G. Roberts, Jr., Chief Justice, United States Supreme Court, Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Opening Statement before the Committee on the Judiciary of the United State Senate 55–56 (2005) (excerpt from transcript at https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process).

Florida judicial selection debate, the opportunity to set policy is even more limited—trial judges often give way to juries as finders of fact, and are subject to at least one and, in important cases, several layers of review by higher courts.[17] Because judges' responsibilities are not as closely connected to the electorate as those of the political branches, they do not require the same degree of accountability to voters. That is not to say that judicial elections are never justified, but only to point out that when the electoral process is in a fragile state, there may be reason to insulate some crucial actors without fundamentally changing the structure of our democracy.

Even if our elections have not reached a crisis point, there have been some clear changes since 2000. One is that elections are far more expensive. Recent runoffs for two U.S. Senate seats in Georgia were the two most expensive congressional races in history.[18] And the money is coming from more and more sources with less and less transparency. As reported by the Brennan Center for Justice in a 2017 Report:

> Rather than contributing to candidates or political parties, wealthy interests are increasingly relying on outside spending by groups as a way to influence state supreme court elections, mirroring the trend in elections for political offices since the Supreme Court's 2010 decision in *Citizens United v. FEC* . . . . The growth of outside spending by interest groups has brought with it a stunning lack of transparency.[19]

This is problematic for all aspects of the democratic process, but particularly for judges, who decide individual cases involving specific parties. As local elections draw more and more national attention from interest groups, the number of people taking an active interest in, and trying to influence the outcome of, judicial elections

---

[17] *See* FLA. CONST. art V, §§ 3–4 (outlining the appellate jurisdiction of the supreme court and district courts of appeals in Florida).

[18] *See* Liza Lucas, *Record Amount Spent on Georgia Senate Races*, 11 ALIVE.COM (Jan. 5, 2021), https://www.11alive.com/article/news/local/verify-cost-georgia-senate-race-most-expensive-ever/85-bcd2554d-0780-4da0-9d97-7e854cedfd2e ("[M]ore than $830 million combined have [sic] been spent for Georgia's twin [Senate] races ...."); *See also* Emma Green, *Georgia's Billion-Dollar Bonfire: The Runoff Races for Two U.S. Senate Seats in Georgia Matter. But Piling on More Cash is Not an Effective Way to Win*, THE ATLANTIC (Jan. 5, 2021), https://www.theatlantic.com/politics/archive/2021/01/money-spent-georgia-senate-runoffs/617545/ (reporting that the two campaigns spent $443,210,038.26 and that "outside groups not legally affiliated with the four candidates have put in nearly half a billion more").

[19] Alicia Bannon, Cathleen Lisk & Peter Hardin, *Who Pays for Judicial Races?: The Politics of Judicial Elections 2015-2016*, BRENNAN CENTER FOR JUST., https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf (last visited Apr. 26, 2021).

increases.[20] The more involvement private donors have in a judge's election or re-election, the more likely ethical questions will arise.[21] More donors equals more cases with potential conflicts, and more money equals potentially more profound conflicts when they do occur. Even if we are not facing a crisis of confidence in our elections, more active political involvement in state and local elections is very real, and may present actual conflicts that make judicial elections less attractive now than in 1998 and 2000.

II. COURTS ARE MORE INVOLVED IN THE DEMOCRATIC PROCESS THAN EVER BEFORE

Another reason judicial elections are less consistent with our notions of democracy now than they were twenty years ago is that judges are more likely to be active participants in the outcome of elections than ever before. As evidenced by the recent presidential election, which was the most litigated of all time despite no substantial evidence of wrongdoing in any jurisdiction, litigation surrounding elections is becoming more and more common.[22] This may be a byproduct of the

---

[20] Case in point the retention vote for three Iowa supreme court justices who participated in a 2009 ruling that same-sex marriage is protected under the Iowa constitution. The justices raised no money for their retention campaigns and were unopposed. In fact, no justice had failed to get a majority of "yes" votes in Iowa since 1962, yet all three were voted out of office. The vote was widely seen as a "referendum on the issue and the ruling, rather than the judges themselves," and reflects the increasing politicization of judicial elections, in line with the heightened partisan divide throughout the country. Mallory Simon, *Iowa Voters Oust Justices Who Made Same-Sex Marriage Legal*, CNN (Nov. 3, 2010), http://www.cnn.com/2010/POLITICS/11/03/iowa.judges/index.html ("The [failed retention vote] marks the end of a showdown in the state that was funded by several million dollars from mostly out-of-state groups opposed to the same-sex marriage ruling.").

[21] Although the focus here is largely trial judges, other Florida judges are subject to periodic retention elections, which could raise some of the same concerns. THE FLA. BAR, GUIDE FOR FLORIDA VOTERS (2020), https://www-media.floridabar.org/uploads/2020/05/Voter-Guide-2020-single-page_WEB_v24ADA051320.pdf (explaining retention elections for state supreme court justices and appellate judges).

[22] This is certainly true of the 2020 election compared to the contested election in 2000:

> The level of litigation that took place in 2000 was unprecedented . . . . That word, unprecedented, gets used a lot when describing the 2000 election. But what was unprecedented two decades ago is starting to look quaint in 2020. 2020, election lawyers say, may be the most litigated election ever.

Sam Gringlas, Audie Cornish & Courtney Dorning, *Step Aside Election 2000: This Year's Election May Be The Most Litigated Yet*, NPR (Sept. 22, 2020), https://www.npr.org/2020/09/22/914431067/step-aside-election-2000-this-years-election-

increase in national attention to state and local elections[23] or of greater spending.[24] Regardless of the cause, the fact that elections are more likely to end up in court inevitably draws judges closer to the political process. This closer connection to elections could breed suspicion (warranted or not) of judges tasked with protecting the integrity of the same system that granted them authority to do so.

The litigation surrounding the 2020 presidential election was a terrific example of the importance of judicial independence in election law. In over sixty lawsuits spread across the country, judges repeatedly defended the legitimacy of elections in the face of inadequate, or often nonexistent, evidence.[25] On the one hand, this should not be surprising. After all, it is judges' job to decide cases on the evidence before them, so to do so in a series of relatively easy cases in that regard should not be particularly noteworthy. The reality, however, was quite different. The judges in those cases were under immense social and political pressure from political actors as well as ordinary citizens. Judges appointed by President Trump were called traitors for rejecting his campaign's challenges to the election in so-called swing states.[26]

---

may-be-the-most-litigated-yet. *See also* Election Law Program: Resources for Judges on Election Law and Litigation, NAT'L CENTER FOR STATE COURTS, http://www.electionlawprogram.org/ (last visited Apr. 26, 2021) ("Since *Bush vs. Gore*—and even more so with the rise of COVID-19—election litigation has become commonplace in the United States. Election litigation often forces judges to make quick decisions interpreting complex state election codes—decisions that impact public confidence in electoral outcomes.").

[23] Harry Stevens, Adrian Blanco & Dan Keating, *Where Votes Are Still Being Counted*, WASH. POST, https://www.washingtonpost.com/graphics/2020/elections/vote-count/ (last updated Feb. 20, 2021 12:57 PM).

[24] Brian Schwartz, *Total 2020 Election Spending to Hit Nearly $14 Billion, More Than Double 2016's Sum*, CNBC (Oct. 28, 2020, 2:00 PM EDT), https://www.cnbc.com/2020/10/28/2020-election-spending-to-hit-nearly-14-billion-a-record.html (last updated Nov. 1, 2020, 7:16 PM EDT).

[25] Jacob Shamsian & Sonam Sheth, *Trump and Republican Officials Have Won Zero Out of at Least 42 Lawsuits Filed Since Election Day*, BUSINESS INSIDER (Jan. 5, 2021, 9:51 AM), https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11.

[26] Aaron Blake, *The most remarkable rebukes of Trump's legal case: From the judges he hand-picked*, WASH. POST. (Dec. 14, 2020, 10:37 AM EST), https://www.washingtonpost.com/politics/2020/12/14/most-remarkable-rebukes-trumps-legal-case-judges-he-hand-picked/ ("All told, at least eight judges appointed by Trump have ruled against or declined to bolster the pro-Trump effort pushing baseless allegations of massive voter fraud and irregularities, as did another on his Supreme Court shortlist."); Brendan Cole, *Wisconsin Judge Who Ruled Against Donald Trump Gets Extra Police Protection After Threats*, NEWSWEEK (Dec. 22, 2020, 5:19 AM EST), https://www.newsweek.com/brian-hagerdorn-wisconsin-supreme-court-trump-election-police-protection-1556586 (describing how "conservative" Wisconsin supreme court justice Brian Hagedorn "previously said that he had received some 'dark messages' after his

Whether simply doing their job or not, any human assessment reveals a difficult situation. Would it have been such a surprise if one judge capitulated and ruled in favor of overturning the election? If one judge gave into the intense pressure and threats, would that make it more likely another would follow? Even if a few judges giving way did not ultimately turn the election, it could only damage the public's confidence in the election results, especially in the eyes of those who were predisposed to believe the claims of fraud and irregularities.

Now imagine how that pressure manifests itself if the judge in question is facing reelection at the hands of the same people seeking to influence the election law case before her. It could be seen as just another feature of judicial elections—controversial cases inevitably lead to pressure from constituents who may choose to either reward or punish a judge at the ballot box for their decision. If this is true, then whether the controversial case involves an election should not necessarily impact the pressure on an elected judge. There are two additional considerations, however, when political pressure on an elected judge comes from an election case. The first is that in an election case, the resolution is inherently political; once controversy attaches to the case, any decision affecting the outcome of the election can be viewed in terms of political gain and loss. This is not necessarily true of other, non-election-related controversies that do not break so cleanly along political lines, but is far more likely to be true when the case itself involves the political process.[27] The second is that when an elected judge feels public pressure over an election case, she can assume that the people applying that pressure are politically active and engaged and therefore are more likely to vote. This does not have to be true to be important; if a judge draws the rational conclusion that constituents who are concerned about the outcome of an election dispute are more likely to use elections to advance their own agenda (i.e. by voting to oust the judge who decided against them), it could magnify the negative effects of political accountability on judicial performance and integrity.

III. THE CASE FOR JUDICIAL APPOINTMENT IS STRONGER IN THE CURRENT ENVIRONMENT

Appointing judges is not without its pitfalls. Relying on a small cadre of "experts" to choose judges potentially exacerbates the conflicts of interest associated with judicial elections. If judges feel beholden to those who appoint them—often high-ranking government officials who have more opportunity to benefit from favorable treatment by a friendly judge than an ordinary voter—they may not be any more independent or impartial than those dependent on the electorate for their position. Moreover, if the appointing official is herself directly elected, then the same amount

rulings, telling *The New York Times*: 'I've been called a traitor. I've been called a liar. I've been called a fraud... I've been told I might be tried for treason by a military tribunal.'").

[27] Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 993 (2005).

of political pressure attaches to the appointment of a new judge as to their election; the only difference is which person in the process feels it most directly (the judge or the person who appointed them). Either way, judicial appointments are far from apolitical, nor are they intended to be.[28] The question is whether there are any benefits to removing judges from the electoral process that are not overcome by the corresponding costs of appointment. I would suggest three such benefits of judicial appointments that are even more compelling now than in 2000 when Florida counties chose to elect their judges.

The first is that the appointments process, although not necessarily less fraught politically, appears so to the general public. Even though most voters know little to nothing about the judicial candidates that appear on their ballot,[29] the very act of voting for them puts them in a category with other political candidates. As public opinion of our elected officials and the institutions they inhabit plummets,[30] and as partisanship becomes increasingly common and divisive,[31] the risk of guilt by association for elected judges threatens not only the candidates' reputations for impartiality and objectivity, but also that of the institution itself. For a branch of government dependent on public confidence and perception for its legitimacy,[32] the threat of being associated with such an overtly political act as an election could diminish public confidence in, and by extension the efficacy of, the courts.

---

[28]Dulcie Green Wink, *Judicial Confirmations: Politics and Predictions about Questions Not Answered*, 69 TEX. B.J. 393, 393 (2006); *see* U.S. CONST. art. II, § 2.

[29] *See* Klingensmith, *supra* note 1, at 491 n.145 (citing "[n]umerous studies [that] have documented the low levels of information voters have about judges and judicial performance").

[30] *See* Harry Enten, *Congress' Approval Rating Hasn't Hit 30% in 10 Years. That's a Record.*, CNN (June 1, 2019, 10:39 AM EDT), https://www.cnn.com/2019/06/01/politics/poll-of-the-week-congress-approval-rating/index.html ("From 1974 . . . to September 2009, the average approval rating for Congress . . . was 37%. . . . But that 37% is more than double the 17% average approval rating Americans have given Congress since September 2009."); Richard Wike & Shannon Schumacher, *Attitudes Toward Elected Officials, Voting and the State*, PEW RES. CENTER (Feb. 27, 2020), https://www.pewresearch.org/global/2020/02/27/attitudes-toward-elected-officials-voting-and-the-state/ ("In the United States, 71% believe elected officials don't care about average citizens.").

[31] *Political Polarization in the United States*, FACING HISTORY & OURSELVES, https://www.facinghistory.org/educator-resources/current-events/explainer/political-polarization-united-states (last visited Apr. 26, 2021).

[32] Justice Sandra Day O'Connor explained as much with respect to the legitimacy of the Supreme Court in her famous opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*: "[T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." 505 U.S. 833, 866 (1992). *See also* Alexander Hamilton, *Federalist No. 78*, *in* THE FEDERALIST PAPERS (McLean's ed., 1788) (noting that federal courts have "neither FORCE nor WILL, but merely judgment").

A second reason for favoring judicial appointment is that it affords judges greater opportunity to moderate their positions over time, free from continuing accountability to the voters or their representatives. This of course is not always true. Appointed judges may face retention elections that cause them to feel political pressure throughout their career.[33] With few exceptions, however, judges facing retention elections are overwhelming approved by the voters.[34] When combined with the widely accepted idea that the electorate in judicial races is rarely well informed about the candidate or their performance,[35] this supports the notion that judicial appointments, even when followed by periodic retention elections, do not trigger the same political pressures as judicial election (and re-election) campaigns.[36] The proof is in the pudding. No judge has ever lost a retention election in Florida, and across the country, retention election losses are exceedingly rare.[37] Some high-profile exceptions aside, the current hyper-partisan environment in American politics does not seem to be affecting the stability of judicial appointments, even when they include periodic retention elections. To the extent there is any movement, it reveals that high-profile retention elections have been targeted by politically motivated actors seeking to influence the composition of the judiciary.[38] If retention elections are indeed becoming more politicized, however, that does not mean they should be treated more like judicial elections. On the contrary, it suggests that state judicial appointments be modeled more closely after the federal judiciary, which does not require appointed judges to seek retention, let alone by popular election.[39]

A related, and final, reason why judicial appointments may be more desirable in an environment so focused on political power and partisanship is that appointments allow sitting judges to focus their public service message on notions of justice rather than politics or judicial ideology. The resultant benefit is not only additional distance between the judiciary and hyper-partisanship, but also a public reminder of the mission of the courts and their place in our democracy. Judges have an educational role in our society. Justice O'Connor, for example, is a strong advocate

---

[33] *See, e.g.,* FLA. CONST. art. V, § 10.

[34] *See* Klingensmith, *supra* note 1, at 499 ("in states requiring appointed judges to face merit retention votes, rarely was a judge ever removed. Thus, nomination by a commission and gubernatorial appointment was tantamount to a lifetime appointment.").

[35] *See id.* at 491, n.145 (collecting sources).

[36] This is even less surprising because judges seeking retention typically run unopposed. *See Judicial Selection: Significant Figures*, BRENNAN CENTER FOR JUST. (May 8, 2015), https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures ("In 16 states, judges are appointed by the governor and reselected in unopposed retention elections.").

[37] *See* Klingensmith, *supra* note 1, at 499.

[38] *See* Simon, *supra* note 20 (describing how funding from national organizations contributed to the failed retention election of three Iowa supreme court justices who ruled that same-sex marriage was protected under Iowa's constitution).

[39] U.S. CONST. art. III, § 1.

for public civics education.[40] Judges frequently speak to members of the public about various aspects of the justice system and how it works, and are encouraged by their professional code of ethics to do so.[41] Regardless of the actual (and inevitable) political effects felt by appointed judges, their freedom from direct political accountability via popular election allows them to publicly articulate a role for the courts that focuses on the core principles of judging—impartiality, objectivity, and fairness. That public message is potentially diminished if the judge is associated with the partisan rancor and expectations currently associated with electoral politics.

IV. CONCLUSION

Judge Klingensmith's article provides an interesting account of the evolution of Florida's judicial selection process, and offers valuable insights into the role of politics in the voters' decisions about how judges should be chosen. This essay is designed to build on that work to offer some (modest) insights into how the judicial selection debate may be framed by our current political climate. More specifically, by recasting the Florida voters' decisions in 1998 and 2000 as interrelated attempts by the electorate to aggrandize its power over the judiciary, we gain a different perspective as to which judicial selection regimes are best suited to the hyper-partisan and cynical political landscape we currently see. As the credibility of our elections comes under fire, the judiciary plays an increasingly prominent role in their outcome. Rather than bring the judiciary even closer to an electoral system in the middle of a legitimacy crisis, the current environment counsels for not only a separation of judges and their selection from politics, but also the appearance thereof.

---

[40] In 2009, after retiring from the Court, she started iCivics, an online civics education tool for middle and high school student that is designed "[t]o cultivate a new generation of students for thoughtful and active citizenship." *Our Story*, ICIVICS, https://www.icivics.org/our-story (last visited Apr. 26, 2021).

[41] CODE OF CONDUCT FOR UNITED STATES JUDGES, CANON 4: A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF JUDICIAL OFFICE 12 (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf ("A judge may engage in extrajudicial activities, including law-related pursuits and . . . may speak, write, lecture, and teach on both law-related and nonlegal subjects."). The commentary to Canon 4 explains a judges' obligation in more detail:

> As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so.

Id. at 15.

While certainly not a panacea, judicial appointment better achieves that goal, now more than ever.