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INSULATING INCUMBENT JUDGES FROM THE VICISSITUDES OF THE POLITICAL ARENA: RETENTION ELECTIONS AS A VIABLE ALTERNATIVE

I. Introduction

A duty of ethical conduct restricts the manner in which judges may engage in political activity.¹ The Code of Judicial Conduct (CJC)² constitutes the primary source of ethical law governing the political activities of incumbent judicial candidates³ and sets forth acceptable standards of judicial political conduct.⁴ The limits the CJC imposes on sitting judges are rigorous.⁵ The canons of the

1. See Survey: *The Ethical Dilemma Of Campaigning For Judicial Office: A Proposed Solution*, 14 *FORDHAM URB. L.J.* 353 (1986) [hereinafter *Ethical Dilemma*].

2. See generally MODEL CODE OF JUDICIAL CONDUCT (1972). The Model Code of Judicial Conduct is a set of rules governing the conduct of the bench, developed and promulgated by the American Bar Association in 1972. See *id.*; *Ethical Dilemma*, *supra* note 1, at 355.

3. The New York State Bar Association has adopted, with certain amendments, the Model Code of Judicial Conduct. See *N.Y. JUD. LAW* (McKinney 1975).

4. See MODEL CODE OF JUDICIAL CONDUCT Canon 7 (1972). Entitled "A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office," Canon 7 comprises the most authoritative guideline of ethical judicial political conduct. *Id.* Canon 7A(1) states:

A judge or a candidate for election to judicial office should not: (a) act as a leader or hold any office in a political organization; (b) make speeches for a political organization or candidate or publicly endorse a candidate for public office; (c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions

Id.

Canon 7A(2) states:

A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings . . . identify himself as a member of a political party, and contribute to a political party or organization.

Id.

5. See Cheit & Golze, *Are Sitting Judges Sitting Ducks? The Case for Abolishing Judicial Elections*, 55 *CAL. ST. B.J.* 414, 415 (1980) [hereinafter *Sitting Ducks*].

CJC proscribe a variety of improprieties⁶ and place several restrictions on a judge's extra-judicial activities.⁷

At the same time that judges are ethically restricted from engaging in political activities,⁸ New York law requires that trial court judges seeking reelection run for office in a popular election.⁹ Currently, judicial incumbents—supposedly “apolitical” during their term in office—have to return to the political arena for reelection after years of political inactivity.¹⁰ The present system compels judges seeking reelection to seek support “from the very politicians from whom they have been expected to stay at arm's length during their years on the bench.”¹¹ Thus, a basic conflict exists between judicial ethical guidelines and the political demands of democratic elections. On the one hand, active partisan activity seems a primary qualification for reelection, while on the other hand, the CJC prohibits judicial politicking.¹²

This Note proposes legislation that would cure many deficiencies in the present system of judicial tenure in New York.¹³ First, the

6. See MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1972). Canon 2 is entitled “A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.” *Id.* Canon 2 proscribes any act by a judge that might “convey the impression that [others] are in a special position to influence him.” *Id.* The commentary to Canon 2 states: “Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges [and a] judge must avoid all impropriety and appearance of impropriety.” MODEL CODE OF JUDICIAL CONDUCT Canon 2 commentary (1972).

7. See MODEL CODE OF JUDICIAL CONDUCT Canon 4 (1972). A judge may engage in quasi-judicial activities, provided that in doing so “he does not cast doubt on his capacity to decide impartially any issue.” *Id.* A judge may participate in extra-judicial activities “that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties.” MODEL CODE OF JUDICIAL CONDUCT Canon 5B (1972).

8. See *supra* notes 3-7 and accompanying text.

9. Most New York state court judges currently seeking reelection must run for office in a popular election. See Picchi, *Wachtler Goes Public in Lobbying for Retention Election of Judges*, Albany Times Union, May 20, 1986, at B5, col. 1 [hereinafter Picchi]. Similarly, most New York state court judges initially gain office by popular election. See *infra* note 34 and accompanying text.

10. See *Insulate Sitting Judges from Partisan Politics*, Buffalo News, May 23, 1986, at C2, col. 1 (Editorial) [hereinafter *Insulate Sitting Judges*]. Judicial terms range from 10-14 years. See *infra* notes 22-34 and accompanying text.

11. *Insulate Sitting Judges*, *supra* note 10, at C2, col. 1.

12. Lynn, *2 Judges' Setback Stirs Controversy*, N.Y. Times, Sept. 22, 1983, at B6, col. 4 [hereinafter Lynn]. Since judges “are barred from active politics,” they are “unable to influence directly the decisions of political leaders,” and therefore “can't protect themselves politically.” *Id.*

13. See *infra* notes 95-114 and accompanying text.

Note examines the present retention system¹⁴ for trial court judges in New York State in light of the strict standards of judicial ethics the CJC imposes on sitting judges.¹⁵ Part II analyzes several problems in the current reelection process,¹⁶ focusing on the complex predicament a judicial incumbent faces as a result of having to return to the political arena.¹⁷ Part III then explores three possible alternatives to the present reelection system.¹⁸ Finally, the Note recommends that the New York State Legislature amend the state constitution¹⁹ and implement a method of retention that would allow a sitting judge to remain in office with the approval of the voters without being subject to a primary or general election.²⁰ This method of retention would permit New York trial court incumbents in elective positions to seek reelection by first securing the approval of a nonpartisan screening panel and then by securing public endorsement through an uncontested retention election.²¹

II. Current Reelection Law in New York State

In order to comprehend fully how retention elections would operate in New York, it is necessary to describe the components of the state's judicial system. New York State is comprised of four judicial departments.²² These departments, with some exceptions, consist of

14. Throughout American history, reformers have attempted to create systems for "retaining" judges upon completion of their term in office. See Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 210, 211 (1980) [hereinafter *Judicial Retention Elections*].

15. See *infra* notes 22-37 and accompanying text.

16. See *infra* notes 38-57 and accompanying text.

17. See *infra* notes 42-55 and accompanying text.

18. See *infra* notes 58-92 and accompanying text.

19. The judicial retention measure would require amendment of the state constitution. See Ernst, *State's Top Jurists Recommend Election Reform for Best Judges*, Buffalo News, May 20, 1986, at A7, col. 1 [hereinafter Ernst]. As a constitutional amendment, the resolution would have to be passed by two separately elected legislatures, and then approved by a voter referendum. See *Wachtler Asks Separate Action On Judicial-Retention Measure*, N.Y.L.J., May 20, 1986, at 1, col. 3 [hereinafter *Judicial-Retention Measure*].

20. See *infra* notes 194-201 and accompanying text.

21. The judicial retention proposal would require a sitting judge to secure the endorsement of a screening commission, and then run for reelection without opposition. See *infra* notes 80-91 and accompanying text. This plan would affect judges of the New York Supreme Courts, New York County Courts, New York Surrogate's Courts, New York Family Courts outside of New York City, New York Civil Courts and District Courts. *Judicial-Retention Measure*, *supra* note 19, at 1, col. 3.

22. N.Y. CONST. art. VI, § 4a.

the following trial courts: (1) supreme court—the principal trial court in New York;²³ justices are elected for fourteen-year terms;²⁴ (2) civil court—a court of limited jurisdiction (suits up to \$25,000, small claims, landlord and tenant);²⁵ judges are elected for terms of ten years;²⁶ (3) family court—a court with jurisdiction over family matters;²⁷ family court judges within the City of New York are appointed by the Mayor for terms of ten years,²⁸ while family court judges outside New York City are elected for ten-year terms;²⁹ (4) surrogate's court—a court of limited jurisdiction over probate matters, the administration of estates and some adoptions;³⁰ judges are elected for fourteen-year terms in New York City and for ten-year terms in all other parts of the state;³¹ (5) criminal court—a court with jurisdiction limited to criminal concerns;³² the Mayor appoints its judges for terms of ten years.³³

Under current law, most New York State judges are initially selected by popular election.³⁴ Other states, however, employ diverse methods for retaining judges in their positions.³⁵ In New York, an incumbent seeking a new term of office must often participate in a popular election to retain his or her position.³⁶ Judicial incumbents

23. *Id.* § 7a.

24. *Id.* § 6c.

25. *Id.* § 15b (McKinney Supp. 1987).

26. *Id.* § 15a (McKinney 1969).

27. *See id.* § 13b (McKinney Supp. 1987).

28. *Id.* § 13a (McKinney 1969).

29. *Id.*

30. *See id.* § 12d.

31. *Id.* § 12c.

32. *See id.* § 15c.

33. *Id.* § 15a.

34. New York is among 13 remaining states that use partisan elections for the initial selection of nearly all judges. *See JUDICIAL ELECTIONS IN NEW YORK, -VOTER PARTICIPATION AND CAMPAIGN FINANCING OF STATE SUPREME COURT ELECTIONS 1981, 1982 AND 1983, 74-75* (Fund for Modern Courts, Inc. 1984) [hereinafter SUPREME COURT ELECTIONS]. All judges initially selected by popular election in New York run on a partisan ballot. *See COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1986, 162* (1986). A "partisan election" is "an election wherein at least one candidate represents a party which fielded [a] candidate in the last . . . election." 31 WORDS AND PHRASES (Supp. 1986); *see Joseph v. United States Civil Serv. Comm'n*, 554 F.2d 1140, 1143 (D.C. Cir. 1977). In 1846, New York changed from gubernatorial and legislative appointment to direct popular election. *See A. ASHMAN & J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS 9* (1974) [hereinafter ASHMAN & ALFINI].

35. Federal judges, unlike state judges, enjoy life tenure. *See U.S. CONST. art. III, § 1.*

36. *See Picchi, supra* note 9, at B5, col. 1. Sitting judges now seek reelection in contested partisan elections. *See id.*

are mere candidates for reelection, and must submit themselves again to the political process by which a party decides whom it should nominate for judicial office.³⁷

The current judicial retention system, however, suffers from major inadequacies. First, the reelection process by which political parties choose candidates for public office is extremely political. Political parties select first-time candidates for most courts and also incumbent judges running for reelection.³⁸ As a result, judicial tenure often depends upon issues "wholly irrelevant to the qualifications, ability, or record of [an] incumbent or aspirant."³⁹ Moreover, the political maneuvering required to obtain party support tends to detract from the appearance of judicial independence⁴⁰ and erodes public confidence in the judiciary.⁴¹

Recent developments in New York, particularly on Long Island and in the Bronx, further exacerbate this problem.⁴² Traditionally, political parties automatically endorse qualified judges seeking reelection.⁴³ The rationale behind bipartisan endorsements is "to keep the judges free of political maneuvering."⁴⁴ Recently, however, that "unwritten system has broken down."⁴⁵ Leaders of political parties

37. See *Insulate Sitting Judges*, *supra* note 10, at C2, col. 1.

38. See *Rescue Judges From the Bosses*, N.Y. Times, June 2, 1986, at A16, col. 1 (Editorial) [hereinafter *Rescue Judges*].

39. Note, *Analysis of Methods of Judicial Selection and Tenure*, 6 SUFFOLK U.L. REV. 955, 965 (1972) [hereinafter *Judicial Selection*]; see Hyde, *Judges: Their Selection and Tenure*, 30 J. AM. JUD. SOC'Y 152, 154 (1947). Judicial nominations are usually a "reward for political services rendered by the nominee." SURROGATE'S COURT ELECTIONS IN NEW YORK STATE 1980-1985, 90 (Fund for Modern Courts, Inc. 1986) [hereinafter *SURROGATE'S COURT*].

40. See *Rescue Judges*, *supra* note 38, at A16, col. 1. It would be "ludicrous" to demand sitting judges to act independently of the political leaders who choose them for the bench. *Id.*

41. The present system of judicial election "leads to a public perception of a politicized judiciary, which does not enhance what is already a fragile branch of government." *Judicial-Retention Measure*, *supra* note 19, at 1, col. 3.

42. See *id.*

43. See *Wachtler Backs Retention Vote*, N.Y. Newsday, Nov. 12, 1986, at 13, col. 2 [hereinafter *Retention Vote*]; 2 *Suffolk Judges Lose Support of Own Parties for Re-election*, N.Y. Times, July 1, 1985, at B7, col. 1 [hereinafter *Suffolk Judges*].

44. *Suffolk Judges*, *supra* note 43, at B7, col. 1.

45. *Retention Vote*, *supra* note 43, at 13, col. 2; see *Rescue Judges*, *supra* note 38, at A16, col. 1 (Bronx Democrats refused to renominate two democratic judges); Wacker, *Judge Drops Re-election Candidacy*, Newsday, Sept. 27, 1984, at 19, col. 1 (state supreme court justice abandoned bid for reelection after failing to win conservative party endorsement); Long, *GOP Ends Endorsing Democrat Judges*, Newsday, May 22, 1984, at 4, col. 1 (Nassau Republicans refuse to endorse Democratic incumbent judges) [hereinafter Long].

have now discarded tradition by refusing to endorse sitting judges.⁴⁶ As a result, many competent judges have been denied reelection.⁴⁷

The recent "politicalization of the judiciary" creates an urgent need for a new system of judicial reelection.⁴⁸ At present, county chairmen "control" judicial nominating conventions, and therefore have the power to "terminate" judicial careers.⁴⁹ Judges who devote most of their professional life to judicial service can be denied renomination "by the political whim of a local leader."⁵⁰ Moreover, the current judicial reelection system poses a serious threat to the independence of the judiciary, since it signals to sitting judges that they must "do nothing that may offend political leaders."⁵¹ In addition, since political leaders have the power initially to choose judicial candidates, elections are mere political appointments made by powerful political party leaders.⁵² In essence, the selection of

46. See *Suffolk Judges*, *supra* note 43, at B7, col. 1; Long, *supra* note 45, at 4, col. 1. In 1984, Joseph N. Mondello, Nassau County Republican Chairman, abandoned the custom of bipartisan endorsement for competent sitting judges. See Sexton, *Politics Wins Out Over Statedmanship For Nassau Judges*, *Newsday*, May 22, 1984, at 51, col. 1; see also Lynn, *Democrats Join Behind Judges*, *N.Y. Times*, Sept. 30, 1984, at 6, col. 3 (Long Island ed.).

In 1983, Stanley M. Friedman, Bronx County Democratic Chairman, refused to endorse two incumbent Democratic New York State Supreme Court justices because of political considerations. See Lynn, *Nassau G.O.P. Denies Endorsement for 3 Judges*, *N.Y. Times*, May 18, 1986, at 38, col. 4; see also *Judicial-Retention Measure*, *supra* note 19, at 1, col. 3.

47. In 1986, three Democratic Nassau County judges were defeated because they did not have Republican endorsement for reelection. See Lynn, *Democrats Losing on Judges*, *N.Y. Times*, Apr. 6, 1986, § 11 (Long Island Weekly), at 1, col. 1. In 1983, two judges of unquestioned ability were forced to run on the liberal party line and were eventually defeated. See *Rescue Judges*, *supra* note 38, at A16, col. 1.

48. Weston, *Wachtler Supports Retention Votes*, *N.Y. Newsday*, May 21, 1986, at 16, col. 3 [hereinafter Weston].

49. See Picchi, *supra* note 9, at B5, col. 1. Under the current judicial reelection system, in which political leaders endorse judicial incumbents, political bosses essentially decide the future of sitting judges. See *Retention Vote*, *supra* note 43, at 13, col. 1.

50. Lynn, *supra* note 12, at B6, col. 4.

51. Friedman *Asserts Minorities Need Judges in Bronx Court*, *N.Y.L.J.*, Sept. 22, 1983, at 3, col. 3. The current political process is "a bossed system that makes even judges the pawns of the clubhouse." *A Soiled Judicial Process Indeed*, *N.Y. Times*, Sept. 27, 1983, at A32, col. 1 (Editorial) [hereinafter *Soiled Judicial Process*].

52. See *THE ILLUSION OF DEMOCRACY: NEW YORK CITY CIVIL COURT ELECTIONS 1980-1985*, 29-91 (Fund for Modern Courts, Inc. 1986) (election of civil court judges is nothing more than appointment by political party bosses) [hereinafter *ILLUSION*]; *SURROGATE'S COURT*, *supra* note 39, at 90 (candidates running for Surrogate are commonly selected by political party); *JUDICIAL ELECTIONS IN NEW YORK: VOTER*

judges in New York State is "a process controlled not by the voters but by political leaders, largely unaccountable to the citizens of New York."⁵³ Popular elections, therefore, are mere "ratifications" of candidates nominated earlier by political leaders⁶⁴ and are an "illusion" of democracy.⁵⁵

Furthermore, it is difficult for judges returning to the political arena to possess effective political strength while they are ethically restricted from engaging in political activities.⁵⁶ While new candidates enter the election campaign with great political strength, incumbent judges are forced to remain politically inactive during their term of office.⁵⁷ Thus, an inherent inconsistency exists under the present retention system for judges in New York State. Judicial incumbents are caught between the strict requirements of judicial ethics that the CJC imposes, and the political realities of the democratic election process.

III. Analysis: Alternatives to the Present Reelection System

Several alternatives to New York State's present judicial reelection system are available.⁵⁸ One approach is to revise the strict ethical requirements of the CJC and expand the scope in which judges may engage in political activities.⁵⁹ Another alternative is to shorten a judge's term in office, thereby preventing a judicial incumbent from losing contact with the political mainstream.⁶⁰ A third approach is adopting a judicial retention system under which sitting judges would

PARTICIPATION AND CAMPAIGN FINANCING OF STATE SUPREME COURT ELECTIONS 1978, 1979 & 1980, 113 (Fund for Modern Courts, Inc. 1982) (supreme court elections are mostly ratifications of candidates nominated by political leaders) [hereinafter VOTER PARTICIPATION]; SUPREME COURT ELECTIONS, *supra* note 34, at 84 (nomination of candidate by dominant party is "lynchpin" of judicial selection process).

53. SUPREME COURT ELECTIONS, *supra* note 34, at 86.

54. See VOTER PARTICIPATION, *supra* note 52, at 5.

55. ILLUSION, *supra* note 52, at xii.

56. See Ernst, *supra* note 19, at A7, col. 1. Under the present judicial reelection system, incumbents "must remain aloof from politics until the final year of their term, then court the same political leaders they earlier ignored to attain the party's backing for another term." *Id.*

57. See *Insulate Sitting Judges*, *supra* note 10, at C2, col. 1. Currently, sitting judges must "insulate themselves from partisan politics on the bench in the interest of impartial justice" and then "must compete for re-election against any opponents who can gain a place on the ballot." *Id.*

58. See *infra* notes 59-61 and accompanying text.

59. See *infra* notes 62-73 and accompanying text.

60. See *infra* notes 74-79 and accompanying text.

no longer need to participate in popular elections in order to remain in office.⁶¹

A. Expanding Judicial Political Conduct

One approach to the judicial political dilemma would be to revise the canons of the CJC that regulate the political activities of judges to allow incumbents to defend themselves and engage in politics more vigorously. Adopting this reform, however, might cause judges to become "nothing more than politicians in black robes."⁶² The CJC imposes strict standards of conduct on judges to ensure that the bench presents a decorous public face.⁶³ Several canons of the CJC reflect this basic concern.⁶⁴ "Effective administration of the law" requires the preservation of public confidence in the legal system.⁶⁵

Similarly, public faith in the legal system demands, at the very least, the appearance of judicial impartiality.⁶⁶ The success of the law enforcement system depends upon society's belief in the "independence, ability, and integrity of the judiciary."⁶⁷ Political activity by judges tends to undermine the appearance of judicial impartiality.⁶⁸ The judiciary should remain an apolitical institution separate and distinct from the political branches of government.⁶⁹ To maintain an independent judiciary, courts must be free from the influence of the executive and legislative branches of government.⁷⁰ The judiciary

61. See *infra* notes 80-87 and accompanying text.

62. *Sitting Ducks*, *supra* note 5, at 418.

63. See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1972). Canon 1 states that a judge should observe "high standards of conduct so that the integrity and independence of the judiciary may be preserved." *Id.*

64. The warranting of great protection for judicial appearance is manifested in a number of canons. See *supra* notes 4-7 and accompanying text.

65. Gary, *Ethical Conduct in a Judicial Campaign: Is Campaigning an Ethical Activity?*, 57 WASH. L. REV. 119, 136 (1981) [hereinafter Gary].

66. *Id.*; see T. BENDITT, LAW AS RULE AND PRINCIPLE 91-93 (1978).

67. *Judicial Selection*, *supra* note 39, at 955.

68. See *Sitting Ducks*, *supra* note 5, at 418; see also W. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 95 (1973) [hereinafter REPORTER'S NOTES].

69. See *Judicial Selection*, *supra* note 39, at 969. "[J]udges must apply the law as written and remain independent from the ebb and flow of public opinion and politics." SUPREME COURT ELECTIONS, *supra* note 34, at 73.

70. See *Judicial Selection*, *supra* note 39, at 969. The framers of the United States Constitution recognized this concern by providing for a judiciary that is essentially free from the influence of other branches of the government. See U.S. CONST. art. III, § 1; *Sitting Ducks*, *supra* note 5, at 419.

cannot be "tainted with the aura of political favoritism."⁷¹ CJC limitations upon a judicial incumbent's political activities operate to alleviate this concern.⁷² Expanding the scope in which judges may engage in political activities could destroy the independence and integrity of the judiciary.⁷³

B. Limiting a Judge's Term of Office

Alternatively, reforms could attempt to limit a judge's term of office, thereby preventing a sitting judge from losing contact with the political mainstream.⁷⁴ Under the existing system, judicial terms last for ten to fourteen years.⁷⁵ Adopting such reforms, however, could result in well-qualified incumbents wasting valuable time campaigning every few years instead of performing their judicial duties.⁷⁶ This waste of judicial talent would impede judicial progress and exacerbate the existing difficulty courts have in keeping up with their dockets.⁷⁷ Another insidious danger in shortening the term of office of an incumbent jurist is that a lawyer may be reluctant to abandon a lucrative career at the risk of losing an election to "someone more skilled at politics."⁷⁸ Moreover, requiring frequent reelection of judges would diminish judicial independence even more than the present system does, since short terms would require incumbents to maintain "amiable relations" with the political forces that initially placed them on the bench.⁷⁹

C. Retention Elections

Another possible solution is for New York State to adopt a retention system for judicial incumbents under which sitting judges would no longer need to engage in partisan political maneuvering

71. See *Judicial Selection*, *supra* note 39, at 969.

72. See Gary, *supra* note 65, at 136-37.

73. The framers of the United States Constitution recognized that the judiciary is "more likely to retain its independence and integrity" if judges are insulated from the political forum. *Sitting Ducks*, *supra* note 5, at 419.

74. See *Judicial Selection*, *supra* note 39, at 965.

75. See *supra* notes 22-33 and accompanying text.

76. Hyde, *Judges: Their Selection and Tenure*, 30 J. AM. JUD. SOC'Y 152, 155 (1947).

77. See generally S.B. CARBON & L.C. BERKSON, JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES 14 (1980) [hereinafter JUDICIAL RETENTION].

78. *Judicial Selection*, *supra* note 39, at 966.

79. *Id.*

in order to secure reelection.⁸⁰ "Judicial retention" would guarantee a sitting judge the right to seek reelection by asking the voters at a general election whether he or she should continue in office.⁸¹ This process would require an incumbent judge wishing to remain in office to submit to an unopposed election, held in the year prior to the year his or her present term is due to expire.⁸²

The unopposed election is in the form of a question: "Shall Judge 'X' be retained in office?"⁸³ Voters would cast approval for the performance of the incumbent with a simple "yes" or "no" vote for retention.⁸⁴ An incumbent judge would be reelected in this non-partisan election upon the approval of a majority of voters.⁸⁵ If a majority of the electorate chooses to retain the incumbent, he or she will remain in office for a new term, after which the incumbent must again submit to an unopposed election.⁸⁶ If a majority of those casting ballots vote against retaining the incumbent in office,

80. A retention election requires an incumbent judge to run unopposed, based on his or her record, in order to remain in office. *Judicial Retention Elections*, *supra* note 14, at 211.

81. In 1934, California became the first state to adopt judicial retention elections, followed by Missouri in 1940. *See id.* at 213. Currently, constitutional or statutory provisions permit twenty states to utilize retention elections for some or all of their judges. *See* ALASKA STAT. §§ 22.05.080(a), 22.05.100, 22.10.150, 22.10.170, 22.15.195 (1976); ARIZ. CONST. art. VI, §§ 37-40; ARIZ. REV. STAT. ANN. § 12-101 (1956); CAL. CONST. art. VI, § 16 (amended 1974); COLO. CONST. art. VI, §§ 7, 10(2), 16, 20(1), 25, 26; COLO. REV. STAT. §§ 13-4-101, 13-4-104, 13-6-205 (1967); FLA. CONST. art. V, §§ 3, 10(a), 11 (1972, amended 1976); FLA. STAT. ANN. § 105.051 (West 1977); 1956 Ga. Laws 3368; IDAHO CODE § 1-2220 (1979); ILL. CONST. art. VI, §§ 8, 10, 12(d); ILL. REV. STAT. ch. 46, §§ 2A-9, 24-11 (1980); IND. CONST. art. VII, §§ 10-12, 18; IOWA CONST. art. V, §§ 15-17; IOWA CODE ANN. §§ 46.12, 46.16, 46.20, 46.21, 46.24, 684.43 (West 1976); KAN. CONST. art. III, §§ 2, 5, 6; KAN. STAT. ANN. §§ 20-2901, 20-2903, 20-2908 (1977); MD. CONST. art. IV, § 5A(c)-(e); MO. CONST. art. V, §§ 19, 25, 27; MONT. CONST. art. VII, § 8; MONT. CODE ANN. § 3-5-201 (1977); NEB. CONST. art. V, § 21; NEB. REV. STAT. §§ 24-820, 24-821 (1974); OKLA. CONST. art. VII, §§ 1, 2, 5; OKLA. STAT. ANN. tit. 51, § 8 (1957), § 10 (West 1978); PA. CONST. art. V, §§ 13, 15 (1968, amended 1978); TENN. CODE ANN. § 16-443 (1976); UTAH CONST. art. VIII, § 3; UTAH CODE ANN. §§ 20-1-7.1, 20-1-7.6, 20-1-7.7 (1977); WYO. CONST. art. V, § 4.

82. Picchi, *supra* note 9, at B5, col. 1.

83. *See Judicial Retention Elections*, *supra* note 14, at 211; *Retention Vote*, *supra* note 43, at 13, col. 2.

84. *See, e.g.*, JUDICIAL RETENTION, *supra* note 77, at 3; AMERICAN JUDICATURE SOCIETY, BULLETIN IV FIRST DRAFT OF AN ACT TO ESTABLISH A MODEL COURT FOR A METROPOLITAN DISTRICT 52-53 (Mar. 1914).

85. *Judicial Retention Elections*, *supra* note 14, at 211.

86. *See JUDICIAL RETENTION*, *supra* note 77, at 3; *Insulate Sitting Judges*, *supra* note 10, at C2, col. 1.

the office will be filled by regular election at the next general election.⁸⁷

In addition, in order to effectuate this process, the legislature would create various screening panels, to be known as Commissions on Judicial Qualifications, to evaluate the qualifications of judges seeking reelection. Incumbent judges would need a Commission recommendation in order to submit their names to the voters in a retention election.⁸⁸ An incumbent seeking reelection through the retention process would first have to obtain a recommendation of "well-qualified" before submitting his or her name to the retention ballot.⁸⁹ This procedure, however, would still allow incumbents who fail to secure such recommendation, or who lose a retention election, to seek reelection the following year through the "traditional" political process.⁹⁰ Failure to secure Commission approval would not result in automatic disqualification from a subsequent term, but only in the inability to be named on a retention ballot. Thus, the voters would still make the final determination of the qualifications of a judicial candidate.⁹¹

Notably, the state Administrative Board of the Courts, including Chief Judge Sol Wachtler, the presiding justices of the four appellate divisions and the chief administrative judge, supports the concept of a retention plan under which sitting judges are screened for competence and then run for uncontested reelection.⁹² In addition, the New York State Bar Association has endorsed measures to eliminate political considerations from the renomination of qualified judges.⁹³

87. Winters, *Improved Methods of Selecting Judges*, in *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 44, 48 (A.B.A. 1971).

88. The Commissions would consider the qualifications of incumbent judges seeking reelection via the retention election—not candidates seeking initial terms. See *Insulate Sitting Judges*, *supra* note 10, at C2, col. 1.

89. PROPOSALS TO IMPROVE JUDICIAL SELECTION AND MERGE THE TRIAL COURT: A REPORT BY THE COUNCIL ON JUDICIAL ADMINISTRATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 3 (1985) [hereinafter *IMPROVE JUDICIAL SELECTION*].

90. See Picchi, *supra* note 9, at B5, col. 1. Judges denied Commission recommendation or who lose a retention election may nevertheless stand for election in the regular general election. See *Judicial-Retention Measure*, *supra* note 19, at 1, col. 3; Ernst, *supra* note 19, at A7, col. 1.

91. See *Insulate Sitting Judges*, *supra* note 10, at C2, col. 1. The retention plan would "retain a voice for voters." *Id.*

92. See *id.*; Weston, *supra* note 48, at 16, col. 3; See *Judicial-Retention Measure*, *supra* note 19, at 1, col. 3; Picchi, *supra* note 9, at B5, col. 1.

93. See Fox, *State Bar Backs Pay Raises, Election Reform for Judges*, N.Y.L.J., Nov. 9, 1983, at 1, col. 3.

Despite the national trend toward retention elections, debate over their utility persists.⁹⁴ One can raise several arguments for and against their implementation.

1. Advantages of a Retention System

A retention scheme would greatly improve New York's present system for judicial reelection.⁹⁵ A retention plan would remove the need for political campaigns by incumbent judges,⁹⁶ by allowing judges to concentrate on their judicial duties without the distraction of campaigning for reelection.⁹⁷ Although the "competition" inherent in election campaigns is an important element of democracy, participation by sitting judges in judicial campaigns impairs judicial efficiency.⁹⁸

Furthermore, by eliminating the expense of a political campaign, a retention scheme would also remove political factors from the process of judicial selection.⁹⁹ Sitting judges would no longer need to solicit party support in order to obtain judicial tenure.¹⁰⁰ Retention elections would eliminate the problem incumbent judges now face when attempting to secure a party nomination.¹⁰¹ In addition, once a judge has secured a position on the bench based on political, organizational or financial assistance of others, a judge will "find it almost impossible to resist completely the importunities of his

94. See JUDICIAL RETENTION, *supra* note 77, at 13.

95. See *infra* notes 96-114 and accompanying text.

96. See *Judicial Retention Elections*, *supra* note 14, at 216.

97. P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 8 (1980) [hereinafter DUBOIS]; see *Judicial Retention Elections*, *supra* note 14, at 216. Inconveniences most frequently named include the "physical effort of campaigning, candidate's time consumed in a political race, campaign expenses, and general indignities of direct exposure to the voting public." DUBOIS, *supra*, at 12.

98. In competitive partisan elections, judges often neglect their professional responsibilities in order to secure time for fund-raising and campaign activity. See JUDICIAL RETENTION, *supra* note 77, at 14. This neglect "produces backlogs and results in inadequate service to consumers of the judicial system." *Id.*

99. See *Sitting Ducks*, *supra* note 5, at 415; see also Stookey & Watson, *Merit Retention Elections: Can the Bar Influence Voters?*, 64 JUDICATURE 235 (1980) [hereinafter Stookey & Watson].

100. See Adamany & Dubois, *Electing State Judges*, WIS. L. REV. 731, 774 (1976) [hereinafter Adamany & Dubois].

101. See *Judicial Retention Elections*, *supra* note 14, at 216. Under the present election system in New York State, incumbent judges must go "hat in hand" to a political leader in order to be renominated. Picchi, *supra* note 9, at B5, col. 1.

creditors for payment through judicial favors."¹⁰² Under a retention scheme, however, judges would no longer feel "obligated" to a specific interest group since judicial selection would be based only upon considerations of professional qualifications and competence, rather than on the degree of a candidate's party affiliation and financial support.¹⁰³

Under a retention plan, the only obligation an incumbent would incur extraneous to his official judicial duties would be the "filing of a statement of his intention to remain in office."¹⁰⁴ This election process would ensure the appearance of judicial independence and prevent incumbent judges from having to run the "political gauntlet" in order to remain on the bench.¹⁰⁵ Freed from reliance on political financial support and favors, the judiciary could perform its function of judicial review without fear of political retribution.¹⁰⁶

Another advantage of retention elections would be their assurance of a "high quality judiciary."¹⁰⁷ Retention elections would compel judges to "run against their record."¹⁰⁸ Requiring an incumbent to seek reelection without competition, based on his or her own record, would encourage judges to perform their judicial tasks in a satisfactory manner, because judges who failed to act competently while in office would likely not be reelected.¹⁰⁹ Qualified judges, however, "who have provided meritorious services" would be retained on the bench.¹¹⁰ Moreover, keeping judges out of the "political thicket" would encourage successful lawyers to sacrifice their legal practices in exchange for the virtual guarantee of long tenure once on the bench.¹¹¹ Currently, qualified candidates for judicial office may be

102. DUBOIS, *supra* note 97, at 21; see L. MAYERS, *THE AMERICAN LEGAL SYSTEM* 386 (1964).

103. See *JUDICIAL RETENTION*, *supra* note 77, at 14. By not having opponents on the ballot, retention elections place a premium on an incumbent's qualifications and temperament rather than on his or her degree of political popularity. *Id.*; see Griffin & Horan, *Merit Retention Elections: What Influences the Voters?*, 63 *JUDICATURE* 78, 79 (1979) [hereinafter Griffin & Horan].

104. *Judicial Selection*, *supra* note 39, at 966.

105. See *IMPROVE JUDICIAL SELECTION*, *supra* note 89, at 3.

106. See DUBOIS, *supra* note 97, at 20-21.

107. See *JUDICIAL RETENTION*, *supra* note 77, at 17; Moran, *Method of Selecting Judges*, 32 *FLA. B.J.* 471, 472 (1958) [hereinafter *Selecting Judges*].

108. Harkness, Jr., *Yes or No on November 2*, 56 *FLA. B.J.* 685 (1982) [hereinafter Harkness].

109. See *Judicial Selection*, *supra* note 39, at 966-67.

110. Harkness, *supra* note 108, at 685.

111. See *JUDICIAL RETENTION*, *supra* note 77, at 17.

discouraged from seeking positions on the bench because they know that periodically they must contend with the vicissitudes of the partisan political process in order to continue in office.¹¹²

Finally, a retention plan is "democratic," because it allows the public to maintain the ultimate political voice. A judge facing retention must still be responsive to the people's will, or else he or she will not be reelected. It affords the electorate the opportunity to evaluate judicial performance and to remove incompetent judges lacking the temperament or abilities required for judicial office.¹¹³ A retention system provides citizens "the strong, dedicated and independent judiciary they need," as judges remaining on the bench "owe their office to the people who voted for retention, not to any political organization or special interest group."¹¹⁴

2. Possible Disadvantages of a Retention Plan

Since this nation's founding, critics have argued over the question of how best to balance judicial independence and public accountability.¹¹⁵ Retention elections represent an attempt to ensure public accountability while guaranteeing judicial independence.¹¹⁶ Nevertheless, critics raise several arguments against adopting retention elections.

(a) Accountability

Critics of the retention plan argue that general elections are not "political maneuvering," but rather the basis of democratic government.¹¹⁷ They contend that a retention proposal establishes a special "class" of political candidates—judicial incumbents—who, unlike other candidates for public office, are insulated from the vagaries of political competition.¹¹⁸ This argument is based on the

112. *Id.* It is "a factor of no small importance when a busy and successful lawyer is asked to give up a flourishing practice and go on the bench." *Id.* at 6; G. WINTERS, *SELECTED READINGS: JUDICIAL SELECTION AND TENURE* 19, 26 (Am. Judicature Soc'y 1973) [hereinafter Winters].

113. Harkness, *supra* note 108, at 685.

114. *Id.* Retention elections promote an independent judiciary, which consequently enhances public confidence in the bench. *See* JUDICIAL RETENTION, *supra* note 77, at 14.

115. *See* JUDICIAL RETENTION, *supra* note 77, at 1.

116. *Id.*

117. Conservative Party Legislative Memorandum (May 7, 1985).

118. *See* *Judicial Retention Elections*, *supra* note 14, at 216; *Selecting Judges*, *supra* note 107, at 474-75; *see also* Jenkins, Jr., *Retention Elections: Who Wins When No One Loses?*, 61 JUDICATURE 79, 80 (1977) [hereinafter Jenkins].

premise that when "the choice is limited to approval or disapproval, there is no meaningful choice given to the voters."¹¹⁹ Partisan contests force judicial incumbents "to publicly account for decisions they have made, policies they have established, and actions they have taken."¹²⁰

While this argument has considerable merit, it fails to recognize that retention elections merely provide incumbent judges a place on the ballot while providing the people with a "veto."¹²¹ It is still the people who retain the important right to evaluate a judge's performance in office.¹²² Thus, the public's opportunity to approve or disapprove an incumbent judge in a retention election is the "ultimate check on judicial accountability."¹²³

Furthermore, such an argument ignores the reality of the present system of reelection in New York State, in which the exigencies of a political campaign are at odds with the ethical demands imposed upon incumbent judges.¹²⁴ A judicial incumbent is unlike other candidates for public office. A judicial incumbent seeking reelection is entirely at the mercy of a political process that may ignore his or her demonstrated capacity to serve.¹²⁵ The present system's requirements, which prevent incumbents from engaging in political activity in order to be elected, are in essence "undemocratic."¹²⁶ It creates an unfair advantage for candidates who are not subject to CJC proscriptions from engaging in political activities.¹²⁷

119. NEW YORK COUNTY LAWYERS' ASS'N, REPORT NO. 113 (July 1985).

120. *Judicial Retention Elections*, *supra* note 14, at 216.

121. *See id.* at 221; *see also* Winters, *supra* note 112, at 25.

122. *See* Griffin & Horan, *Judicial Merit Retention In Wyoming: An Analysis And Some Suggestions For Reform*, 15 LAND & WATER L. REV. 567, 569 (1980) [hereinafter *Judicial Merit Retention*].

123. *Id.*; *see Judicial Retention Elections*, *supra* note 14, at 216. Moreover, a retention election is "a simple and manageable mechanism," because there is no opponent "to cloud the issues" and a simple majority is sufficient to remove an unsatisfactory judge. *Judicial Retention Elections*, *supra* note 14, at 216.

124. *See supra* notes 38-57 and accompanying text.

125. *See Judicial Retention Elections*, *supra* note 14, at 216.

126. *See* Margolick, *Timeless Debate: How to Pick Judges*, N.Y. Times, Sept. 22, 1983, at B6, col. 2. Critics of the present system claim that it is "democratic in name only." *Id.*; *see Soiled Judicial Process*, *supra* note 51, at A32, col. 2.

127. Many judicial candidates are not subject to the proscriptions of the Model Code of Judicial Conduct. *See Sitting Ducks*, *supra* note 5, at 415. Although the Model Code of Judicial Conduct expressly applies to candidates for judicial office, the sanctions suggested by the Commission on Judicial Performance are enforceable only against judges. *See* Thode, *The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793, 802 (1972); *see also* REPORTER'S NOTES, *supra* note 68, at 95-96.

In addition, the framers of the United States Constitution never contemplated the concept of partisan elections.¹²⁸ The direct election of office holders became popular only during the Jacksonian Era.¹²⁹ Moreover, since political leaders have the power initially to choose judicial candidates, and since popular elections are mere ratifications of political party selection,¹³⁰ "[t]he notion of direct popular expression of choice is, in effect, a mirage."¹³¹

Finally, the public is better served by not subjecting incumbent judges to popular elections.¹³² During a campaign, sitting judges must rely on political parties for financial support.¹³³ As a result, judges may feel "obliged to color or change the outcome of certain decisions."¹³⁴ In addition, electoral victory may depend upon a judge's "political popularity" rather than on his or her qualifications and competence.¹³⁵ Retention elections would alleviate these prob-

128. See *Judicial Retention Elections*, *supra* note 14, at 216; Rush, *Merit Retention of Trial Court Judges—A Logical Step*, 52 FLA. B.J. 643 (1978) [hereinafter *Merit Retention*].

129. See *Judicial Retention Elections*, *supra* note 14, at 216; see also ASHMAN & ALFINI, *supra* note 34, at 9.

130. *Id.*; see also *supra* notes 52-55 and accompanying text. The popular election of judges is "illusory," since cross-party endorsements limit voter choice. See *Now's the Time for Cuomo to Push Judge Selection Reform*, N.Y. Post, Sept. 28, 1983, at 36, col. 1 (Editorial). Senator Roy M. Goodman (R-Manhattan) noted that "[p]eople think they elect our judges, but this is a grand illusion. The plain fact is they are merely ratifying the actions of a few political leaders who dominate the process." *Id.* In essence, most New York State court judges are "elected" by political leaders and then presented to the electorate for "rubber-stamp ratification." *Sheltering Judges From Political Winds*, *Newsday*, Nov. 17, 1986, at 60, col. 1 (Editorial) [hereinafter *Political Winds*].

One study compiled by the Fund for Modern Courts, Inc., a court reform group, analyzing New York State Supreme Court elections in 1978, 1979 and 1980, concluded that political party endorsement was the dominant factor in determining the outcome of Supreme Court elections. See *Most Judges Are Chosen by the Pols, Not at the Polls*, *Newsday*, Nov. 24, 1982, at 100, col. 1 (Editorial) [hereinafter *Most Judges*]; see also VOTER PARTICIPATION, *supra* note 52, at 113. The report further revealed that in only three of eleven judicial districts could the races be called truly "competitive with voters exercising an option as to the candidates apart from their party affiliations." *Id.* Moreover, in the three judicial districts in which contests were competitive, running for judicial office was "an expensive undertaking." VOTER PARTICIPATION, *supra* note 52, at 113 (campaign expenditures in supreme court elections ran as high as \$85,000). Other court elections also illustrate the same pattern. See *Most Judges*, *supra*, at 100, col. 1.

131. JUDICIAL RETENTION, *supra* note 77, at 14.

132. See *Judicial Retention Elections*, *supra* note 14, at 216; see also Adamany & Dubois, *supra* note 100, at 774.

133. See *Judicial Retention Elections*, *supra* note 14, at 216.

134. *Id.*

135. *Id.*

lems and better protect the judiciary from partisan politics.¹³⁶

(b) Voter Ignorance

A second objection to retention elections is that they fail to provide adequate information about the fitness of an incumbent judge.¹³⁷ Critics argue that without an opponent, voters would not effectively scrutinize an incumbent's record.¹³⁸ Hence, the public would be unable to make "an informed selection."¹³⁹ In partisan elections, the "election campaign" serves an important function in furnishing information to the voters.¹⁴⁰

Under a retention election plan, however, wide dissemination of information about a judicial incumbent would be unnecessary.¹⁴¹ Once a Judicial Qualifications Commission has recommended a competent person, there should be no need "to widely publicize a commendable record."¹⁴² A Commission evaluation would provide the public with sufficient information about a judge to make a "rational voting choice."¹⁴³ Moreover, in the event a judge's record is egregious enough to require removal, "sufficient adverse publicity will be generated by the bar and public without necessitating an opponent."¹⁴⁴

A further objection to retention elections is that they fail to provide meaningful guidelines to assist the public in voting.¹⁴⁵ Critics argue that the formal absence of competition and partisanship prevents voters from making an "informed decision" about the qualifications of an incumbent judge.¹⁴⁶ In partisan elections, the electorate has the opportunity to rely upon party labels in making its selection.¹⁴⁷

136. *Id.*; see Taft, *The Selection and Tenure of Judges*, 38 A.B.A. REP. 418, 423 (1913).

137. JUDICIAL RETENTION, *supra* note 77, at 15; *Selecting Judges*, *supra* note 107, at 471.

138. JUDICIAL RETENTION, *supra* note 77, at 15.

139. *Id.*; see also *Judicial Merit Retention*, *supra* note 122, at 569.

140. Griffin & Horan, *supra* note 103, at 84.

141. See *Judicial Retention Elections*, *supra* note 14, at 217.

142. *Id.*; see JUDICIAL RETENTION, *supra* note 77, at 15.

143. *Judicial Merit Retention*, *supra* note 122, at 573.

144. JUDICIAL RETENTION, *supra* note 77, at 15.

145. See *id.* at 16.

146. Griffin & Horan, *supra* note 103, at 79. Without traditional party guidelines, voters may be precluded from making informed decisions about sitting judges. See *id.*

147. Adamany & Dubois, *supra* note 100, at 774.

In retention elections, however, voters may be forced to rely upon name recognition or incumbency in placing their votes.¹⁴⁸

The first problem with this argument is that upon closer analysis, one can perceive that partisan elections actually lack "meaningful voting guides."¹⁴⁹ Party labels are not in fact "effective indicators" for determining the qualifications of a judicial incumbent.¹⁵⁰ Moreover, a recommendation by a Judicial Qualifications Commission is a far superior guide to assist voters in selecting a judicial candidate than is party identification.¹⁵¹ Furthermore, the public may make use of evaluations prepared by bar associations in determining the qualifications of incumbent judges.¹⁵² A bar association, with the assistance of the media, can greatly enhance the level of information and "salience" of judicial retention elections.¹⁵³

(c) *Voter Apathy*

Another criticism of retention elections concerns the possibility that the public, by reason of apathy or self-satisfaction, may neglect to vote for a competent incumbent.¹⁵⁴ This situation would permit a very small number of adverse voters to remove him or her from office.¹⁵⁵ To alleviate this problem, incumbent judges should automatically be retained in office unless a specified percentage of the electorate votes for removal.¹⁵⁶ Such a requirement would eliminate the need for affirmative votes for retention, thereby ensuring that a disgruntled minority will not be able to remove a qualified incumbent unless his or her removal is supported by a substantial percentage of the electorate.¹⁵⁷

148. See *id.* at 778; see also JUDICIAL RETENTION, *supra* note 77, at 16.

149. See JUDICIAL RETENTION, *supra* note 77, at 16.

150. *Id.* Party labels are not practical guides for determining an incumbent's aptitude or performance. *Id.*

151. *Id.* As a guide for determining a judicial candidate's qualifications, a Commission evaluation is preferable to the opinion of political leaders who have minimum contact with a judge in his professional capacity. *Id.*

152. *Id.* Bar associations may provide "meaningful assessments" of sitting judges allowing voters to make informed decisions. See Griffin & Horan, *supra* note 103, at 82.

153. See Stookey & Watson, *supra* note 99, at 241.

154. See *Judicial Selection*, *supra* note 39, at 967.

155. *Id.*

156. *Id.* at 969.

157. *Id.*

(d) *Life Tenure*

Another argument against retention elections is that they inevitably result in lengthy tenure.¹⁵⁸ Retention elections “virtually assure a judge life tenure.”¹⁵⁹ Historical examination, however, reveals that retention elections were initially designed to ensure that qualified judges be retained on the bench.¹⁶⁰ It was understood that lengthy tenure, besides insulating judges from inappropriate political influences, would also make judicial removal from office difficult.¹⁶¹ Indeed, lengthy judicial tenure provides several advantages over frequent judicial turnover.

First, lengthy judicial terms increase the “number and quality of judicial applicants.”¹⁶² Successful lawyers will be more easily enticed to leave their legal practice and seek a position on the bench if they know their tenure will be fairly secure.¹⁶³ Second, the competence of a judge increases with experience.¹⁶⁴ Third, lengthy tenure assures “independence of thought and action.”¹⁶⁵ Fourth, even in states that provide for partisan elections, judicial incumbents often serve for life.¹⁶⁶ Finally, recent reports indicate that judicial incum-

158. See Douglass, *Merit Retention—Another Assault on the Elective Process*, 52 FLA. B.J. 645 (1978); Jenkins, *supra* note 118, at 80.

159. *Judicial Retention Elections*, *supra* note 14, at 211. Few judges have ever been defeated in retention elections. See *id.* Historically, the number of incumbent judges defeated in retention elections is insignificant compared with the number of incumbent judges defeated in partisan elections. See *id.* at 221. In 1972, when 308 judges serving in 11 states sought reelection, only four failed to return to office. See *Merit Retention Elections in 1972: A Special Society Report*, 56 JUDICATURE 252 (1973); see also DUBOIS, *supra* note 97, at 18; Griffin & Horan, *supra* note 103, at 79. In 1976, when 353 judges from 13 states sought retention, only three were defeated. See Jenkins, *supra* note 118, at 80; see also DUBOIS, *supra* note 97, at 18; Griffin & Horan, *supra* note 103, at 79. According to a recent study, in the first 45 years since retention elections have been adopted, only 33 judges have not been retained in office. See *Judicial Retention Elections*, *supra* note 14, at 211.

160. See, e.g., *Merit Retention*, *supra* note 128, at 643; see also JUDICIAL RETENTION, *supra* note 77, at 17; Hall, *The Selection and Retirement of Judges*, 10 AM. JUDICATURE SOC'Y BULL. 29-30 (Dec. 1915) [hereinafter Hall].

161. JUDICIAL RETENTION, *supra* note 77, at 6. As James Parker Hall noted in 1915, “when . . . [retention] is the sole issue [on the ballot], it will be extremely difficult to get a popular majority against any fairly successful judge.” *Id.*; Hall, *supra* note 160, at 30.

162. JUDICIAL RETENTION, *supra* note 77, at 17; see *Selecting Judges*, *supra* note 107, at 472.

163. See JUDICIAL RETENTION, *supra* note 77, at 17.

164. *Id.*

165. *Id.*

166. *Id.* In partisan elections, judicial incumbents are rarely challenged. See *id.*; *Merit Retention*, *supra* note 128, at 643.

bents can be denied reelection even under a retention scheme.¹⁶⁷

(e) *Voter Turnout*

Another criticism of retention elections is that they are often plagued by low voter turnout.¹⁶⁸ Critics contend that retention elections fail to stimulate voter interest,¹⁶⁹ while electoral competition and party identification tend to increase voter participation.¹⁷⁰ This objection, however, assumes low voter turnout is an adverse result. In actuality, retention elections were never designed to generate widespread voter participation.¹⁷¹ Through the implementation of Judicial Qualifications Commissions, high voter turnout is unnecessary, because the Commission process ensures that highly qualified persons will be retained on the bench.¹⁷² Widespread voter participation becomes necessary only in select situations, when a sitting judge is involved in "egregiously improper conduct or has physical or mental infirmities."¹⁷³ On such occasions, voters would be inspired to participate in removing an unqualified individual from the bench.

In sum, there are several "misconceptions" about the purposes and effects of retention elections.¹⁷⁴ It is clear, however, that retention elections would provide a proper balance between judicial independence and public accountability.¹⁷⁵

3. *The Establishment of Judicial Qualifications Commissions*

The main problem with retention elections is the threat of an "uninformed" or "uneducated" electorate.¹⁷⁶ Retention elections

167. In 1986, voters ousted several state supreme court justices, including three chief justices. See Paonita, *Voters in 3 States Reject Chief Justices*, Nat'l L.J., Nov. 17, 1986, at 3, col. 1 (Chief Justice Rose E. Bird of California, Chief Justice Frank D. Celebrezze of Ohio, and Chief Justice Rhoda B. Billings of North Carolina).

168. See JUDICIAL RETENTION, *supra* note 77, at 15; see also Adamany & Dubois, *supra* note 100, at 769; Griffin & Horan, *supra* note 103, at 82.

169. See *Judicial Retention Elections*, *supra* note 14, at 233.

170. See J. CORSI, *JUDICIAL POLITICS: AN INTRODUCTION* 112 (1984); DUBOIS, *supra* note 97, at 244.

171. See JUDICIAL RETENTION, *supra* note 77, at 15.

172. *Id.*

173. *Judicial Retention Elections*, *supra* note 14, at 217.

174. *Id.* at 233; see *supra* notes 117-73 and accompanying text.

175. See *Judicial Retention Elections*, *supra* note 14, at 233.

176. See DUBOIS, *supra* note 97, at 18-20. An educated electorate may be the critical factor assuring that the retention scheme neither becomes a " 'flagrant distortion of the Jeffersonian model' nor a (political) 'compromise.' " *Retention Elections: An Alaskan Update*, 67 JUDICATURE 212 (1983) [hereinafter *Alaskan Update*].

can often be devoid of helpful or accurate information about an incumbent.¹⁷⁷ Without competitive elections, the voting public may be uneducated about an incumbent's capabilities¹⁷⁸ and may fail to scrutinize the incumbent's record thoroughly.¹⁷⁹ Thus, a voter may find it difficult to discern an incumbent's qualifications for re-election.¹⁸⁰

To eliminate this shortcoming, Judicial Qualifications Commissions should prepare reports on the fitness of a sitting judge. Prior to the retention election, the Commission should publish a written report evaluating the qualifications of an incumbent, recommending whether or not the judge should remain in office. The Commission would evaluate the qualifications of incumbent judges before they could be reelected, thereby ensuring that only those candidates found "well-qualified" would be eligible for retention.¹⁸¹ Thus, through an effective, "credible"¹⁸² evaluation process the retention system will serve its intended purpose.¹⁸³

The main criticism of establishing Commissions on Judicial Qualifications is that they may limit the people's voice in the judicial system by failing to reflect the will of the people accurately.¹⁸⁴ A judicial nominating Commission, when nominating qualified candidates for the bench, may be subject to "[m]istakes, biases and faulty reasoning."¹⁸⁵ To remove problems of possible bias, Commission

177. See JUDICIAL RETENTION, *supra* note 77, at 15.

178. *Id.*

179. *Id.*

180. See DUBOIS, *supra* note 97, at 19.

181. See *Insulate Sitting Judges*, *supra* note 10, at C2, col. 1. Under the recommended reform, a Judicial Qualifications Commission would place only competent sitting judges on the retention ballot. See *id.*

182. See *Alaskan Update*, *supra* note 176, at 258.

183. Through credible public information obtained by judicial qualifications commissions, a state can overcome the factors that unfairly influence voters in a retention system, including: "incumbency, lack of opposition/issues, restrictions on judicial campaigning, and lack of widely disseminated and credible evaluative information." *Id.*

There is also a strong indication that the public is responsive to judicial recommendations. See *id.* Indeed, analyses of voting patterns in Alaska show "reliance by the electorate on judicial recommendations may be increasing each election year." *Id.* In 1978, in Alaska, 71 percent of all those voting for or against retention reviewed judicial recommendations before voting. See *id.* at 212. In Illinois, "the percentage of favorable votes received by candidates on the retention ballot . . . corresponded quite closely" to bar association evaluations. DeMoss, *The Judicial Retention Campaign: A Significant Success*, 73 ILL. B.J. 258 (1985).

184. See *Judicial Selection*, *supra* note 39, at 968.

185. *Id.*

membership should reflect equal political representation.¹⁸⁶

In addition, the Judicial Qualifications Commissions should include both laypersons and members of the bar.¹⁸⁷ The possibility exists that judges may find it difficult to remain neutral towards lawyers who appear before them who are also on the Commissions. Nevertheless, the Commissions should include lawyers, since "[h]olding judicial office is a technical responsibility requiring legal knowledge."¹⁸⁸ The nominating panels should also include laypersons—who will better "serve the ends of justice,"¹⁸⁹ as lawyers are apt to focus only on the legal skills of the person they nominate, excluding other important factors such as "general education, character, and community standing."¹⁹⁰ Moreover, including laypersons on the nominating Commissions further ensures that the general public will have a "voice" in the selection of judges.¹⁹¹

Finally, to prevent the possibility of politically motivated judicial appointments, a bipartisan state legislative committee should select the lay members of the Commissions, thereby protecting the commissions from political interference.¹⁹² As merit retention intends to deprive the executive branch of the opportunity to make judicial appointments solely on the basis of political motivation, it would be self-defeating to allow the executive direct input into the appointment of the nominating Commissions.¹⁹³

IV. Recommendations

The New York State Legislature should pass a constitutional amendment instituting a judicial retention system that allows in-

186. See ASHMAN & ALFINI, *supra* note 34, at 26-27.

187. See *Judicial Selection*, *supra* note 39, at 968.

188. *Id.*; see Atkins, *Merit Selection of State Judges*, 50 FLA. B.J. 203, 207 (1976) [hereinafter *Merit Selection*]. The commissions should comprise "knowledgeable members of the legal profession." *Judicial Selection*, *supra* note 39, at 968.

189. *Judicial Selection*, *supra* note 39, at 968.

190. *Id.*

191. *Merit Selection*, *supra* note 188, at 207. Inclusion of non-lawyer members to the commissions "assures that public expectations concerning the judiciary are influential and the non-professional attributes of a good judge are recognized." ASHMAN & ALFINI, *supra* note 34, at 25; ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION 40 (1973) (tentative draft).

192. See *Judicial Selection*, *supra* note 39, at 968; see also ASHMAN & ALFINI, *supra* note 34, at 25.

193. See *supra* note 192.

cumbent judges to seek reelection by an endorsement from a nominating screening panel and then by the public in an uncontested retention election. The retention election would be held the year before an incumbent's term expires.¹⁹⁴ The plan, however, would not preclude sitting judges who lose a retention election, or who fail to secure a Commission recommendation, from seeking reelection the following year through the traditional political process.¹⁹⁵

The judicial system must be insulated from "crude forms" of political pressure.¹⁹⁶ A retention plan would greatly improve the present judicial reelection system by putting the emphasis where it belongs—on proven judicial merit, "not party politics and the whims of political bosses."¹⁹⁷ The proposed retention plan would promote judicial independence and enhance public confidence in the integrity of the judicial system, while preventing the removal of competent incumbents solely for political reasons.¹⁹⁸ It would also eliminate the necessity for judges to campaign for reelection or "to compete for political favors in a partisan arena that their judicial office and responsibilities otherwise require them to avoid."¹⁹⁹ In addition, the security of tenure provided by the plan, coupled with the screening of incumbent judges by a Judicial Qualifications Commission, would ensure recruitment of the highest quality legal professionals to the judiciary.²⁰⁰ Furthermore, retention elections would relieve sitting judges of much that is indecorous in our elective system while, at the same time, preserving in the electorate the right to select its own judiciary.²⁰¹

V. Conclusion

The recent politicalization of the judiciary creates an urgent need for a new system of judicial reelection for trial court judges in New

194. See *supra* notes 81-82 and accompanying text.

195. See *supra* notes 90-91 and accompanying text.

196. See *Political Winds*, *supra* note 130, at 60, col. 1. The election process should not be allowed to create pressure on judges to make particular decisions at the risk of losing their seats at the next election. See Phillips, *Retention Elections/Restoring Order in the Court Debate*, 8 L.A. LAW. 7 (June 1985).

197. *Insulate Sitting Judges*, *supra* note 10, at C2, col. 1.

198. See *supra* notes 95-114 and accompanying text.

199. *Insulate Sitting Judges*, *supra* note 10, at C2, col. 1.

200. See *supra* notes 110-12 and accompanying text.

201. Through the vehicle of retention elections, the public can voice its approval or disapproval of an incumbent without any partisan political intervention. See *supra* notes 113-14 and accompanying text.

York State. Currently, qualified judicial incumbents must contend with the vicissitudes of the partisan political process in order to remain in office. Popular election does not, in any meaningful sense, occur in New York. A retention plan would provide a proper balance between judicial independence and public accountability. Recent events in Long Island and in the Bronx further mandate the necessity of implementing a new mechanism of judicial tenure in New York State to ensure that political "machines" do not deny the renomination of qualified judges for political reasons. Judicial retention election is that mechanism.

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