# JUDICIAL RETENTION ELECTIONS FOR STATE APPELLATE JUDGES: THE IMPLICATIONS OF THE BALLOT-ACCESS CASES

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ABSTRACT

*This Article considers methods by which state appellate court judges are selected. It focuses on the evolution of and rationale for the so-called merit-selection system, a hybrid approach that prevails in a substantial number of jurisdictions. Under merit selection, there is an initial gubernatorial appointment based on recommendations from a nominating committee and a retention election, which is limited to a single candidate and a single question: whether the initially appointed appellate judge should be retained so as to serve a new term. The retention election is a form of election that satisfies states' requirements that judges be elected. But the limits on access to the retention-election ballot pose substantial issues under the Supreme Court's ballot-access cases.The Article recognizes that merit selection has been challenged under state and federal constitutional theories but not under the ballot-access cases, which may prove to be the Achilles Heal of the retention-election system. Strict scrutiny applies to the total foreclosure of access to an election ballot, and the strict-scrutiny standard applies to judicial elections. Strict scrutiny requires consideration of alternatives, such as contested elections or judicial appointments. While merit-selection systems have long been challenged yet never toppled, consideration of the ballot-access cases may result in a different outcome, as judicial retention elections serve as a complete bar to the ballot for all candidates other than the candidate who seeks retention for a new term.*



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## I. INTRODUCTION

The method by which state appellate court judges are selected has been a contested issue for a long time. This Article will discuss the various perspectives on the issue—including their respective drawbacks and advantages—and describe the evolution of the so-called "merit-selection" approach, a hybrid process that prevails in a substantial number of states. The Article will conclude that a federal constitutional vulnerability likely serves as an Achilles Heel to the merit-selection system. That system is characterized by (i) initial gubernatorial appointment as constrained by recommendations from a nominating commission, and (ii) a retention election, an election limited to a single candidate and a single question: whether the initially

appointed appellate judge is to be retained.[1]

The vulnerability arises from the nature of the retention election. The strategy of merit selection is to limit the number of the candidates in the retention election, so that the voters' choice is not among candidates, but for a single candidate, to determine whether he or she is to be retained in office for a new term of years. That strategy is a form of limitation on access to the election ballot and is in tension with the line of cases that places constraints on a state's ability to restrict candidate access to the ballot. The retention election that is at the core of merit selection has not previously been analyzed through the prism of the ballot-access cases.[2]

While the method of selecting state appellate judges is not a new issue, it remains a highly controversial one. Litigation challenging the merit-selection system has customarily focused on state constitutional issues—whether a process that includes a retention election qualifies as an "election" under state constitutional provisions that require appellate judges to be elected by the people.[3] After struggling with this issue, courts have uniformly found that retention elections do qualify as elections under such state constitutional provisions.[4]

Dissatisfaction with the merit-selection system has also led to some federal constitutional challenges. The focus of these federal challenges has been on the composition and electoral constituency for the nominating commissions.[5] These challenges have been framed in part by a thoughtful analysis of Professor Nelson Lund, which appeared in 2011.[6] Three circuit courts have reviewed and rejected these challenges, although in one of the cases each of the three judges on the Court of Appeals panel put forth a separate analysis (two concurrences and a dissent).[7] The conclusion here, because the issue has not previously

1. See *infra* notes 62-66.

2. See *infra* notes 16–19 and accompanying text.

3. *E.g.*, Hooker v. Haslam, 437 S.W.3d 409 (Tenn. 2014).

4. *E.g.*, *id.*

5. *E.g.*, Bradley v. Work, 154 F.3d 704 (7th Cir. 1998); Kirk v. Carpeneti, 623 F.3d 889 (9th Cir. 2010); Dool v. Burke, 497 Fed. Appx. 782 (10th Cir. 2012) (*per curiam*), *cert. denied*, 133 S.Ct. 992 (2013); Moncier v. Haslam, 570 Fed. Appx. 553 (6th Cir. 2014).

6. *See generally* Nelson Lund, *May Lawyers Be Given the Power to Elect Those Who Choose Our Judges? "Merit Selection" and Constitutional Law*, 34 HARV. J. L. & PUB. POL'Y 1043 (2011) (discussing federal challenges to merit selection). For a response to Lund, on Lund's own terms, see Cort A. Van Ostran, *Justice Not for Sale: A Constitutional Defense of the Missouri Plan for Judicial Selection*, 44 WASH. U. J. L. & POL'Y 159 (2014).

7. *See Dool*, 497 Fed. Appx. at 784–95 (affirming the constitutionality of Kansas' election process with concurring and dissenting opinions).

been properly framed or characterized, is that the challengers' disaffection rings true from a federal constitutional perspective.

The very design of the merit-selection structure has a federal constitutional Achilles Heel, specifically with the retention election. The challengers' dissatisfaction has a strong constitutional provenance, but the challenges have not been dressed up in quite the right constitutional suit of clothing. The result has been that the constitutional challenges to this point have been deemed wide of the mark. The contention of this Article is that a properly directed and focused federal constitutional challenge through the Court's ballot-access jurisprudence is worthy of serious analysis, should be viewed from the perspective of prospective voters, and must be subjected to heightened ("strict") scrutiny under the Supreme Court's ballot-access jurisprudence.

At this point, please indulge a brief analytical detour, a *Baedeker* to other examples of constitutional challenges that failed when constitutionally mis-attired, but then succeeded when they were dressed in constitutionally appropriate outfits. In *Bendix Autolite Corp. v. Midwesco Enterprises*,[8] Ohio tolled its statute of limitations for any period that a person or a corporation was not "present" in Ohio.[9] In earlier litigation, *G.D. Searle & Co. v. Cohn*,[10] the Supreme Court had upheld, in a challenge under the Equal Protection Clause, differential treatment in terms of statutes of limitations for in-state and out-of-state defendants.[11] The Court in *G.D. Searle* recognized that a state could permissibly make differential adjustments in the statutes of limitation for the greater difficulty in serving nonresident corporations or persons in contrast to in-state defendants.[12] In *Bendix Autolite*, on the other hand, the Court sided with challengers to the tolling of statutes of limitations for nonresident entities.[13] The successful challenge raised claims of discrimination under the Commerce Clause, with the Court acknowledging that "state interests that are legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny."[14] Identifying the appropriate constitutional category and framing the issue in appropriate

8. 486 U.S. 888 (1988).
9. *Id.*
10. 455 U.S. 404 (1982).
11. *Id.*
12. *Id.* at 404–05.
13. *Bendix Autolite*, 486 U.S. at 888–89.
14. *Id.* at 894.

constitutional clothes were essential to understanding the constitutional flaw at issue.[15]

So it is with respect to the merit-selection system of appellate judges. The constitutional vulnerability is the retention election—an "election" under state constitutions that makes the merit-selection system subject to federal constitutional election-law principles.[16] After all, what is the concept underlying the judicial retention election, which is one of the critical pillars of merit selection? The foundation of this electoral system is the fact that states limit access to the general election ballot to a single candidate; therefore, the merit-selection process is—and is designed to be—a mechanism for restricting access to an election ballot to one person, and thereby barring access to the election ballot by any other candidate. The retention-election form effectively and purposefully bars independent candidates from access to the election ballot.[17] The preferred candidate is assured of no electoral competitors. Such total restriction of access by an

15. Similar examples arise in the context of access to judicial proceedings and municipal residency requirements for city workers and workers on city projects. *Compare* Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) (holding that Sixth Amendment, which guarantees the accused a public trial, does not give the public or the press a right of access to certain judicial proceedings), *with* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (deciding that First Amendment requires public to have access to a criminal trial); McCarthy v. Phila. Civ. Serv. Comm'n, 424 U.S. 645 (1976) (rejecting equal protection challenge to municipal residency requirement for municipal workers), *and* White v. Mass. Council of Constr. Emps., Inc., 460 U.S. 204 (1983) (rejecting Commerce Clause challenge to municipal residency requirements for city workers and city contractors on city jobs) *with* United Bldg. & Constr. Trades Council v. City of Camden, 465 U.S. 208 (1988) (subjecting municipal residency requirement for contractors on city construction projects to heightened scrutiny under Privileges and Immunities Clause analysis).

16. In Sailors v. Bd. of Educ. of Kent Cnty., 387 U.S. 105 (1967), the Supreme Court declined to apply election-law principles to an appointed county school board: "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen . . . by some other appointive means rather than by an election." *Id.* at 108. In the absence of an election—and when no election is constitutionally mandated—election-law principles have no application. *Id.* at 111. *Sailors* strongly suggests that there is no federal constitutional requirement that state-court judges must be elected. A system of appointing state judges is not subject to successful challenge under election-law principles. *See* Moncier v. Haslam, 570 Fed. Appx. 553, 559 (6th Cir. 2014) (observing that "there is no federally protected interest in seeking a state-court judgeship that, under state law (as interpreted by the state supreme court), already has been lawfully filled by gubernatorial appointment"). That is, a person seeking a judicial position "has no recognized right under the United States Constitution to run for an office that, under state law, already has been filled" by gubernatorial appointment. *Id.*

17. For a recent case holding unconstitutional a provision "that effectively limits service on state courts to members of the Democratic and Republican parties," and thereby precludes judicial service by independents, see Adams v. Governor of Del., 922 F.3d 166, 169 (3d Cir. 2019). The Supreme Court reversed that decision on grounds that the challenger lacked standing. Carney v. Adams, 141 S. Ct. 493 (2020). The judicial positions involved in that case are unelected positions and, therefore, not subject to the cases relating to elections. Sailors v. Board of Ed. of Kent Cty., 387 U.S. 105, 108 (1967).

independent candidate to an election ballot is what has been called, in another context,[18] a "frontal assault" on a core constitutional interest that the Supreme Court has recognized since the landmark case of *Williams v. Rhodes*.[19]

The Supreme Court in *Williams* recognized federal constitutional limits to government's ability to preference the established parties, Democrats and Republican, in terms of ballot access.[20] Some state interests might well justify some advantaging of the established parties, but a state could not erect barriers to ballot access for new or third parties that effectively precluded third parties from securing access to an electoral ballot.[21] Such preclusion of ballot access denies some voters "not only a choice of leadership but a choice on the issues as well."[22]

The focus in *Williams* was ballot access for third parties, but the Supreme Court quickly recognized that the First Amendment interests of voters extended to independent candidates as well: the state "must … provide feasible means for other political parties and other candidates to appear on the general election ballot."[23] Independent candidates must be assured reasonable access to the general election ballot, and they cannot be forced to form a political party so as to qualify for ballot access.[24]

The critical ballot-access interests at stake, as recognized in *Williams*, are those of voters, who express their political preferences through their votes for candidates for office.[25] Restrictive ballot-access laws "place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs [protected by the First Amendment],[26] and the right of qualified voters, regardless of their political persuasion, to cast their

18. Nat'l Soc'y of Pro. Eng'g v. United States, 435 U.S. 679, 695 (1978) (rejecting a claim that a professional society's anticompetitive rule on contract bidding could be justified because of the "potential threat that competition poses to the public safety and the ethics of the profession" as "nothing less than a frontal assault on the basic policy of the Sherman Act").

19. 393 U.S. 23 (1968).

20. *Id.* at 29.

21. *Id.* at 31.

22. *Id.* at 33.

23. Storer v. Brown, 415 U.S. 724, 728 (1974).

24. *Id.* at 746.

25. *See* Lubin v. Panish, 415 U.S. 709, 716 (1974) ("[V]oters can assert their preferences only through candidates or parties or both."); Anderson v. Celebrezze, 460 U.S. 780, 787 (1983) (agreeing with this proposition from *Lubin*).

26. *See Anderson*, 460 U.S. at 788 n.7 (recognizing fundamental First Amendment rights "implicated by restrictions on the eligibility of voters and candidates" to the election ballot).

votes effectively"—rights that "rank among our most precious freedoms."[27] When a state limits candidates' access to the election ballot, it restricts "the choices available to voters" and thereby "impairs the voters' ability to express their political preferences."[28] Since "[o]verbroad restrictions on ballot access jeopardize … political expression,"[29] they are subject to strict scrutiny, with the state having to show that its ballot-access restrictions are "necessary to serve a compelling interest."[30]

Although this point has not been addressed before in cases involving merit selection, the ballot-access line of cases indicates that the retention elections that form a critical component of merit selection must be subjected to strict scrutiny, justified by the state as "necessary" to serve an interest deemed "compelling." The necessity inquiry addresses the means adopted by a state to achieve a compelling interest. Courts applying strict scrutiny consider alternatives available through which a state can reasonably achieve its objectives. This consideration of alternatives under strict scrutiny affords states little or no deference.[31] It is far from clear that a state can succeed in making the type of showing required under strict scrutiny, unless a state could somehow establish that something about judicial elections is inherently different from other representative elections, such that the Court's traditional ballot-access analytical framework should not apply. Except in narrow circumstances, such as First Amendment claims involving personal campaign finance solicitation,[32] the Supreme Court has declined to carve out exceptions for judicial elections to conventional election-law doctrine under strict scrutiny.[33]

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27. *Williams*, 393 U.S. at 30; *see also Anderson*, 460 U.S. at 786 ("The impact of candidate eligibility requirements on voters implicates basic constitutional rights").

28. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979).

29. *Id.* at 186.

30. *Id.* at 184.

31. Fisher v. Univ. of Tex., 570 U.S. 297, 311 (2013) (explaining that government receives "no deference" under strict scrutiny in means-ends analysis).

32. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 455 (2015) (upholding Florida's law restricting judges from personally soliciting campaign donations).

33. *See* Republican Party of Minnesota v. White, 536 U.S. 765 (2002) (using strict scrutiny to strike down Minnesota's law that prohibited candidates for judicial office from announcing their political views); N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196 (2008) (upholding New York's system of choosing party nominees for the State Supreme Court); s*ee also* Chisom v. Roemer, 501 U.S. 380 (1991) (applying Voting Rights Act, Section 2, to context of judicial elections); Clark v. Roemer, 500 U.S. 646 (1991) (applying Voting Rights Act, Section 5, in context of judicial elections). *But see* Wells v. Edwards, 409 U.S. 1095 (1973) (affirming without opinion district court's refusal to apply conventional one person, one vote rules to judicial election context).

This Article explores ballot-access issues related to merit-selection systems by proceeding in four parts. First, it provides background history on the development of judicial merit-selection systems and the legal challenges these systems have faced. Then, it provides a thorough constitutional analysis of ballot-access challenge issues, concluding that retention elections cannot survive the strict scrutiny analysis to which courts should subject them. After determining that the ballot-access framework is the proper clothing that merit-selection system challenges have been searching for, the Article explores one further matter—raising and rejecting counterarguments derived from a faulty comparison to recall elections, which are distinct from, but have some interesting factual similarities to, judicial selection and judicial retention elections.

## II. BACKGROUND

### *A. Judicial Selection in the Nineteenth Century*

Until the mid-nineteenth century, selection of state judges was typically part of the political appointment process—a hodgepodge of executive appointment and selection by legislatures.[34] In 1832, Mississippi became the first state to elect all its judges.[35] The early state initiatives to elect judges were aimed at divesting control of judges from political officials, limiting judicial authority, and providing political accountability and oversight to the voters.[36]

Part of the rationale for the evolution of the judicial election method of selecting judges was the perceived need for courts to oversee political institutions. Judges appointed by legislatures were deemed too deferential to those legislative institutions that controlled judicial appointments. An elected judiciary was thought to be independent—*i.e.*, independent of appointing legislatures and governors; such courts could exercise stronger judicial review, holding political institutions accountable by elected—and politically accountable—judges.[37] And there is evidence that elected judges embraced this role of overseeing political institutions. In the mid-nineteenth century, courts were aggressive in striking down statutes, leading to a "more widespread

34. Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1074 (2010).

35. *Id.* at 1066.

36. *Id.* at 1072.

37. *Id.* at 1089.

practice and acceptance of judicial review."[38]

This was envisioned as a political role of courts, in aggressively overseeing the conduct of the political branches. The early rationale for judicial elections was a belief that judicial review would serve as an effective majoritarian check on the political branches, with judicial elections providing legitimacy and political accountability for that expanded and enhanced judicial role.[39] Judges would protect the people from their government, and elections provided a political and legitimating check on the judges.[40]

Over time, as courts developed counter-majoritarian and anti-populist theories and doctrines, the wisdom of the expanded political role for courts was called into question. Courts were seen as opposing democratizing initiatives; their political role became fodder for critics who took issue with courts' intrusion into the territory of the other political branches. The policy push back took the form of expanding judicial deference and, in turn, reducing the political dimensions of the judicial role, as well as opposition to judicial elections, especially for appellate courts.[41] The practical problem was the widespread presence in state constitutions of provisions assuring that state judges would be elected by the people.[42] The so-called merit-selection process was developed in response to the desire for less politicization of courts and, legally, as a work-around for the state constitutional requirements that judges must be elected by the people.[43]

### *B. History of the Merit-Selection Process*

Missouri was the first state to adopt a merit-selection process for judges.[44] Against a backdrop of Progressive Era reforms, Missouri voters approved a merit-selection plan in 1940.[45] The plan was designed

38. *Id.* at 1115.

39. *Id.* at 1128 (describing correspondence at the time that indicated a belief that "appointed judges were cowed by the democratic legitimacy of legislators, but elections gave judges more courage to assert their power on behalf of 'the people.'").

40. *Id.*

41. *Id.* at 1142–45.

42. *See id.* at 1097 ("By 1860, out of thirty-one states in the Union, eighteen states elected all of their judges, and five more elected some of their judges.").

43. *See* F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 451–52 (2004) (describing the impetus for merit-selection systems as "limit[ing] political influences on state judges").

44. Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 723 (2009).

45. *Id.*

to reduce the partisanship and corruption that had become rampant in the selection of judges.[46] Many states followed in Missouri's footsteps, adopting the merit-selection process, which came to be known as the Missouri Plan.[47]

Before settling on a merit-selection process, Missouri experimented with both gubernatorial judicial appointments and contested judicial elections. The original Missouri constitution allowed the governor to appoint judges for life, mirroring the federal system.[48] In 1850, Missouri amended its constitution to require contested judicial elections.[49] That decision was intended to make judges directly accountable to the voters and to reduce the influence of the governor and the legislature over judges.[50]

Contested judicial elections in Missouri quickly became highly partisan and were largely controlled by powerful party bosses.[51] In the early 1900s, the Democratic political machine had almost complete control of electoral politics in Missouri.[52] This led to many elected officials, including judges, being selected by a small number of party bosses sitting in proverbial smoke-filled rooms.[53] As a result, judges were indebted to the Democratic political machine, and faced political retribution if they did not rule as the party bosses wished them to.[54] Missouri voters rejected the partisanship of contested judicial elections in 1940,[55] when the merit-selection process was incorporated into the state's constitution.[56]

Responding to corruption arising out of gubernatorial judicial appointments, other states adopted merit-selection systems based on the Missouri Plan. Kansas adopted the Missouri Plan in 1956 after a scandal involving the state's governor.[57] After losing in the Republican primary, the governor resigned his office.[58] The chief justice of the state

46. *Id.*
47. See text accompanying notes 57-61, *infra*..
48. Stith & Root, *supra* note 44, at 720.
49. *Id.* at 721.
50. *Id.*
51. *See* Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or A Survivor in A Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 318 (1997).
52. *Id.*
53. Stith & Root, *supra* note 44, at 721–22.
54. *Id.*
55. Daugherty, *supra* note 51, at 318.
56. *Id.*
57. Lund, *supra* note 6, at 1067.
58. *Id.*

supreme court, a friend of the governor's, resigned at the same time.[59] The state's lieutenant governor then became the state's interim governor and appointed the former governor to fill the newly created vacancy on the state's supreme court.[60] This political horse trading demonstrated that partisanship and corruption were not limited to contested judicial elections, and gave momentum to the trend of states adopting merit-selection systems in an attempt to insulate the judicial selection process from political pressures. As of 2020, thirty-five states and the District of Columbia used some form or component of a merit-selection system.[61]

The Missouri Plan employs a three-step process for selecting judges, which includes elements derived from the traditional systems of gubernatorial judicial appointments and judicial elections.[62] First, a judicial commission solicits and evaluates applications for judicial vacancies.[63] The commission nominates three individuals it believes are qualified to fill the vacancy and sends them to the governor for consideration.[64] Second, the governor selects one of the three nominees and appoints that person to the bench.[65] Third, the citizens of the state vote in retention elections to determine whether the judge can remain on the bench for a new term.[66] In Missouri, judges are subject to retention elections after a probationary period of one to two years.[67] If the judges are retained after this period, they serve a full term, after which they are again subject to a retention election for another new term.[68]

Membership on judicial commissions is typically dominated by lawyers. Missouri's Appellate Judicial Commission has seven members, four of whom are lawyers, and three of whom are not.[69] The lawyers include a judge from the Missouri Supreme Court and lawyers from the eastern, southern, and western districts of Missouri who are elected by

59. *Id.*
60. *Id.*
61. *See Methods of Judicial Selection*, NATIONAL CENTER FOR STATE COURTS (last visited July 22, 2020), http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (providing state-by-state analysis of judicial selection).
62. Stith & Root, *supra* note 44, at 725–26.
63. MO. CONST. art. V, § 25(a).
64. *Id.*
65. *Id.*
66. MO. CONST. art. V, § 25(c)(1).
67. *Id.*
68. *Id.*
69. Mo. Sup. Ct. R. 10.02.

their peers.[70] The governor appoints one non-lawyer from each of these districts.[71] The other members serve staggered six-year terms.[72]

Other states have adopted modified versions of the Missouri Plan. Prior to the passage of Amendment 2 in 2014,[73] Tennessee used a merit-selection system known as the Tennessee Plan.[74] Tennessee's constitution contained a requirement that judges be elected by the voters.[75] The state fulfilled this requirement by making judges subject to uncontested retention elections.[76] Tennessee statutorily created a Judicial Nominating Commission, which was responsible for submitting three candidates to the governor when a judicial vacancy occurred.[77] The governor then appointed one of these three nominees to fill the vacancy.[78] At the end of a judge's term, the Judicial Performance Evaluation Committee evaluated the judge.[79] If the committee recommended that the judge be retained, the judge was placed on the ballot for an uncontested retention election.[80] If the committee recommended that the judge be replaced, a contested election was held.[81] Therefore, even though Tennessee's constitution required judicial elections, the Tennessee Plan was often functionally equivalent to the Missouri Plan.

Tennessee amended its constitution in 2014 through Amendment 2 so that the governor is responsible for appointing appellate judges who are confirmed by the state legislature.[82] Under Amendment 2, Tennessee continues to use uncontested retention elections.[83]

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70. *Id.*
71. *Id.*
72. Mo. Sup Ct. R. 10.03.
73. Tennessee's voters ratified Amendment 2 in 2014, granting the governor the power to appoint state appellate and Supreme Court judges, the legislature the power to confirm them, and the voters the power to retain or not retain them in an election. The election takes place at the completion of a term, which is eight years. *See* TENN. CONST. art. VI, § 3. The ratification process used for all state constitutional amendments was challenged in response to a separate, controversial amendment on the ballot that same year. However, the Sixth Circuit affirmed Tennessee's amendment process in George v. Hargett, 879 F.3d 711, 730 (6th Cir. 2017), *cert. denied*, 129 S.Ct. 239 (2018).
74. Hooker v. Haslam, 437 S.W.3d 409, 421–22 (Tenn. 2014).
75. *Id.*
76. *Id.*
77. *Id.* at 416
78. *Id.*
79. *Id.* at 421–22.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*

Tennessee's constitution now mandates that the state's appellate judges, who have been appointed by the governor and confirmed by the legislature, be placed on the ballot for retention elections at the end of their terms, seeking a new term in office.[84]

### *C. Previous Challenges to Judicial Retention Elections*

Uncontested judicial retention elections have been challenged on both state and federal constitutional grounds. State constitutional challenges have focused on whether judicial retention elections satisfy constitutional requirements that appellate judges be elected by the people. Federal constitutional challenges have focused on the composition and electoral constituency of judicial commissions. None of these challenges have succeeded in demonstrating that uncontested judicial retention elections are unconstitutional.

In 2014, a five-member Special Supreme Court in Tennessee held that the Tennessee Plan, which required appellate judges to appear on the ballot in uncontested judicial elections, did not violate the state's constitution.[85] The court rejected a claim that Tennessee's constitution required contested judicial elections.[86] At the time, the Tennessee Constitution stated that "Judges of the Supreme Court shall be elected by the qualified voters of the State," and that "[t]he Judges of the Circuit and Chancery Courts, and of other inferior Courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned."[87] The challenger argued that uncontested retention elections violated the state's constitution "because the phrase 'shall be elected by the qualified voters' in the Tennessee Constitution require[d] that the voters be given a choice of two or more candidates in a contested popular election."[88]

The court held that the phrase "elected by the qualified voters" included retention elections, as well as contested elections.[89] The Court reasoned that "the Tennessee Plan's retention election ballot fully meets the definition of 'elect' because it is a process of choosing someone for public office by voting."[90] While retention elections feature only one candidate, the ballot still gives voters a choice between

84. *Id.*
85. *Id.* at 429.
86. *Id.* at 422.
87. *Id.* at 421.
88. *Id.* at 422.
89. *Id.* at 429.
90. *Id.* at 428.

two alternatives, because they can choose whether the judge is retained or replaced.[91] Therefore, Tennessee's merit-selection system was upheld as constitutional under state law—a form of election as required under the Tennessee Constitution.[92]

Several federal challenges have also been brought against state laws establishing uncontested judicial retention elections. These challenges have focused primarily on the racial effect of a Missouri Plan style of judicial selection system under the Voting Rights Act; and whether the makeup of state judicial committees violated the Voting Rights Act or infringed on the Equal Protection rights of the voters participating in the retention elections.

In 1998, in *Bradley v. Work*,[93] the Seventh Circuit upheld Indiana's merit-selection process, which was closely modeled after the Missouri Plan.[94] The challenge under the Voting Rights Act addressed "the system of appointment plus retention elections"[95] and included a challenge to the racially disproportionate effects that arose from the composition of the judicial nominating committee.[96] The court held that a judicial-retention election was subject to the Voting Rights Act, even in the context of a Missouri-Plan-style system in which judges are initially appointed and "even though judges do not 'represent' anyone in the same way a legislator does."[97] That is, the Voting Rights Act applies to the "retention phase"[98] of the "system of appointment plus retention elections."[99] While it may appear "a bit unseemly to think of the question of judicial retention as fundamentally the same as a bond issue or a proposal to amend the state's constitution," these "questions have the critical characteristic in common: it is the voters directly who make the choice, through the casting of their ballots."[100] Accordingly, the Voting Rights Act applied to judicial retention elections that followed initial gubernatorial appointment—even if the Act would not apply to the initial appointment process itself because it is not, by itself,

91. *Id.*
92. *Id.* at 429.
93. 154 F.3d 704 (7th Cir. 1998).
94. *Id.* at 710–11.
95. *Id.* at 706.
96. *Id.*
97. *Id.* at 709. The Seventh Circuit relied heavily on Chisom v. Roemer, 501 U.S. 380 (1991). *See* discussion *infra* Section III.C.
98. *Bradley*, 154 F.3d at 706.
99. *Id.* at 709.
100. *Id.* at 710.

an election.[101]

In 2010, the Ninth Circuit held that the Board of Governors of the Alaska Bar Association appointing three members to the state's Judicial Council did not constitute an Equal Protection violation.[102] Historically, the makeup of the Judicial Council was modeled after the Missouri Plan.[103] The Council includes three non-attorneys appointed by the governor and confirmed by the legislature, three attorneys, and the chief justice of the Alaska Supreme Court.[104] The state's constitution mandates that the three attorneys "shall be appointed for six-year terms by the governing body of the organized state bar."[105]

The plaintiffs argued that "all participants in the judicial selection process must be either popularly elected or appointed by a popularly elected official."[106] Therefore, the plaintiffs asked the court to enjoin the operation of Alaska's merit-selection process because three members of the Judicial Council were selected by the Board of Governors of the Alaska Bar Association.[107] The Board of Governors was elected by the membership of the Alaska Bar, not by the public at large.[108] The plaintiffs claimed that the Equal Protection Clause of the Fourteenth Amendment limits the appointment power to elected officials.[109]

The Ninth Circuit rejected the plaintiffs' Equal Protection claim.[110] The court noted that the Supreme Court had previously allowed a political party to appoint someone to fill an interim vacancy in the Puerto Rico Legislature.[111] The Supreme Court rejected the argument that the appointment violated the Equal Protection Clause because the political party was not made up of popularly elected officials.[112]

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101. *Id.* at 709 ("[A] state could avoid the Voting Rights Act altogether by using a system of appointed judges."). On the merits, the Seventh Circuit held that there was not enough evidence to find that the merit-selection system violated the Voting Rights Act. *Id.* at 710–11. The court also held that the voters had not preserved their independent 14th and 15th Amendment arguments on appeal but, in dicta, expressed skepticism that intentional race discrimination could be established. *Id.* at 711.

102. Kirk v. Carpeneti, 623 F.3d 889, 896 (9th Cir. 2010).

103. *Id.* at 892.

104. *Id.* at 892–93.

105. *Id.* at 893.

106. *Id.* at 896.

107. *Id.* at 895.

108. *Id.* at 896 (citing Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969)).

109. *Id.* at 898–99.

110. *Id.* at 899–900.

111. *Id.*

112. *Id.*

Therefore, the Ninth Circuit held that the Supreme Court had already rejected the plaintiff's argument that the appointment power can only be vested in elected officials.[113]

Furthermore, the Ninth Circuit noted that even if the appointment power was limited to elected officials, that principle was not violated in *Kirk*.[114] The court reasoned that the Judicial Council only had the power to nominate candidates, not to make final judicial appointments.[115] Under the Missouri Plan, the power to appoint judges is still vested in the popularly elected governor.[116]

The Tennessee Plan was also challenged in federal court in 2014.[117] Herbert Moncier, who wished to fill a vacancy on the Tennessee Court of Criminal Appeals, argued that the state of Tennessee violated his First and Fourteenth Amendment rights to ballot access and political association.[118] The Sixth Circuit upheld the dismissal of Moncier's suit due to lack of standing.[119] The court explained that "[r]ather than asserting a 'particularized stake in the litigation,' Moncier's complaint contained mostly general allegations that the manner in which Tennessee selects and retains its appellate court judges violates his rights *and the rights of all Tennessee voters* under the First and Fourteenth Amendments."[120] The court also noted that there was no federally protected interest in seeking a state-court judgeship that had already been lawfully filled by the governor.[121]

The Sixth Circuit was not required to rule on Moncier's substantive claims because Moncier did not have standing to challenge Tennessee's merit-selection system.[122] If brought by a plaintiff with standing, however, the ballot-access argument may prove to be the strongest challenge to uncontested judicial retention elections. The Article now turns to that issue.

## III. DOCTRINAL FRAMEWORK FOR BALLOT-ACCESS CHALLENGES

For over fifty years, the Supreme Court has recognized that access

113. *Id.*
114. *Id.* at 900.
115. *Id.*
116. *Id.*
117. Moncier v. Haslam, 570 Fed. Appx. 553, 554 (6th Cir. 2014).
118. *Id.* at 555.
119. *Id.* at 557.
120. *Id.*
121. *Id.* at 559.
122. *Id.* at 560.

to the election ballot affects fundamental "overlapping" interests (i) "of individuals to associate for the advancement of political beliefs" and (ii) "of qualified voters … to cast their votes effectively."[123] Restrictions on ballot access that impose "severe burdens" on these interests are subject to strict scrutiny, necessitating a showing that they are "narrowly tailored and advance a compelling state interest."[124]

Ballot-access restrictions affect not only the interests of potential candidates but also have an impact on the interests of voters—limiting their range of choice among candidates.[125] And the "impact of candidate eligibility requirements on voters implicates basic constitutional rights" of political association and voting rights.[126] Ballot-access restrictions also cannot be used to achieve impermissible substantive objectives, such as imposing term limits.[127] But states may make use of ballot-access restrictions that "protect the integrity and reliability of the electoral process itself."[128]

This Part addresses the history and legal framework of constitutional challenges to ballot-access restrictions. Ultimately, courts will apply strict scrutiny and likely invalidate laws that unnecessarily burden core associational rights of both candidates and voters. This strict scrutiny standard has also been applied to First Amendment cases in the context of judicial elections.

### *A. Ballot-Access Restrictions: A Look at the Cases*

When addressing ballot-access issues, courts have recognized competing values, working to balance the voting rights of citizens and the policy goal of preserving the two-party system. The Supreme Court addressed this conflict in 1968 in *Williams v. Rhodes*, striking down an Ohio law that made it virtually impossible for third-party presidential candidates to appear on the ballot.[129] The Ohio law required new political parties "to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding

123. Williams v. Rhodes, 393 U.S. 23, 30 (1968).

124. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997); *see Williams*, 393 U.S. at 31 (applying strict scrutiny).

125. Anderson v. Celebrezze, 460 U.S. 780, 786 (1983). *Cf.* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 828–38 (1995) (recognizing significance of limiting ballot access as a vehicle for imposing unconstitutional term limits); Cook v. Gralike, 531 U.S. 510 (2001) (recognizing the same).

126. *Anderson*, 460 U.S. at 786.

127. *Term Limits*, 514 U.S. at 828–38.

128. *Anderson*, 460 U.S. at 788 n.9.

129. Williams v. Rhodes, 393 U.S. 23, 34 (1968).

gubernatorial election."[130] This represented a significantly higher burden than that placed on the Democratic and Republican parties, which were "allowed to retain their positions on the ballot simply by obtaining 10% of the votes in the last gubernatorial election and need not obtain any signature petitions."[131]

The Court reviewed the Ohio law under a strict scrutiny standard because it "place[d] burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[132] The Court explained that the right to associate and form a political party meant "little if that party could be kept off the election ballot and denied an equal opportunity to win votes."[133] Additionally, the right to vote is significantly limited if citizens only have the option to choose between two parties, despite other parties wishing to appear on the ballot.[134]

The Court noted the constitutional importance of both of these rights. The right to political association is protected from federal encroachment by the First Amendment and protected from state encroachment by the Fourteenth Amendment.[135] The Court also emphasized the importance of the right to vote, stating that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[136]

The law could not survive strict scrutiny analysis because Ohio "failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate."[137] Ohio argued that it had several compelling interests that supported the law. First, the state argued that preserving the two-party system, which led to political stability and compromise, represented a compelling interest.[138] The Court rejected that argument, noting that the Ohio law did not merely favor the two-party system, but gave two specific parties, Democrats

130. *Id.* at 24–25.
131. *Id.* at 25–26.
132. *Id.* at 30.
133. *Id.* at 31.
134. *Id.*
135. *Id.* at 30–31.
136. *Id.* at 31.
137. *Id.*
138. *Id.* at 31–32.

and Republicans, a complete monopoly on access to the ballot.[139] The Court did not view preserving this monopoly as a compelling interest, noting that competition in ideas is essential to the electoral process and is furthered by allowing new political parties access to the ballot.[140] Second, Ohio claimed it had an interest in ensuring that election winners were the choice of a majority of voters, not merely a plurality.[141] Though the Court conceded this concern was a legitimate state interest, it held that "this interest cannot justify the very severe restrictions on voting and associational rights which Ohio has imposed."[142]

The Court similarly rejected Ohio's other claimed interests, such as decreasing voter confusion and ensuring an effective party structure.[143] Thus, once a ballot-access law impinges on core associational rights, the interest claimed by the state must surpass generalized concerns such as preserving party systems and structure or reducing voter confusion.

In 1974, the Supreme Court applied a similar analysis to ballot-access restrictions placed on independent candidates.[144] In *Storer v. Brown*, the Court held that *Williams* stood for "the proposition that the requirements for an independent's attaining a place on the general election ballot can be unconstitutionally severe."[145] The California law being challenged in *Storer* required independent candidates "to file a petition signed by voters not less in number than 5% of the total votes cast in California at the last general election."[146] The Court noted that this percentage did not appear to be excessive based on its past rulings.[147] California law, however, did not allow voters who participated in a party primary to sign an independent candidate's petition, which could make it significantly more difficult for an independent candidate to obtain the necessary number of signatures.[148] Therefore, the Supreme Court remanded the case to the district court "to assess realistically whether the law imposes excessively burdensome requirements upon independent candidates."[149]

The Court also rejected the state's argument that the signature

139. *Id.* at 32.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 31–32.
144. Storer v. Brown, 415 U.S. 724, 738 (1974).
145. *Id.*
146. *Id.*
147. *Id.* (citing Jenness v. Fortson, 403 U.S. 431, 442 (1971)).
148. *Id.* at 739.
149. *Id.* at 738.

requirement did not matter because California had an established system to allow new political parties to qualify for the ballot.[150] The Court explained that "the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other."[151] Therefore, the Court held that independent candidates could not be forced to join a political party in order to gain access to the ballot.[152] Mirroring the language of *Williams*, the Court stated "we perceive no sufficient state interest in conditioning ballot position for an independent candidate on his forming a new political party as long as the State is free to assure itself that the candidate is a serious contender, truly independent, and with a satisfactory level of community support."[153]

In subsequent rulings, the Supreme Court clarified the scope of its holding in *Williams*. The Supreme Court examined numerous restrictions on ballot access to determine which restrictions permissibly furthered the policy goal of political stability and which restrictions placed overly harsh burdens on the rights to vote and to associate.

In 1971, the Court upheld a law requiring that third-party candidates file nominating petitions signed by five percent of eligible voters.[154] Additionally, in 1992, the Court upheld a prohibition on write-in voting.[155] However, in 1979 the Court struck down a law requiring independent candidates and new political parties to obtain more than 25,000 signatures to appear on the ballot in Chicago.[156] The Court also struck down a law that created an early filing deadline for independent candidates who wished to appear on the general election ballot.[157]

This series of cases demonstrates that while the Supreme Court is willing to allow reasonable restrictions on access to the ballot that advance other critical interests, it will not uphold laws that unduly restrict or have the functional effect of completely barring third-party and independent candidates from access to the ballot. Yet, that is the very type of restriction that is part of the architecture—structural and

150. *Id.* at 745–46.
151. *Id.* at 745.
152. *Id.* at 746.
153. *Id.*
154. Jenness v. Fortson, 403 U.S. 431, 442 (1971).
155. Burdick v. Takushi, 504 U.S. 428, 441–42 (1992).
156. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 187 (1979). The unjustified burden resulted from the linkage of the numerosity requirement and the simultaneous geographical distribution requirement. See *id.* at 186. For a more detailed explanation, see text accompanying notes 242-45, *infra*.
157. Anderson v. Celebrezze, 460 U.S. 780, 806 (1983).

from a policy perspective—of judicial-retention elections.

*B. First Amendment Challenges to Judicial Elections*

The Court has applied strict scrutiny in First Amendment challenges to judicial elections as well. In *Republican Party of Minnesota v. White*,[158] the Court held that Minnesota's "announce clause," which barred a judicial candidate from "announc[ing] his or her views on disputed legal or political issues,"[159] violated the plaintiff's First Amendment rights.[160] The Court applied strict scrutiny to this restriction because it burdened a core First Amendment freedom—"speech about the qualifications of candidates for public office."[161] The Court held that the announce clause failed both prongs of strict scrutiny.[162] The purported interest of impartiality—defined as a "lack of preconception in favor of or against a particular *legal* view"—was not compelling because it was impossible, even undesirable, to find a judge who met the respondent's definition of impartiality.[163] Even if that interest—alternatively defined as "the lack of bias for or against either *party* to the proceeding"[164]—were compelling, the announce clause was not narrowly tailored to it; in fact, the Court ruled that "the clause was barely tailored to serve that interest *at all*" because it only barred speech against issues and not against particular parties.[165]

The Court has also applied strict scrutiny to a judicial election restriction in a case where it identified sufficiently compelling interests to uphold the law. In *Williams-Yulee v. Florida Bar*,[166] the Court applied strict scrutiny to a Florida judicial conduct rule that prohibited judges from personally soliciting campaign funds because "speech about public issues and qualifications of candidates for elected office commands the highest level of First Amendment protection."[167] Nevertheless, the Court found this to be the "rare case" in which a state showed its speech restriction was narrowly tailored to serve a

158. 536 U.S. 765 (2002).
159. *Id.* at 768.
160. *Id.* at 788.
161. *Id.* at 774.
162. *See id.* at 776–78 (analyzing the policy under both the narrow tailoring and compelling government interest prongs of the strict scrutiny test and concluding that the State did not meet its burden).
163. *Id.* at 777.
164. *Id.* at 775.
165. *Id.* at 776.
166. 575 U.S. 433 (2015).
167. *Id.* at 443.

compelling state interest.[168]

The Court found compelling Florida's twin interests of protecting the judiciary's integrity and maintaining the public's confidence in an impartial judiciary.[169] The Court found that restricting personal solicitation of campaign funds was narrowly tailored to those compelling interests because it restricted "a narrow slice of speech" and left judicial candidates free to discuss any issue other than personally asking for campaign donations.[170] While "[s]tates may regulate judicial elections differently than they regulate political elections because the role of judges differs from the role of politicians,"[171] they may only do so if the different treatment satisfies both prongs of strict scrutiny when fundamental interests are at stake.[172]

In a third First Amendment challenge to a judicial selection process, the Court did not apply strict scrutiny but did apply conventional analysis in the judicial election process. In *New York State Board of Elections v. Lopez-Torres*,[173] a challenge to the state's method for selecting nominees for supreme court justice via a party convention, plaintiff contended that the process violated his First Amendment rights as a challenger to the candidates selected by party leadership.[174] The Court did not apply strict scrutiny because the primary First Amendment right cited by the respondent—the right for a political party to structure its internal processes and choose its own candidates—was a right of the party itself, not the respondent.[175] Importantly, the Court applied conventional doctrine, applicable generally to election nominations, without even suggesting that a different approach was called for because a judicial election was at issue.[176]

168. *Id.* at 444 (citing Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion)).

169. *See id.* at 448.

170. *Id.* at 452.

171. *Id.* at 446.

172. *Id.* at 444. The canon at issue in *Williams-Yulee* only applied to trial judges, who are selected through a contested election. Thus, the restrictive canon did not apply to the retention elections that were used in Florida for appellate judges. It is questionable whether the rationale for constraining the First Amendment interests in the context of contested elections, as applied in *Williams-Yulee*, would necessarily translate to the merit-selection context, where appellate judges are voted on in retention elections without competition.

173. 552 U.S. 196 (2008).

174. *Id.* at 201–02.

175. *See id*. at 203.

176. *See id.* at 205 (reviewing past Court treatment of election nomination procedures without differentiating for judicial elections).

### *C. Conventional Analysis Applies to Judicial Elections*

The above cases demonstrate that judicial elections do not receive a different constitutional analysis than traditional (representative) elections. Some have asserted that the nature of the offices should lead to differential treatment of these types of elections.[177] However, despite these differences, courts continue to scrutinize judicial elections under the traditional constitutional doctrines—*i.e.*, strict scrutiny—that govern in election cases.

This is not to gainsay that there are inherent differences between judges and other officials, and that those differences can shape the application of traditional doctrines in the judicial election context. For example, in *Williams-Yulee*, the Court, while applying strict scrutiny, noted that "[s]tates may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians."[178] However, these differences have only been highlighted and analyzed in circumstances substantially distinct from uncontested merit-selection processes. Additionally, doctrinally, those differences must be analyzed under strict scrutiny—as necessary to promote a compelling interest—with the burden of justification on the state.

In *Williams-Yulee*, the challenged Florida restrictions on personal candidate fundraising applied to contested elections for trial judges, not uncontested retention elections for appellate judges.[179] Florida's decision to distinguish the need for restrictions on personal solicitations by judges in the context of contested and uncontested elections provides a good illustration of narrow tailoring when First Amendment interests are at stake. The dangers to judicial integrity and perceived impartiality were deemed by Florida (and found to be by the Court) substantial when contested judicial elections are involved, but those interests were not similarly at stake in the context of uncontested appellate court retention elections.

The policy adopted by Florida and the judicial response in

177. For example, an amicus brief supporting Minnesota's announce clause in *White* argued that "the judiciary is different from the other two branches of government and thus needs special rules to preserve the independence of the institution." *See* Brief of Ad Hoc Committee of Former Justices and Friends Dedicated to an Independent Judiciary as Amicus Curiae in Support of Respondents at 9, Republican Party of Minnesota v. White, 536 U.S. 765 (2002) (No. 01-521).

178. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 446 (2015) (citing Republican Party of Minnesota v. White, 536 U.S. 765, 783 (2002)).

179. *See id.* at 439–40 (explaining the Florida Code of Judicial Conduct).

*Williams-Yulee* reflected the application of the strict scrutiny tailoring approach—limit restrictions on fundamental voting interests only as necessary to promote compelling interests, but do not unnecessarily abrogate those compelling interests in voting by doing away with the contested elections themselves. Such elections affirm fundamental voting interests, and they are an integral part of assuring the legitimacy of the merit-selection system, particularly in states that require that judges be elected.[180] If contested judicial elections in some contexts or in some ways pose dangers, then government must regulate against those dangers in a targeted manner so as to safeguard the integrity of the judicial process, but must not unnecessarily restrict the elections themselves, which empower voters and promote fundamental democratic interests.[181]

In both the statutory and constitutional contexts, the Court has rejected arguments that judicial elections warrant different analytical frameworks from other elections. In sum, the Court has held that state judicial election systems are subject to the same federal statutory and Constitutional analyses and requirements as are other, representative elections.

The federal statutory context is reflected in *Chisom v. Roemer*,[182] where the Court held that state judicial elections are subject to the Voting Rights Act of 1965 (VRA).[183] At issue in *Chisom* was whether § 2 of the VRA applied to judicial elections, including its test for determining whether a voting procedure resulted in abridging one's right to vote "on account of race or color."[184] Section 2(b) provides a "totality of circumstances"[185] test that assesses whether minority voters have less opportunity to "elect *representatives* of their choice."[186] The Court ruled that the term "representatives" included "winners of representative, popular elections," a definition broad enough to include judges.[187]

Justice Stevens' opinion specified that neither the Constitution nor

180. See Hooker v. Haslam, 437 S.W.3d 409, 426 (Tenn. 2013) (holding that Tennessee fulfills the state constitutional obligation to elect its judges by making appellate judges subject to uncontested retention elections).

181. *Cf.* James v. Valtierra, 402 U.S. 137, 141 (1971) (reasoning that voting through provisions such as referendums empowers people and "demonstrate[s] devotion to democracy").

182. 501 U.S. 380 (1991).

183. *Id.* at 404.

184. *Id.* at 390–91 (quoting 79 Stat. 437).

185. *Id.* at 394.

186. *Id.*at 388 (quoting 96 Stat. 134) (emphasis added).

187. *Id.* at 399.

federal statutory law requires state judges to be elected; however, once a state "has chosen a different course" and opted for a form of popular election, the state's judicial elections become subject to the VRA's requirements.[188] In other words, state judicial elections are not different than other "representative" elections for purposes of federal statutory law under the VRA.

The same reasoning applies to federal constitutional challenges to judicial retention elections, as evidenced by the Court's opinion in *White*. Justice Scalia, writing for the majority, acknowledged that Minnesota had the right to eliminate popular elections altogether; however, he emphasized that "the greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance."[189] Once a state "chooses to tap the energy and the legitimatizing power of the democratic process, it must accord the participants in that process . . . [their] First Amendment rights[]."[190] Therefore, a state that chooses to elect its judicial officials via a retention election must satisfy the federal constitutional doctrinal requirements specified by the Court's ballot-access cases.

Justice O'Connor, who is no fan of judicial elections, concurred in *White*.[191] While she wrote "separately to express [her] concerns about judicial elections generally," she agreed that the regulation scheme involved in Minnesota's selection of judges was subject to the same federal constitutional standards as other, representative elections.[192] When uncontested judicial retention elections are evaluated under the First and Fourteenth Amendments, it becomes clear that retention elections raise similar ballot-access issues to those addressed in *Williams* and *Storer*. Since fundamental constitutional interests are compromised, strict scrutiny applies. Retention elections infringe *personal* rights to vote and to associate. Under the cases, a court should apply strict scrutiny as the Court did in *Williams* and *Storer*, and, in the

188. *Id.* at 400.

189. Republican Party of Minnesota v. White, 536 U.S. 765, 788 (2002) (citing Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

190. *Id.* (citing Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

191. In her concurrence in *White*, Justice O'Connor criticized judicial elections, suggesting it is impossible for judges to ignore popular opinion when deciding cases in election systems—likening it to "ignoring a crocodile in your bathtub"—and arguing that turning judges into elected politicians erodes respect for the judiciary. *See id.* at 789 (O'Connor, J., concurring) (citing Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994)).

192. *Id.* at 788.

context of judicial elections, in *White* and *Williams-Yulee*.

Merit-selection systems bar access to the ballot completely. Only one candidate, the incumbent judge, is permitted to have his or her name on the ballot in a judicial retention election, which takes place at the end of the incumbent judge's term, and which determines who is elected to serve a new term. All other potential candidates for judge, either independents or members of another party, are prohibited from having their names placed on the ballot. This monopoly to ballot access places a significant burden on the rights of citizens to vote and to associate. The rights to associate and join a political party mean little in the context of judicial elections if a citizen does not have the option to vote for a candidate of his or her choice or chosen party. Under the ballot-access cases, the right to vote is significantly limited if voters only have the option to make a decision about one candidate.

## IV. RETENTION ELECTIONS UNDER STRICT SCRUTINY ANALYSIS

As shown above, merit-selection systems present serious ballot-access concerns that call for application of strict scrutiny, in line with ballot-access cases generally. This Part will argue that strict scrutiny analysis reveals the constitutional Achilles Heel of the merit-selection system.

In order for judicial retention elections to survive strict scrutiny, states must demonstrate that the laws are narrowly tailored to meet a compelling state interest.[193] In the ballot-access cases, the Court has recognized state interests in political stability and political compromise, but has rejected giving a monopoly to the two major parties as a compelling state interest.[194] The Court has similarly rejected justifications for eliminating ballot access in elections such as the following: ensuring that election winners are the choice of a majority of voters; decreasing voter confusion in a cluttered ballot; and ensuring an effective party structure.[195] These state interests are, if anything, weaker in the context of judicial elections than in traditional representative elections.

At the same time, there are state interests peculiar to judicial elections that would qualify as compelling. For example, the Supreme Court has held that protecting the integrity of the judiciary and

193. *See, e.g.*, *id.* at 774.
194. Williams v. Rhodes, 393 U.S. 23, 32 (1968).
195. *Id.* at 32–33.

maintaining the public's confidence in an impartial judiciary are compelling interests.[196] As a general matter, insulating judges from certain aspects of the political process may be a reasonable, tailored means of protecting judicial integrity; but it will be difficult for states to demonstrate under strict scrutiny that laws establishing uncontested judicial retention elections are narrowly tailored.

Laws are only narrowly tailored under strict scrutiny if they provide the least restrictive means to achieve the compelling state interest in question.[197] To survive strict scrutiny analysis, states must shoulder the burden to prove that neither competitive judicial elections nor gubernatorial judicial appointments can succeed in assuring the compelling interests that the court has recognized in the context of judicial selection—protecting the judiciary's integrity and maintaining the public's confidence in an impartial judiciary.

### *A. Compelling Interests and Narrow Tailoring: Judicial Integrity and Impartiality*

Under strict scrutiny, the system of uncontested retention elections that characterizes merit selection must be shown to serve a compelling state interest in a narrowly tailored manner. In the context of judicial elections, the Supreme Court has only identified two interests it has deemed compelling: promoting public confidence in judicial integrity, from *Williams-Yulee*; and maintaining judicial impartiality, from *White*. Courts define these particular interests narrowly, with careful precision. Arguments designed to address generalized fears of public distrust or judicial partiality will likely not suffice.[198] And, under strict scrutiny, the presumption of validity that normally attaches to state legislation is reversed; the burden of justification rests with the state.

Merit selection—and the nominating commissions and uncontested retention elections that characterize merit-selection systems—are designed to insulate judges from what are perceived as the damaging

196. Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444–45 (2015).

197. *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 816 (2000) ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."); *Williams*, 393 U.S. at 31 (applying "compelling state interest" standard in ballot-access context); Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (applying compelling interest standard in voter qualification context).

198. *See White*, 536 U.S. at 774–80 (proposing and analyzing various potential meanings of judicial impartiality and concluding that the Minnesota regulation could not be upheld using that state interest).

effects of the political process. Such claims are hotly contested; but, in any event, those claims must be tested under strict scrutiny—which focuses on the fit between merit selection as a system of selecting judges and those claims. Under strict scrutiny, courts look into and weigh the nature and degree of harm to the constitutional values promoted by the ballot-access cases, and examine the availability of alternatives such as appointment or elections with less-constrained access to the ballot. Interests in support of merit selection must be carefully and narrowly defined, as was done in *White* regarding the concept of judicial impartiality, without reliance on general, abstract concerns. Narrow tailoring analysis includes consideration of alternative approaches that are less destructive to the constitutional interests recognized in the ballot-access cases. Appointment and other forms of election must be considered as alternatives.

1. Public Confidence in Judicial Integrity and Narrow Tailoring

Judges must be independent enough to strike down statutes that violate state or federal constitutions, even if those statutes are popular with voters.[199] This requires judicial integrity, which must be clear to the public. As Chief Justice Roberts noted in *Williams-Yulee*, "[u]nlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse; ... neither force nor will but merely judgment.' The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions."[200] Thus, even the "public perception of judicial integrity is 'a state interest of the highest order.'"[201]

Merit selection, proponents contend, maintains public confidence in judicial integrity by promoting judicial independence balanced with some backstop of weak, truncated democratic accountability. Democratic accountability, via elections, is a critical feature of merit selection. Under its design, the Missouri Plan utilizes a nonpartisan nominating commission to select a slate of qualified candidates for review by the appointing official.[202] This feature of merit-selection

199. *See* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (C. Rossiter ed. 1961) ("[I]t is not to be inferred . . . that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions.").

200. *Williams-Yulee*, 575 U.S. at 445–46 (citing THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (C. Rossiter ed. 1961) (internal citations omitted)).

201. *Id.* at 446 (citing Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009)).

202. *See* Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their*

systems promotes independence by eliminating concerns that judges will in some way provide a benefit for a coalition of interests that elevated them to power.[203] To maintain public faith in the system, some mechanism for democratic accountability must exist—the retention election.

To illustrate this concern, Professor Jeffrey Jackson highlights the potential concern of a judge that "has a long history of ruling in favor of one particular party, or in favor of criminal defendants in all situations regardless of the facts of the case."[204] If no manner of political accountability existed, allowing for the removal of the judge in an election, the public might lose faith in judicial integrity. Therefore, uncontested retention elections maintain enough democratic accountability to maintain the perceived legitimacy of the system. Thus, proponents of the Missouri Plan claim the system maintains public confidence in the judiciary by protecting judges from the damaging effects of contested political elections and protecting the public from extreme and unrestrained judges.

Even if it were constitutionally permissible to take the politics out of elections by restricting ballot access and thereby impairing the constitutional values and interests that have been recognized and vindicated in the ballot-access cases, there is reason to believe merit selection does not eliminate the role of politics in judicial selection. Under strict scrutiny, the burden is on the state to show that the merit-selection system does in fact and in a narrowly tailored manner further a compelling interest of protecting public confidence in the judiciary.

In evaluating the claim that the Missouri Plan eliminates the role of politics in selecting judges, Professor Brian Fitzpatrick of Vanderbilt Law School argues that merit-selection systems merely change the political venue of these decisions.[205] Professor Fitzpatrick is "skeptical that merit selection *removes* politics from judicial selection," arguing that the process "may simply *move* politics" away from democratic processes and into the nominating commissions.[206] In his view, "relative to other methods of selection in use today—elections and appointments by elected officials—[the nominating commissions and

*Application to a Commission-Based System*, 34 FORDHAM URB. L.J. 125, 133 (2007) (describing the Missouri Plan's design).

203. *Id.*

204. *Id.*

205. *See* Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 676 (2009).

206. *Id.*

uncontested retention elections] transfer power over judicial selection from the electorate to the bar."[207] Though merit selection may partially insulate judges from the political process, it does not eliminate the effect of politics emanating from the nominating commission. Professor Fitzpatrick notes that "[t]o believe that politics is deemphasized in merit systems, one would have to believe that the commissions who nominate candidates would exhibit greater indifference to" politics than the public.[208] Therefore, even though the Missouri Plan might alter some of the deleterious effects of democratic politics, merit-selection systems might only insulate judges from the democratic process, not from politics generally. And the burden of persuasion in this debate under strict scrutiny is on states that adopt merit selection and restrict access to the retention election ballot.

Judicial integrity "does not easily reduce to precise definition, nor does it lend itself to proof by documentary record," so states that adopt merit-selection systems must provide courts with a specific articulation and evidence of how the nominating commissions and uncontested retention elections support this interest.[209] The ballot-access limitations of the merit-selection system impinge on core associational and voting interests. Once a restriction infringes these interests, arguments that the restriction addresses generalized concerns are insufficient to sustain them. For example, in *Williams v. Rhodes*,[210] general concerns about political stability and promoting compromise through a two-party system were insufficient to sustain the ballot access restrictions at issue.[211] Similarly, in *Illinois State Board of Elections v. Socialist Workers Party*,[212] the state interest of "avoiding overloaded ballots" could not sustain ballot restrictions.[213] Thus, states that seek to defend a merit-selection system will likely have to make specific, evidence-based, nuanced arguments that the system protects public confidence in the judiciary in particular, unique ways. This burden will likely prove very difficult for states that seek to defend merit-selection systems.

207. *Id*. at 679.
208. *Id.* at 686.
209. Williams-Yulee v. Fla. Bar, 575 U.S. 433, 447 (2015).
210. 393 U.S. 23 (1968).
211. *See id.* at 31–32.
212. 440 U.S. 173 (1979).
213. *See id.* at 186 (questioning why this state interest required more restrictive measures for Chicago than the rest of the state).

2. Impartiality and Narrow Tailoring

Another potential compelling interest purportedly advanced by merit-selection systems could be judicial impartiality. As a threshold matter, a claim of "impartiality" as a basis for restricting access to the ballot—as a means of promoting a compelling interest in judicial integrity—would need to specify the meaning of the surprisingly broad term. In *White*, the Court provided a thorough discussion of the possible meanings of the term "impartiality" in the judicial context.[214] It provided three possible definitions, stating that "impartiality" could be (i) the lack of bias for or against the *parties* in the litigation, (ii) the lack of bias for or against particular *legal views*, or (iii) a general quality of "openmindedness."[215] The Court rejected the second definition out of hand as a compelling interest because a judge without any particular legal views is "evidence of lack of qualification, not a lack of bias."[216]

While the court did not explicitly deem the other definitions as compelling interests because the restriction failed the means-end relationship prong of the strict scrutiny analysis, discussions of each definition are enlightening. The first definition of impartiality—lack of bias against particular parties—appears in line with the traditional definition of the term, particularly in the due process context.[217] But as Justice O'Connor noted in her *White* concurrence, "the very practice of electing judges undermines this interest."[218] Bias is an inherent part of any election process. As Justice O'Connor observed, the state chose to "elect its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias . . . ."[219] By limiting democratic involvement with judicial selection, merit selection seeks to reduce the bias from contested elections and, it is claimed, protects public confidence in judicial integrity by promoting the

214. *See* Republican Party of Minnesota v. White, 536 U.S. 765, 775–80 (2002).

215. *Id.*

216. *Id.* at 778 (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972)).

217. *See id.* at 776 (collecting cases illustrating this definition of impartiality in the due process context).

218. *Id.* at 788 ("But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case."). *See also* Chisom v. Roemer, 501 U.S. 380, 400–01 (1991) ("The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.").

219. *White*, 536 U.S. at 792.

perception of impartiality. This claim of impartiality must be tested under strict scrutiny—*i.e.*, it must not only be demonstrated to be present as a compelling interest, but also it must be narrowly tailored to achieve the demonstrated compelling interest.

Further, impartiality could be understood as "openmindedness," or a willingness to "consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case."[220] While the Court did not explicitly endorse this interest as compelling, merit selection proponents could argue that it is compelling, and that nominating commissions can properly consider such traits of potential judges.

### *B. Narrow Tailoring: Alternatives to Judicial Retention Elections*

There are two common alternatives to judicial retention elections that would not raise the same ballot-access issues as retention elections. The first alternative is contested judicial elections featuring multiple candidates. Election systems could include the introduction of professional review entities that inform voters of judicial temperament and similar qualifications, yet do not curtail ballot access as judicial-retention elections do. The second alternative is a system of gubernatorial appointments and legislative confirmation, analogous to the system for selecting federal judges. Proponents of merit-selection systems would contend that these alternatives cannot succeed in achieving the compelling state interests of protecting public confidence in judicial integrity or protecting judicial impartiality, and thus merit-selection systems must be deemed narrowly tailored. But it would seem that existing alternatives suffice as acceptable means of protecting state interests, causing retention elections to fail under strict scrutiny. Indeed, judicial elections originated, in part, to divest control of judges from political officials and to provide political accountability and oversight to voters, respecting political interests of voters.[221]

#### 1. Competitive Judicial Elections

One of the biggest potential objections to judicial elections is that judicial candidates will be forced to solicit donations from special interest groups and then feel beholden to those special interest groups if they win. One empirical study confirmed "a significant relationship

220. *Id.* at 778.
221. *See supra* Part II.A.

between business group contributions to state supreme court justices and the voting of those justices in cases involving business matters."[222] The data demonstrate that "the empirical relationship between business contributions and justices' voting for business interests exists only in partisan and nonpartisan systems."[223] The study found "no statistically significant relationship between money and voting in retention election systems."[224]

Another potential objection to judicial elections is that judges will not treat criminal defendants fairly because they are concerned about the political consequences of appearing weak on crime. Business groups, which have no special connection to criminal law, often run advertisements criticizing the criminal records of judges they do not support.[225] This strategy appears to have affected judges' sentencing practices. Empirical studies have demonstrated that "judges facing imminent elections are less likely to overturn criminal convictions."[226] Similar to data about campaign contributions, "this tendency was highest in partisan elections and not as significant in retention elections."[227]

From these data it can be concluded that campaign contributions and negative advertising have a greater effect on judges who are forced to run in contested elections than judges who are only subject to retention elections. Therefore, it can be argued that contested elections are not an alternative that can succeed in achieving the compelling state interest of promoting public confidence in judicial integrity or assuring judicial impartiality.

The result in *Williams-Yulee* demonstrates how a properly regulated election process can result in a narrowly tailored solution in this context. In *Williams-Yulee*, the Court upheld the state bar canon

222. Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, AMERICAN CONSTITUTION SOCIETY (June, 2013), https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/JusticeAtRisk_Nov2013.pdf.

223. *Id.*

224. *Id.*

225. Billy Corriher, *Merit Selection and Retention Elections Keep Judges Out of Politics*, CENTER FOR AMERICAN PROGRESS ACTION FUND (Nov. 1, 2012), http://cdn.americanprogress.org/wp-content/uploads/2012/11/JudicialElectionsPart3-C4-2.pdf. Examples of this strategy include a pro-tort reform group in Washington running an advertisement criticizing a judge for letting a convicted murderer go free and a coal company in West Virginia criticizing a judge for giving probation to a child abuser.

226. *Id.*

227. *Id.*

prohibiting judicial candidates from personally soliciting campaign donations in contested elections.[228] In its determination, the Court found that holding the election, but limiting the personal solicitation of funds, represented a narrowly tailored solution that furthered the compelling state interest of protecting public confidence in judicial integrity.[229] Thus, *Williams-Yulee* is a proof-of-concept for the notion that states can adjust the regulation of contested elections to survive strict scrutiny, as the state found the proper balance there.

In addition, as a safeguard for judicial integrity and independence (and the appearance thereof), there are due process limits to political excesses. For example, in *Caperton v. A.T. Massey Coal Co.*,[230] the Supreme Court established constitutional constraints on the ability of litigants to influence judges through large campaign contributions.[231] *Caperton* establishes a constitutional limitation that constrains political excesses, short of abandoning traditional elections or election principles such as ballot-access protections.

Further, this broad attack on judicial elections generally calls into question a system that many states historically have chosen as a means for selecting their judges and ignores the role that politics still plays in retention elections. Twenty-two states use some sort of traditional, contested judicial election—partisan or non-partisan—to select the judges on their high courts.[232]

Most states began to shift to an election system in the nineteenth century in order to "increase courts' independence and their power to check the [state] legislature," in addition to adding a more democratic check on the judiciary.[233] Given their popularity and their important role in establishing political oversight and accountability of the judiciary, a court should find that a properly regulated election system that comports with ballot-access rules can adequately insulate judges from the improper aspects of the political process. Indeed, advocates for judicial elections argue that merit selections do not eliminate political influences, but merely replace them "with a *somewhat subterranean process of bar and bench politics*, in which there is little

228. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 455 (2015).
229. *Id.*
230. 556 U.S. 868 (2009).
231. *Id.* at 889.
232. *See Judicial Selection: Significant Figures*, BRENNAN CENTER FOR JUSTICE (last updated October 4, 2021), https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures.
233. Shugerman, *supra* note 34, at 1098.

popular control."[234] These concerns echo the suspicions of Professor Fitzpatrick, who believes the politics of judicial selection via the Missouri Plan merely change the political venue from the public to the bar associations.[235] The anecdotal cynic asks the political or bar leader: Who is going to be merit selected this year? These subtler political activities—the proverbial smoke-filled parlor room discussions—were the impetus for many states to shift to judicial elections in the first place. And, of course, the analysis under strict scrutiny places the burden of justification for the retention-election system on the state, since it impinges on fundamental interests of voters as recognized for over fifty years in the ballot-access cases.

2. Judicial Appointments

Another alternative to merit-selection systems as a means to protect public confidence in judicial integrity and to ensure judicial impartiality is the appointment system similar to that used to select federal judges. The federal system does not require popular judicial elections or any form of oversight by the political branches once a judge is confirmed by the Senate. Just as nominating commissions can be seen as reducing the role of politics in choosing judges, appointments could be viewed similarly; the decision rests with one appointing official, advised as that official deems appropriate. Thus, the federal model of an appointment system represents an alternative to merit selection. It is a traditional and longstanding means of insulating sitting judges from politics and protecting judicial integrity and impartiality. And, by eliminating elections, a non-elective system of appointments does not come within the ballot-access cases, which only apply to elections, not appointments.[236]

In addition, Supreme Court precedent has demonstrated that ballot-access regulations that limit ballot access—without eliminating it—can survive strict scrutiny, and thus represent a less restrictive means to achieve the appropriate compelling state interests. For example, in *Storer v. Brown*,[237] the Court upheld a ballot-access restriction that barred independent candidates from the general election ballot if they had either: (1) voted in the immediately

234. Michael DeBow, et al., THE CASE FOR PARTISAN JUDICIAL ELECTIONS, 33 U. TOL. L. REV. 393 (2002).

235. *See* Fitzpatrick, *supra* note 205, at 676.

236. *See supra* note 16 and accompanying text.

237. 415 U.S. 724 (1974).

preceding primary; or (2) had been a registered member of a party at any time within a year of the preceding primary.[238] The Court identified the compelling state interest as eliminating "unrestrained factionalism" and promoting political stability.[239] For the Court, those ballot-access restrictions represented a permissible means of achieving this vital state interest.[240]

On the other hand, laws that effectively bar ballot access to candidates have never been upheld under strict scrutiny.[241] In *Illinois Board of Elections v. Socialist Workers Party*,[242] a political party challenged a state law regarding petition signature requirements for independent candidates and new political parties.[243] For statewide races, these candidates and parties had to get 25,000 signatures, but local races only required a number equal to 5% of the municipality's voter total in the previous election for the position.[244] Given the size of Chicago and its number of voters, this system led to the anomalous result of local candidates requiring more than the 25,000 signatures needed by statewide candidates.[245] Because this "historical accident" served as a complete bar on ballot access, the law could not survive strict scrutiny.

The same result occurred in *Williams v. Rhodes*, where the state "made it virtually impossible for a new political party . . . to be placed on a state ballot."[246] The Court has made it clear that total bars on ballot access will not be accepted, but certain limitations in pursuit of compelling state interests will. Under this view, some type of ballot-access limitations or preferences for judges seeking a new term through retention could represent a less restrictive means of protecting judicial integrity and impartiality than the total bar created by judicial retention elections.

In sum, competitive judicial elections, including some limited, targeted ballot-access restrictions or preferences if desired—but short of the total exclusion of ballot access under merit selection—and

238. *Id.* at 726.
239. *Id.* at 736.
240. *Id.*
241. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 31–32 (1968) (failing under strict scrutiny because the state failed to identify a compelling interest to sustain the functional bar on ballot access to third-party candidates).
242. 440 U.S. 173 (1979).
243. *Id.* at 178.
244. *See id.* at 176.
245. *See id.* at 177.
246. *Williams*, 393 U.S. at 24.

appointments can provide sufficient means to address the relevant state interests. States would be allowed to generate sufficient regulations to protect compelling state interests, but would not be allowed to embrace the total ballot-access exclusion of merit selection. States can find the right balance in these solutions between running effective, competitive elections, as twenty-two states do, and still maintain public confidence in judicial integrity and impartiality. Once these alternatives are identified, are available, and sufficiently protective of the compelling interests at stake, these options represent sufficient alternatives under the narrow-tailoring prong of strict scrutiny. Accordingly, arguments that judicial-retention elections under existing merit-selection systems are necessary to promote a compelling interest should have a hard time satisfying strict scrutiny.

## V. DO RETENTION ELECTIONS FIT WITHIN THE RECALL ELECTION PARADIGM?

The next question is whether succor for judicial retention elections under merit selection can arise from an analogy to recall elections, which provide an opportunity for voters to remove a sitting officeholder from office before his or her term has expired. Some recall election procedures constrain candidate ballot access; so, one could see an argument being advanced that retention elections should be characterized as a species of recall and should be acceptable on that basis.

While not all merit-selection systems fit a single mode, and not all state constitutional provisions are uniform, the analogy of retention elections to recall elections will not likely save merit-selection retention elections.

The closest call is a claim that a judicial selection system is appointive in character, with the retention elections part of and a check on an appointive process. Systems of appointment are not governed by the election cases. But even in those circumstances, a retention election built into the judicial selection process—and serving a political legitimation function—should be properly characterized as a selection via an election, not a recall. The strongest case for application of traditional strict scrutiny is the situation in which a retention election fulfills a state's constitutional obligation to fill judicial positions by election, not appointment.[247]

247. In Tennessee, for example, before its Constitution was amended to allow expressly for

Overall, given the important differences between merit-selection retention elections and recall processes, analogies to recall elections likely fail to save merit selection from invalidation under strict scrutiny as required by the ballot-access cases.

*A. Recall Elections: In General*

Nineteen states allow for recall elections, in which voters can vote to replace state officials before the expiration of the officeholder's term.[248] The procedure for holding a recall election is governed by the state's constitution or the statute authorizing the recall election.[249] In six states, the election for a replacement is held at the same time as the recall election. This is known as simultaneous recall.[250] In the other thirteen states, the recall ballot only asks whether the official should be replaced.[251] If the official is recalled, a replacement will be appointed by the governor or a special election will be held at a later date.[252]

Most of the highly publicized recall elections have taken place in states that employ the simultaneous model. In 2003, the Democratic Governor of California, Gray Davis, was recalled and replaced by Republican movie star Arnold Schwarzenegger.[253] The first question on the California recall ballot asked only whether Davis should be recalled.[254] The second question asked voters to select a replacement

a hybrid appointment and retention election process, the state Constitution mandated that judges be elected. The retention election was deemed to be an election that fulfilled the constitutional duty to elect judges. Hooker v. Haslam, 437 S.W.3d 409 (Tenn. 2014). Where the retention election fulfills a state constitutional obligation to elect judges, then the ballot-access cases would seem to apply, and the recall election paradigm would not seem to fit.

248. *Recall of State Officials*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sep. 15, 2021), http://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx.

249. *Id.*

250. *Id.* Simultaneous recall elections can take two forms. In Colorado and California, voters are sent a ballot with two questions. *Id.* The first question asks whether the state official should be recalled. *Id.* The second question asks voters to pick a replacement candidate for the office. *Id.* The official being recalled cannot be listed as a candidate on the second question. *Id.* If a majority of voters vote to recall the official, the second ballot question is used to select the official's replacement. *Id.* If a majority of voters vote against the recall, the second question is moot, and the official remains in office. *Id.* In the other four states that require simultaneous recall elections, the certification of a recall petition essentially triggers a special election. *Id.* The recall ballot in these states will only consist of a list of candidates running for the office. *Id.* The official who is being recalled may appear on the ballot along with the other candidates. *Id.* Wisconsin and Arizona automatically place the officials on the ballot, unless they resign their office. *Id.*

251. *Id.*

252. *Id.*

253. *Davis Concedes, Schwarzenegger wins*, CNN (October 8, 2003, 4:20 AM), http://www.cnn.com/2003/ALLPOLITICS/10/07/recall.main/.

254. *Id.*

for the Governor.[255] 135 candidates appeared on the ballot to replace Davis.[256] This included the Democratic Party's preferred replacement for Davis, Lieutenant Governor Cruz Bustamante.[257] California voters voted yes on the first question, removing Davis from office, and simultaneously, in response to the second question, chose Schwarzenegger as Davis's replacement.[258]

In 2012, Wisconsin Governor Scott Walker survived a recall attempt over his decision to cut collective bargaining rights for public employee unions.[259] The Wisconsin recall ballot contained only one question, asking voters to pick their preferred candidate for governor.[260] Walker was automatically placed on the ballot as the incumbent state official being recalled.[261] Milwaukee Mayor Tom Barrett won a Democratic primary to appear on the ballot as the Democratic nominee challenging Walker.[262] Therefore, while the election was triggered by a recall petition, it functioned as a traditional, contested special election, observing traditional ballot-access rules.[263]

In 2013, two Democratic state legislators in Colorado were recalled for their support of gun control legislation.[264] Similar to California, Colorado uses a two question ballot for its simultaneous recall election; however, that recall election functioned differently from the California gubernatorial recall.[265] The first question on the ballot asked whether the legislators should be recalled, and the second question asked voters to select a replacement.[266] Democrats did not nominate or place

255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* In 2021, California had a recall election regarding Governor Gavin Newsom. At the threshold, that process led to a vote not to recall Gov. Newsom, so the second stage was not reached. For a report on the unsuccessful recall election, see Kathleen Ronayne and Michael R. Blood, *California Gov. Gavin Newsom beats back GOP-led recall,* AP (Sept. 15, 2021), https://apnews.com/article/california-recall-results-gavin-newsom-a590782877be099d44f1766b2d138394.
259. *Walker Survives Wisconsin Recall Vote*, NEW YORK TIMES (June 5, 2012), http://www.nytimes.com/2012/06/06/us/politics/walker-survives-wisconsin-recall-effort.html?pagewanted=all&_r=0.
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. Jack Healy, *Colorado Lawmakers Ousted in Recall Vote Over Gun Law*, NEW YORK TIMES (Sept. 11, 2013), http://www.nytimes.com/2013/09/11/us/colorado-lawmaker-concedes-defeat-in-recall-over-gun-law.html?pagewanted=all&_r=0.
265. *Colorado Election Results*, SECRETARY OF STATE SCOTT GESSLER (Sept. 26, 2013), http://results.enr.clarityelections.com/CO/47986/118604/en/summary.html.
266. *Id.*

candidates on the ballot for the second question, ensuring victory for the Republican nominees if the Democratic legislators were recalled.[267] Therefore, while the election formally employed a two question ballot, it functioned as a special election between the Democratic incumbents and the Republican challengers.[268]

Legal challenges have not been successful in stopping recall elections of state officials. Numerous state and federal lawsuits were brought in attempts to enjoin the 2003 California recall election, none of which were successful.[269] While none of the challenges prevented the recall election from occurring, a federal district court in *Partnoy v. Shelley*[270] did hold that California could not require citizens to vote on the recall question in order to have their vote in the succession election counted.[271] The court explained that the California law would "effectively bar Plaintiffs from having their otherwise valid vote for a gubernatorial successor counted, or compel them to vote on a separate issue upon which they do not wish to vote."[272] Therefore, the Court held that the California law placed "a severe restriction on [the Plaintiffs'] Constitutional right to vote."[273] The *Partnoy* case demonstrates that the rules surrounding recall elections can invoke election-law principles and doctrines and can place constitutionally impermissible burdens on the rights to vote and to associate.

So, the natural question is whether the paradigm of recall elections, where (in many states) only one candidate might be on the ballot, insulates judicial retention elections from the constitutional requirements of the ballot-access cases. Elections, including retention elections, that select officials for office likely come within the scope of the ballot-access cases. Recall elections that undo the outcome of an election and force an incumbent from office during his or her term of office would seem to call for a different analysis.

### *B. Should Judicial Retention Elections Be Characterized as Recall Elections?*

Some states are required by their state constitutions to select judges

267. *Id.*
268. *Id.*
269. Kenneth P. Miller, *The Davis Recall and the Courts*, AMERICAN POLITICS RESEARCH (Mar. 2005), https://journals.sagepub.com/doi/pdf/10.1177/1532673X04272729.
270. 277 F.Supp.2d 1064 (S.D.Cal. 2003).
271. *Id.* at 1075.
272. *Id.*
273. *Id.*

via an election. A retention election can qualify as an election, a form of selecting judges, and thereby satisfy the state constitutional requirement for voting.[274] In such circumstances, the retention election is the election for selecting judges as required by state law. The ballot-access cases would seem to fit such circumstances, and the ballot-access standards would apply. Restricting access to the ballot to a single incumbent in such cases would likely be subject to strict scrutiny and would come up short for the reasons already discussed.

On the other hand, a system of pure judicial appointments would not be covered by the ballot-access cases, which do not apply to appointment systems.[275] Judicial merit selection that is based on a state constitution that allows for judicial appointment and formalized retention elections—a hybrid system—raises more nuanced questions.

Recall elections are dissimilar from retention elections in important ways. Recall elections occur outside of the regular election process and are distinct from the underlying process of selecting officials for office. Recall elections undo elections and are designed to correct or supersede an election outcome. There is a threshold requirement for a recall election, typically a petition; a recall is not a routine part of an election process but distinct from it. Once that threshold for recall is satisfied, by the petition or a two-step voting process, a replacement process occurs.

Voters participating in a recall election already had access to the ballot with an opportunity to vote for their desired candidate. The recall election is a way of allowing voters to discipline an official who had been chosen in compliance with normal election-law requirements. It is designed to undo the results of an election, with provisions for an election in the case of a successful recall. That subsequent selection election—even in the context of simultaneous recalls—and the original election would be compliant with ballot-access requirements. Ballot-access principles apply to the initial election and to the replacement election.

In a merit-selection judicial-retention system, the requirements of the ballot-access cases are eviscerated so that the voter-based constitutional values of ballot access are not honored. The retention election is integral to the process, not a corrective of the electoral outcome in a special, distinct procedure with significant triggering

274. Hooker v. Haslam, 437 S.W.3d 409 (Tenn. 2013).
275. *See supra* note 16 and accompanying text.

requirements. The retention election is an essential, democratizing component of a merit-selection system, and it occurs at the end of a judge's term of office. The retention election is designed to select a judge to office for a new term. No petition is needed; the retention election is routine, scheduled, and designed to limit the scope of the election to a single candidate --- the incumbent judge. This is what the ballot-access cases deal with and are driven by—opening access to the ballot in an election process designed to select (not deselect) a candidate for office

In this regard, a recall election is more similar to an impeachment or popular removal process. To return to the example of Governor Davis, Californians had two means to remove Davis from the governor's office—a recall election decided by California's voters or an impeachment process decided by the Assembly.[276] The recall election was one means of removal during the governor's term because the voters were dissatisfied with Davis' performance,[277] even though he did not commit any "misconduct in office" as required for impeachment.[278] Like impeachment, recall is a means of removal that serves as a check on the election process—an opportunity to remove an official who has already been elected via a constitutionally valid election. And the removal comes during the office holder's term, not at the end of the term when the issue involves selection of a person for a new term via an election process. Targeting a single candidate in a recall process may be appropriate in the context of undoing a selection during a term but not so in the context of selecting a candidate at the end of a term for a new term of office.

In sum, judicial retention elections are an integral, planned method of selection for a new term in a position, rather than a method of removal from a position. Tennessee's constitution, for example, states that judges, as part of a hybrid system, "shall be *elected* in a retention election by the qualified voters of the state."[279] Recall elections occur outside the normal, periodic election cycles and are designed, with procedural hurdles, to remove a specific, duly-elected official from a position to which he or she was elected and from a position in which he

276. CAL. CONST. art. IV, § 18.

277. *Davis Concedes, Schwarzenegger wins*, CNN (October 8, 2003), http://www.cnn.com/2003/ALLPOLITICS/10/07/recall.main/ (citing a "whopping 72 percent" disapproval rating for Davis).

278. CAL. CONST. art. IV, § 18.

279. *See* TN. CONST. art. VI, § 3 (emphasis added).

or she is serving during the term of office originally contemplated. Retention elections are a form of popular election to a new term in office; recall elections and other checks on the election process are special instruments for undoing or superseding an election and can result in removal from office during an office holder's term of office.

## CONCLUSION

Merit-selection systems have long been challenged yet never toppled. This Article has identified a new potential arrow for a challenger's quiver. By casting the judicial retention election as a complete bar to the ballot for candidates, challengers can utilize the Court's ballot-access jurisprudence to their advantage. The resulting strict scrutiny could lead to the invalidation of the law, as the judicial retention election is not narrowly tailored to protect a compelling state interest. Alternatives to judicial retention election systems exist—contested elections and systems of appointment without elections. By challenging the merit-selection system under the ballot-access paradigm and related ballot-access cases, challengers to retention elections in a merit-selection system may well have a path to success.

If they adopt an appointment system of judicial selection, like the federal system, states can avoid the implications of the ballot-access cases and avoid having judicial elections; but once a state chooses to hold an election, relying on the legitimating role of an election as a means of selecting judges and holding them politically accountable, it chooses to subject its election process to the relevant federal election laws such as the Voting Rights Act and the Supreme Court's ballot-access jurisprudence.[280]

The United States Constitution does not prohibit states from appointing officials, including judges, as opposed to electing them.[281] States are given "vast leeway in the management of [their] internal affairs."[282] Laws creating appointment processes completely eliminate access to the ballot,but that lack of ballot access does not raise federal constitutional issues because states have sovereign power to determine how to fill vacancies in state and local offices.[283]

Absent a state's decision to hold an election for judicial office, even

280. *See supra* Part III.C.

281. Sailors v. Board of Ed. of Kent Cty., 387 U.S. 105, 108 (1967). *See supra* note 16 and accompanying text.

282. *Sailors,* 387 U.S. at 109.

283. *Id.*

a retention election, there is no federal constitutional claim under the ballot-access cases. Such a claim only applies to state elections, not state systems of appointment. Appointments occur outside of the election process and, therefore, avoid ballot-access issues altogether. A state does not place a substantial burden on a ballot when it appoints an official to the office—it permissibly eliminates the ballot entirely. And the Constitution does not prevent states from eliminating the ballot entirely through an appointment process[284]—the federal model.[285] Once a state "has chosen a different course" and opted for a form of popular election, that state subjects its judicial selection process to federal election law.[286]

The Court provided similar instruction in *White*.[287] Justice O'Connor's concurrence noted that states have multiple permissible options for their judicial selection systems.[288] The majority opinion also made clear, however, that the power to choose between an appointment or election system does not provide the state with power to avoid the Federal Constitution altogether once a state chooses an election system.[289] Likewise, a state that chooses a judicial merit-selection system chooses to hold retention elections. Therefore, the state chooses to subject itself to the Court's ballot-access jurisprudence, even though it has the power to avoid ballot-access issues altogether had it chosen to appoint its judges. Elections confer a form of political legitimacy, but they also trigger constitutional requirements regarding access to the ballot; the sweet of political legitimacy comes with what, for some, is the bitter of having to comply with the ballot-access cases by opening up the retention election to some form of broader ballot access.

284. Chisom v. Roemer, 501 U.S. 380, 400–01 (1991) (holding that Louisiana's judicial elections had to comply with the Federal Voting Rights Act because its judges were "representatives" for purposes of the law); *see also supra* Part III.C.

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

286. *Chisom*, 501 U.S. at 400; s*ee also* Wells v. Edwards, 409 U.S.1095, 1097–98 (1973) (White, J., dissenting) ("We have held that a state may dispense with certain elections altogether. . . . What I had thought the apportionment decisions at least established is the simple constitutional principle that, subject to narrow exceptions, once a State chooses to select officials by popular vote, each qualified voter must be treated with an equal hand and not be subjected to irrational discrimination based on his residence.") (citations omitted).

287. Republican Party of Minnesota v. White, 536 U.S. 765, 787–88 (2002).

288. *Id.* at 791–92.

289. *Id.* at 788.