THE FEDERAL ADVANTAGE: WHY TODAY'S POLARIZED POLITICS POSE THE GREATEST THREAT TO STATE COURTS

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Throughout history, our country has struggled to insulate our judiciary from improper outside influence and political attacks. In some contexts, the polarization of contemporary politics may drive change and progress. However, improper, politically charged discourse poses a great threat to the judiciary—the one branch of government intended to be independent, or free, from political influence. As with the rest of the federal government, federal courts—especially the U.S. Supreme Court—are scrutinized each time they issue a decision, especially those addressing high-profile issues.

But conversations regarding judicial independence must include state court judges, who are responsible for hearing ninety-five percent of the country's cases. Without the benefit of constitutional mechanisms, like Article III, state court judges are more vulnerable than federal court judges to the effect of modern politics. Thus, this Essay focuses on the importance of including state court judges in the important conversation regarding judicial independence and explains how the state judiciaries can look to the federal judiciary for guidance in counteracting this threat.

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I. INTRODUCTION

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. – Hamilton, Federalist Paper No. 78.[1]

When Republican President Ford sought to fill a U.S. Supreme Court vacancy, Democrats controlled the Senate, so "[h]e wanted an easy confirmation."[2] With the nomination of Justice John Paul Stevens, President Ford got his "easy confirmation";[3] Justice Stevens was confirmed by a vote of 98–0.[4] But that was not "because he would be a reliable vote" for either party's ideology.[5] Rather, Justice Stevens' "independence ensured that he wouldn't be" a reliable vote.[6] Indeed, despite changes in the Court, Justice Stevens sought to maintain a consistent judicial philosophy throughout his long, noteworthy career.[7]

"Judicial independence is a cornerstone of our legal system"[8] and a foundation upon which our country was built.[9] Indeed, Canon 1 of the Code of Conduct for United States Judges provides: "An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved."[10] In the words of former U.S. Supreme Court Justice Sandra Day O'Connor: "The framers of the Constitution were so clear in [T]he [F]ederalist

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[1] THE FEDERALIST NO. 78, at 505 (Alexander Hamilton) (Cosimo Classics ed., 2006); *see* David C. Flatto, *The Historical Origins of Judicial Independence and Their Modern Resonances*, 117 YALE L.J. POCKET PART 8 (2007), http://yalelawjournal.org/forum/the-historical-origins-of-judicial-independence-and-their-modern-resonances (discussing the history of judicial independence).

[2] Jamal Greene, *John Paul Stevens Was Justice Incarnate*, N.Y. TIMES (July 17, 2019), https://www.nytimes.com/2019/07/17/opinion/john-paul-stevens.html.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Jess Bravin, *Retired Supreme Court Justice John Paul Stevens Dies*, WALL STREET J., https://www.wsj.com/articles/retired-supreme-court-justice-john-paul-stevens-dies-11563326719 (last updated July 17, 2019, 2:03 PM).

[8] Lee v. State Bd. of Pension Trs., 739 A.2d 337, 341 (Del. 1999); *see* No. 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates, Comm. on Codes of Conduct Adv. Op. [hereinafter Adv. Op. No. 116].

[9] *See, e.g.*, Hamilton, *supra* note 1.

[10] Adv. Op. No. 116, *supra* note 8.

[P]apers and elsewhere that they felt an independent judiciary was critical to the success of the nation."[11]

Yet, despite our Founding Fathers' collective vision and efforts to enshrine judicial independence in the U.S. Constitution,[12] our country's judiciary has been attacked for unpopular decisions throughout history.[13] Attacks against our judiciary—including both state and federal judges—for unpopular decisions have increased since 2010.[14] Exacerbating this concern, contemporary discourse attempts to politicize the judiciary.[15] The media, the public, and the other two branches of government tend to label judges and justices as "liberal" or "conservative," and characterize them based on the executive who appointed them.[16]

To ensure the proper functioning of our democracy, as our Founding Fathers envisioned, we–lawyers, the public, and the media–must work to protect judicial independence. As part of that effort, *Elon Law Review*'s 2019 Symposium–*Celebrating 150 Years of Nine Justices While Wondering About the Supreme Court in Contemporary America*–should be applauded for addressing the very important and timely topic of judicial independence, or the absolute necessity for

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[11] *Q & A with Sandra Day O'Connor*, TIME (Sept. 28, 2006), http://content.time.com/time/nation/article/0,8599,1540702,00.html.

[12] David A. Strauss, *Not Your Founding Fathers' Judiciary*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/article-iii/clauses/45#not-your-founding-fathers-judiciary-by-david-strauss (last visited Jan. 21, 2020) ("[As] the basis of the federal court system," Article III "is a cornerstone of our legal system.").

[13] Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 308 (1997).

[14] Barbara J. Pariente & F. James Robinson, Jr., *A New Era for Judicial Retention Elections: The Rise of and Defense Against Unfair Political Attacks*, 68 FLA. L. REV. 1529, 1549 (2016). Attacks in this context do not refer to physical assault, but doctrinal attacks, such as questioning a judge's competency based solely on disagreement with a ruling or partisan criticism. *Id.* at 1531.

[15] *See* Lawrence Friedman, *Supreme Court Justices Should Not Be Called Conservatives or Liberals*, HILL (July 31, 2019, 4:00 PM), https://thehill.com/opinion/judiciary/455576-supreme-court-justices-should-not-be-called-conservatives-or-liberals.

[16] *See id.*; Johanna Kalb & Alicia Bannon, *Courts Under Pressure: Judicial Independence and Rule of Law in the Trump Era*, N.Y.U. L. REV. (2018), https://www.nyulawreview.org/wp-content/uploads/2018/09/NYULawReviewOnline-93-Kalb_Bannon.pdf; Barbara J. Pariente & Melanie Kalmanson, *Send Them a Message?: The Threat to a Fair and Impartial State-Court Judiciary*, 55 CT. REV. 16, 17 (2019).

judges to remain fair and impartial. This topic is especially important in light of the increased polarization of contemporary politics.[17]

As part of the Symposium, this Essay seeks to highlight the importance of recognizing the unique vulnerability of state court judges when discussing judicial independence. Part II begins by canvassing key distinctions between federal and state courts. Part III explains how recent attacks against the judiciary have increasingly compromised the independence of our state courts. Due to the key differences outlined in Part II, Part IV discusses why state courts are more vulnerable to the consequences of political attacks than federal courts. Part V concludes.

II. REVIEWING KEY DIFFERENCES BETWEEN FEDERAL AND STATE COURTS

In today's politically charged environment, federal courts, including the U.S. Supreme Court, seem to garner the most attention, whether by be media coverage for a high-profile decision or backlash for a politically unpopular decision.[18] But, the "often overlooked"[19] state courts are the workhorse of this country's judiciary.[20] "State courts decide many more cases than federal courts, by far"[21]—"more than 100

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[17] *See* Friedman, *supra* note 15; *Courts Under Pressure: Judicial Independence and Rule of Law in the Trump Era*, BRENNAN CTR. FOR JUST. (Apr. 30, 2018), https://www.brennancenter.org/our-work/research-reports/courts-under-pressure-judicial-independence-and-rule-law-trump-era.

[18] *See* Alicia Bannon & Laila Robbins, *The Nation's Top State Courts Face a Crisis of Legitimacy*, N.Y. TIMES (July 23, 2019), https://www.nytimes.com/2019/07/23/opinion/states-courts-diversity.html.

[19] *Id.*

[20] *See id.* ("[T]he top courts in each state typically are the final word on interpreting state law and make decisions that more than 23,000 lower state court judges are to follow."); Alicia Bannon, *Choosing State Judges: A Plan for Reform*, BRENNAN CTR. FOR JUST. (Oct. 10, 2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf ("While the U.S. Supreme Court usually grabs the headlines, state supreme courts play a powerful role in American life.").

[21] Strauss, *supra* note 12; *see* Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CTR. FOR JUST. 1, 1 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_How_Judicial_Elections_Impact_Criminal_Cases.pdf.

million cases . . . each year."[22] In fact, state courts are responsible for "review[ing] 95% of all cases in the United States."[23]

This Part explains key differences between state and federal courts.[24] Section A reviews differences between methods of judicial selection in the state and federal judiciaries. Section B explains the methods states use for judicial retention—a process that exists only in state courts. Understanding these differences between federal and state court judges is important for several reasons, one of which is why state court judges are more vulnerable to improper outside influence and political attacks—as Part IV explains.

A. Judicial Selection

Judicial selection is the method by which judges are chosen to fill vacant court seats.[25] This Section first reviews how federal judges are selected and then turns to review how state judges are selected across the country.

1. Federal Judges Are Selected by Executive Nomination and Senate Confirmation

Per Article II of the U.S. Constitution, federal judges are selected by executive nomination and Senate confirmation.[26] First, the President nominates a candidate for appointment to a vacant seat.[27] The U.S. Constitution actually does not provide formal requirements for who is eligible to serve as a federal judge.[28] "However, members

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[22] Scott Greytak et al., *Bankrolling the Bench: The New Politics of Judicial Elections 2013-14*, BRENNAN CTR. FOR JUST. 1, 1–2 (2015), https://www.brennancenter.org/sites/default/files/publications/The_New_Politics_of_Judicial_Election_2013_2014.pdf.

[23] Pariente & Kalmanson, *supra* note 16, at 27; *see also* Bannon & Robbins, *supra* note 18 ("Ninety-five percent of all cases in the United States are heard in state courts."); Bannon, *supra* note 20, at 1 ("Ninety-five percent of all cases are filed in state courts[.]"); Greytak et al., *supra* note 22, at 2–3 ("Approximately 95 percent of all cases initiated in the United States are filed in state courts[.]").

[24] *See Comparing Federal & State Courts*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts (last visited Jan. 16, 2020) (providing another iteration of these comparisons).

[25] *See, e.g.*, Bannon, *supra* note 20, at 2.

[26] U.S. CONST. art. II, § 2; *FAQs: Federal Judges*, U.S. CTS., https://www.uscourts.gov/faqs-federal-judges (last visited Jan. 16, 2020).

[27] *FAQs: Federal Judges*, *supra* note 26.

[28] *Id.*

of Congress . . . and the Department of Justice . . . have developed their own informal criteria" that they review in assisting the President with nominations.[29] The President oftentimes receives nomination recommendations from various sources, including the Department of Justice, the Federal Bureau of Investigation ("FBI"), advisors, members of Congress, etc.[30] Even in this process, several sources and common sense suggest that politics is involved—that the President considers a candidate's political ideology in making nominations.[31]

After the President nominates a candidate, the Senate must vote to confirm the nomination.[32] Before the vote, the Senate Judiciary Committee usually holds confirmation hearings for each nominee.[33] At the hearings, committee members may ask the nominee questions about his or her background, judicial philosophy, service, and intentions on the bench.[34] Ultimately, "the Senate holds a final up-or-down vote on the nomination."[35] The nominee must receive a majority affirmative vote to be confirmed.[36]

Since the Supreme Court was established in 1789, the Senate has voted on 163 nominations.[37] Only twelve nominations have been rejected, and seven have been confirmed, but nonetheless declined to

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[29] *Id.*

[30] *Id.*; *see How Judges and Justices Are Chosen*, USHISTORY.ORG: AM. GOV'T, http://www.ushistory.org/gov/9d.asp (last visited Jan. 16, 2020).

[31] *See FAQs: Federal Judges*, *supra* note 26; *How Judges and Justices Are Chosen*, *supra* note 30.

[32] *FAQs: Federal Judges*, *supra* note 26.

[33] *Id.*

[34] BARRY J. MCMILLION, CONG. RESEARCH SERV., R44236, SUPREME COURT APPOINTMENT PROCESS: CONSIDERATION BY THE SENATE JUDICIARY COMMITTEE 14 (2018), https://fas.org/sgp/crs/misc/R44236.pdf.

[35] *The Federal Judicial Nominations Process*, AM. CONST. SOC'Y, https://www.acslaw.org/wp-content/uploads/2018/10/The-Federal-Judicial-Nominations-Process-1.pdf (last visited Jan. 16, 2020).

[36] *Id.*

[37] *Supreme Court Nominations (Present-1789)*, U.S. SENATE, https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Jan. 16, 2020).

serve.[38] Historically, many nominees have been overwhelmingly confirmed,[39] but recent votes indicate a greater partisan divide.[40]

Specifically, the recent selections of Justice Gorsuch and Justice Kavanaugh brought this process and underlying politics to the forefront. After President Obama nominated Merrick Garland to fill the vacancy left by Justice Scalia's death in February 2016, the Senate refused to vote to confirm the nomination.[41] Senate majority leader Mitch McConnell "declared [that] any appointment by the sitting president" would be "null and void" because the seat should be filled by the next President, who would be elected a few months later.[42] The Senate Judiciary Committee members followed McConnell's lead and did not hold any proceedings for Garland's appointment.[43] By taking no action on Garland's nomination, the Senate effectively delayed the process until after the election.[44]

Once elected, President Trump nominated Neil Gorsuch, who was confirmed by a vote of 54–45.[45] Justice Gorsuch was sworn in to office in April 2017, more than a year after the vacancy occurred.[46]

In the summer of 2018, after Justice Anthony Kennedy announced his retirement, President Trump nominated Brett Kavanaugh to fill the vacancy.[47] Justice Kavanaugh's nomination quickly became political when Professor Christine Blasey Ford alleged that Kavanaugh sexually and physically assaulted her when the two knew each other

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[38] *Id.*

[39] *Id.*; *see also* Linda Greenhouse, *Senate, 96-3, Easily Affirms Judge Ginsburg as a Justice*, N.Y. TIMES (Aug. 4, 1993), https://www.nytimes.com/1993/08/04/us/senate-96-3-easily-affirms-judge-ginsburg-as-a-justice.html.

[40] *Supreme Court Nominations (Present-1789)*, *supra* note 37.

[41] *See* Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NAT'L PUB. RADIO (June 29, 2018, 5:00 AM), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

[42] *Id.*

[43] *Id.*

[44] *Id.*; *see Supreme Court Nominations (Present-1789)*, *supra* note 37.

[45] *Supreme Court Nominations (Present-1789)*, *supra* note 37.

[46] *Id.*

[47] Sophie Tatum, *Brett Kavanaugh's Nomination: A Timeline*, CNN, https://www.cnn.com/interactive/2018/10/politics/timeline-kavanaugh/ (last visited Jan. 16, 2020).

in high school.[48] Although Kavanaugh "categorically and unequivocally" denied the allegations, the issue deepened the rift between Republicans and Democrats.[49] While Republicans supported Justice Kavanaugh's nomination, Democrats staunchly opposed the nomination, urging both the FBI to investigate Justice Kavanaugh and the Senate to deny his confirmation.[50] Ultimately, after emotionally charged confirmation hearings,[51] the Senate confirmed Justice Kavanaugh by a vote 50–48, and Justice Kavanaugh was sworn in to the U.S. Supreme Court.[52] Justice Kavanaugh's selection was one of the most contentious in American history.[53]

As the nomination and confirmation processes of Justices Gorsuch and Kavanaugh illustrate, despite the Framers' intent to shield the judiciary from politics, the executive and legislative branches have nevertheless used judicial selection as a political tool.[54] Indeed, several sources argue that Trump's presidency has further undermined the legitimacy of judicial selection by injecting unnecessary politics into the process–even more than before.[55]

2. Methods of Judicial Selection for State Court Judges

Judicial selection in the states is governed by each state's constitution.[56] As a result, judicial selection varies from state-to-state.[57] In fact, even jurisdictions within some states employ different processes

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[48] *See id.*

[49] *Id.*

[50] *See id.*

[51] *See, e.g.*, Sheryl Gay Stolberg & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel with Tears and Fury*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/us/politics/brett-kavanaugh-confirmation-hearings.html.

[52] *Supreme Court Nominations (Present-1789)*, *supra* note 37; Tatum, *supra* note 47.

[53] *See* Tatum, *supra* note 47.

[54] *See Judicial Nominations*, AM. CONST. SOC'Y, https://www.acslaw.org/judicial-nominations/ (last visited Jan. 16, 2020) (stating that President Trump is filling judicial vacancies "at a breakneck speed"); *On the Bench: Tracking President Trump's Judicial Nominations*, AM. CONST. SOC'Y: ACS'S JUD. NEWS ROUNDUP, https://www.acslaw.org/judicial-nominations/on-the-bench/ (last visited Jan. 16 2020).

[55] *See, e.g.*, *On the Bench: Tracking President Trump's Judicial Nominations*, *supra* note 54.

[56] *See Methods of Judicial Selection*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Jan. 16, 2020).

[57] *See id.*

for judicial selection.[58] State methods of judicial selection are either contested elections or merit selection by gubernatorial appointment, legislative selection, or commission-based gubernatorial appointment.[59]

"Most state court judges—unlike federal judges—are elected, not appointed[.]"[60] Currently, the Brennan Center for Justice at NYU School of Law ("Brennan Center") reports that twenty-one states use elections for their state supreme courts.[61] States first adopted judicial elections in response "to concerns that judges were too close to the governors and legislators responsible for appointing them."[62] States that use elections for judicial selection use either partisan or nonpartisan elections.[63]

Of the twenty-one states that use elections, six use partisan elections to select judges for their state supreme courts.[64] These elections require judges to align themselves with a specific political party before being listed on an election ballot.[65] Some argue that contested partisan elections provide the most information to voters by publicizing

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[58] *See id.* (explaining that districts in Kansas are split on the selection of district judges; 17 districts use gubernatorial appointment from a nominating commission while 14 districts use partisan election).

[59] Malia Reddick & Rebecca Love Kourlis, *Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 1, 1 (2014), https://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf; *see Methods of Judicial Selection*, *supra* note 56.

[60] Richard W. Garnett & David A. Strauss, *Article III, Section One*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/article-iii/clauses/45 (last visited Jan. 16, 2020).

[61] *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., http://judicialselectionmap.brennancenter.org/?court=Supreme (last visited Jan. 16, 2020).

[62] Alicia Bannon, *The Rise of Dark Money Is a Threat to Judicial Independence*, BRENNAN CTR. FOR JUST. (July 6, 2018), https://www.brennancenter.org/our-work/analysis-opinion/rise-dark-money-threat-judicial-independence.

[63] *See id.*

[64] *Judicial Selection: An Interactive Map*, *supra* note 61. In 2017, the American Bar Association ("ABA") reported that "39 states . . . use elections as part of their system for choosing judges." *Rethinking Judicial Selection*, A.B.A. (June 14, 2017), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/rethinking_judicial_selection/.

[65] *See* Reddick & Kourlis, *supra* note 59, at 2.

a candidate's political affiliation.[66] However, this method of judicial selection inherently injects politics into the process.

Of course, party affiliation should not indicate how a judge will make decisions once selected. Just because a judge is associated with one political party or another "does not mean the judge will always decide consistent with [that party's] ideals, or is incapable of fairly reviewing a politically sensitive issue. . . . Likewise, even if the judge ultimately votes consistent with what the public would consider"[67] to be the outcome consistent with the judge's political alignment during elections, that "does not mean the judge did not fairly review the case on its merits."[68]

In nonpartisan elections, the candidate does not list any political affiliation.[69] Therefore, nonpartisan elections are considered less political than partisan elections.[70] However, as Malia Reddick and Rebecca Love Kourlis wrote: "The distinction between partisan and nonpartisan elections for judges has become increasingly less relevant, as political parties have become more active in endorsing and providing financial support for judicial candidates and federal courts have rejected limitations on candidates identifying themselves as political party members and participating in party activities."[71]

States that do not hold elections for judicial selection use a merit-based selection process–gubernatorial appointment, legislative selection, or commission-based gubernatorial appointment–which is considered to have fewer of the inherent problems associated with

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[66] *See* Chris W. Bonneau & Damon M. Cann, *Party Identification and Vote Choice in Partisan and Nonpartisan Elections*, POL. BEHAV. (Oct. 30, 2013), http://www2.pitt.edu/~cwb7/assets/papers/PB%2014%20article.pdf.

[67] Melanie Kalmanson, *Neither the Problem Nor the Solution Lies Solely with the Judiciary: Response to Robertson's Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. F. 88, 90 (2018).

[68] *Id.*

[69] Bannon, *supra* note 20, at 2.

[70] *See* David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J. L. & POL. 419, 421 (2007).

[71] Reddick & Kourlis, *supra* note 59, at 2. Reddick is the Former Manager of the Quality Judges Initiative. Kourlis is the Executive Director of the Institute for the Advancement of the American Legal System.

contested elections.[72] In gubernatorial appointment systems, the governor appoints judicial candidates.[73] The Brennan Center reports that ten states use this method of judicial selection.[74] In legislative selection systems, judges are selected by a vote of the state legislature.[75] The Brennan Center reports that only two states use this method.[76]

Finally, the Brennan Center reports that fourteen states use a commission-based gubernatorial appointment system.[77] In this process, a judicial nominating commission reviews the candidate for "professional competence, temperament, integrity, and experience" before the governor makes an appointment.[78] This process is thought to ensure "that judges who eventually stand for a retention election are well-qualified."[79] Some states also require legislative confirmation of the governor's appointment, similar to the federal system.[80] The point is: "With merit selection, candidates move forward in the process based on their qualifications and experience. In other systems, the amount of money spent in an election campaign, name recognition, and political or party connections" may improperly "be the determinative factors."[81]

Of course, even merit-selection systems can be subject to improper influence; in fact, some have argued this system is *more* vulnerable to political influence than elections.[82] Another common criticism of merit selection includes "that it puts elites in control of selecting judges," and that "nominating commissions operate in secret with no public accountability."[83]

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[72] *See id.* at 3 ("Sixty percent of the states . . . use a merit selection process to choose at least some supreme court justices."); *Methods of Judicial Selection*, *supra* note 56. *But see* Reddick & Kourlis, *supra* note 59, at 12.

[73] *Judicial Selection: An Interactive Map*, *supra* note 61.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] Pariente & Robinson, *supra* note 14, at 1534.

[79] *Id.*; *see* Reddick & Kourlis, *supra* note 59, at 1 (providing more information on judicial nominating commissions).

[80] *See* Reddick & Kourlis, *supra* note 59, at 2; *Methods of Judicial Selection*, *supra* note 56.

[81] Reddick & Kourlis, *supra* note 59, at 12.

[82] *See id.* at 9.

[83] *Id.* at 8.

B. Judicial Retention

Judicial retention is the process by which judges remain in their seats from term to term.[84] It is perhaps the most important factor in discussing judicial independence and the effect of improper political influence on our courts.[85]

1. Lifetime Appointment in Federal Courts

[F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security. – Hamilton, Federalist Paper No. 78.[86]

From the very beginning, our Founders envisioned an independent judiciary shielded from overreaching by the other two branches of government.[87] Per Article III, Section 1, of the U.S. Constitution ("Article III"), the federal judiciary employs a system of lifetime appointment.[88]

Absent bad behavior, federal judges cannot be removed and remain in office until their death or voluntary retirement.[89] Under

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[84] *See* Brandice Canes-Wrone, Tom S. Clark & Jee-Kwang Park, *Judicial Independence and Retention Elections*, 28 J. L., ECON., & ORG. 211, 211 (2010) (explaining that in retention elections, a judge is reelected after receiving the required number of votes to approve retention of that judge's seat).

[85] *See* Bannon & Robbins, *supra* note 18.

[86] Hamilton, *supra* note 1.

[87] *Q & A with Sandra Day O'Connor*, *supra* note 11.

[88] U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

[89] *See About Federal Judges*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/about-federal-judges (last visited Jan. 16, 2020); Neil J. Kinkopf, *The Scope of the Impeachment Power: What Are 'High Crimes and Misdemeanors'?*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/349#the-scope-of-the-impeachment-power (last visited Jan. 16 2020); *see also* U.S. CONST. art. III.

the Constitution, "[t]reason, [b]ribery, or other high [c]rimes and [m]isdemeanors" constitute bad behavior.[90] Thus, federal judges may be removed only if the House of Representatives votes to impeach them and the Senate convicts them of one of those offenses.[91] This occurs very rarely.[92] "[S]ince 1803, the House of Representatives has impeached only 15 judges . . . and only 8 of those impeachments were followed by convictions in the Senate."[93]

The federal system of lifetime tenure also protects federal judges from the need to retain their seat in any sort of process, unlike state court judges (as explained below).[94] By instituting lifetime appointment, the Founders intended "to insulate [federal judges and] justices from partisan politics," making them "free to issue rulings based on the law, rather than political favor."[95]

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[90] U.S. CONST. art. II, § 4; *see* Kinkopf, *supra* note 89; *High Crimes and Misdemeanors*, CONST. RTS. FOUND., https://www.crf-usa.org/impeachment/high-crimes-and-misdemeanors.html (last visited Jan. 16, 2020) (providing more information on the definitions of these crimes).

[91] Douglas Keith, *Impeachment and Removal of Judges: An Explainer*, BRENNAN CTR. FOR JUST. (Mar. 23, 2018), https://www.brennancenter.org/blog/impeachment-and-removal-judges-explainer; *About Federal Judges*, *supra* note 89.

[92] Keith, *supra* note 91; *High Crimes and Misdemeanors*, *supra* note 90.

[93] Keith, *supra* note 91.

[94] *See* Garnett & Strauss, *supra* note 60.

[95] Molly Callahan, *Why Do Supreme Court Justices Have Lifetime Appointments?*, NEWS@NORTHEASTERN (Sept. 21, 2018), https://news.northeastern.edu/2018/09/21/why-do-supreme-court-justices-have-lifetime-appointments/; *see* Bannon & Robbins, *supra* note 18, Kinkopf, *supra* note 89. As stated by J.J. Gass:

> An independent judiciary is: (1) not dominated by or dependent on the other two branches of government; (2) not unduly entangled in the political machinery of the other branches, such as the political party apparatus by which legislators and elected executive officials organize themselves and their supporters; and (3) not actuated in its decision-making process by the same considerations and interests as the other branches.

J.J. Gass, *After White: Defending and Amending Canons of Judicial Ethics*, BRENNAN CTR. FOR JUST. 1, 8 (2004), brennancenter.org/sites/default/files/2019-08/Report_after_white.pdf.

But not everyone favors lifetime appointments.[96] Some contend we should reconsider lifetime tenure in favor of a term of years.[97] In fact, a new wave of arguments for reconsidering lifetime tenure arose after the appointments of Justice Gorsuch and Justice Kavanaugh.[98] Critics of lifetime tenure contend it "causes judges to stay in their positions longer than they should—after they have become too old to do their job well, either just because of age or because they are out of touch with modern times."[99] Some also argue that lifetime tenure creates "presidential incentives to select young nominees unseasoned for service" to ensure longevity on the court.[100] Likewise, some argue that lifetime tenure may instigate "'strategic' retirement" decisions—*i.e.*, justices intentionally "timing their [retirement] decision[] to coincide with the administration of a president they like" so that the favored president may nominate the justice's successor.[101] Of course, this latter argument suggests judges are political actors.

Regardless of how one views Article III's provision of lifetime tenure for federal judges, it is indisputable that lifetime tenure distinguishes the federal judiciary from the state judiciaries. This federal framework is especially significant in the context of judicial independence.

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[96] *See, e.g.*, Christopher Ingraham, *Why It's Time to Get Serious About Supreme Court Term Limits*, WASH. POST (Feb. 13, 2016, 8:47 PM), https://www.washingtonpost.com/news/wonk/wp/2016/02/13/why-its-time-to-get-serious-about-supreme-court-term-limits/.

[97] *See, e.g.*, Kevin T. McGuire, *Are the Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court*, 89 JUDICATURE 8 (2005–06), http://mcguire.web.unc.edu/files/2014/01/tenure.pdf; Shaheen Nouri, *Life Tenure and the Dynamic of Judicial Independence in the Federal System*, 5 STETSON J. ADVOC. & L. 155, 155–62 (2018) (explaining earlier attempts to change lifetime tenure); Callahan, *supra* note 95.

[98] *See, e.g.*, Stephen L. Carter, *The Supreme Court Needs Term Limits*, CHI. TRIB. (Oct. 8, 2018, 1:25 PM), https://www.chicagotribune.com/opinion/commentary/ct-perspec-supreme-court-term-limits-brett-kavanaugh-life-tenure-1009-story.html; Stolberg & Fandos, *supra* note 51.

[99] Garnett & Strauss, *supra* note 60; *see* Carter, *supra* note 98; McGuire, *supra* note 97, at 8.

[100] McGuire, *supra* note 97, at 8.

[101] Carter, *supra* note 98.

2. Various Methods of Judicial Retention for State Court Judges

As of 2018, only three states had adopted systems that follow the federal model in which judges do not face retention.[102] In Rhode Island, state court judges, like federal court judges, enjoy lifetime appointment without retention.[103] The two other states, Massachusetts and New Hampshire, have adopted a modified version of the federal model that imposes a limit to the judge's term; their state court judges serve "to age 70."[104]

In the other forty-seven states, state court judges have finite terms anywhere between one and fifteen years.[105] When each term expires, judges must be retained using one of several methods for judicial retention.[106] These methods include reelection, merit-retention election, and executive reappointment.[107] When considering both states that use reelection and "retention elections, nearly ninety percent of state appellate judges must regularly be reelected."[108]

In states that use reelection, judges must be elected by voters to retain their position and may face opposition.[109] Twenty-nine states use reelection for at least one court in the state.[110] Nineteen states use reelection for state supreme court justices.[111] In a merit-retention election system, judges are still on the ballot for retention.[112] However, voters "are not tasked with determining whether the judge is qualified to sit on the bench, but rather whether the judge is qualified to *continue* sitting on the bench—for example, whether the judge has compromised his integrity."[113] Unlike reelection, judges up for merit-

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[102] *Methods of Judicial Selection*, *supra* note 56.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See id.*; Garnett & Strauss, *supra* note 60.

[107] *Methods of Judicial Selection*, *supra* note 56.

[108] Eric T. Kasper, *Are Judges Politicians?: An Analysis of* Williams-Yulee v. The Florida Bar *and Its Constitutional Impact on Judicial Independence and Judicial Ethics Codes Across the U.S.*, 47 U. MEM. L. REV. 1085, 1112 (2017).

[109] *See, e.g.*, Sara Hayden, *Electing the Bench; An Analysis of the Possible Negative Effects of Judicial Elections on Hawai'i's Legal Community*, 18 ASIAN-PAC. L. & POL'Y J. 114, 118–22 (2016) (providing an overview of judicial elections across the United States).

[110] *Methods of Judicial Selection*, *supra* note 56.

[111] *Id.*

[112] *See* Pariente & Robinson, *supra* note 14, at 1533–34.

[113] *Id.* at 1534.

retention election run unopposed.[114] Voters are asked to vote "yes" or "no" as to whether the judge should maintain his or her position.[115] The benefit of a merit retention system is thought to be that it reduces the competition that contested elections cause and "offer[s] strong job security."[116]

Nevertheless, serious opposition to the judge's retention may still arise from organized political opposition rather than a defined opponent, making it more difficult for the judge to campaign for retention.[117] Therefore, "merit retention elections provide no guarantee" that the judge will be retained or the system will be void of improper influence.[118] In fact, political attacks are more common in the retention process than in the initial selection process because special interest groups use the sitting judge's "track record," and more specifically, unpopular decisions to advocate against the judge's retention.[119]

C. Other Differences

In addition to the differences between judicial selection and judicial retention in state and federal courts, other factors contribute to rendering state court judges more vulnerable to the consequences of political attacks than federal judges. For example, as this Section explains, federal judges (1) are insulated from legislative retaliation due to unfavorable decisions and (2) may be more restricted from participating in activities that may create the appearance of impartiality.

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[114] Martin Scott Driggers, Jr., *South Carolina's Experiment, Legislative Control of Judicial Merit Selection*, 49 S.C. L. REV. 1217, 1225 (1998); *see also* Daniel P. Tokaji, *A Toxic Brew, Judicial Election in the Age of Big-Money Politics*, 60 CLEV. ST. L. REV. 497, 498 (2012).

[115] Hayden, *supra* note 109, at 119; Pariente & Robinson, *supra* note 14, at 1533–34.

[116] JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 253 (2012); Edward A. Purcell, Jr., *The Ideal of Judicial Independence: Complications and Challenges*, 47 TULSA L. REV. 141, 154 (2011).

[117] *See* SHUGERMAN, *supra* note 116, at 253–66 (discussing potential opposition to judges in the merit retention systems and stating that the "merit plan is not perfect, and it does not eliminate politics from judicial selection."); Pariente & Robinson, *supra* note 14, at 1534–37.

[118] Purcell, *supra* note 116, at 154.

[119] Pariente & Robinson, *supra* note 14, at 1535–36 ("In today's increasingly polarized political atmosphere, some special-interest groups and political figures have found the value proposition of using unpopular decisions to alter the makeup of a state supreme court too good to pass up.").

1. Insulation from Legislative Actions

In the federal system, Article III bars Congress and the President from retaliating against judges by cutting their salaries.[120] Pursuant to Article III, it would "require a constitutional amendment" to change the protections in place for federal judges.[121] Thus, Article III shields federal judges from having any "reason to shape their rulings in a way that pleases powerful figures or popular opinion."[122]

However, state court judges are not similarly insulated from legislative retribution.[123] In 2018, the Brennan Center reported "legislators in at least 18 states considered at least 60 bills that would have diminished the role or independence of the judicial branch, or simply made it harder for judges to do their job – weakening the checks and balances that underlie our democratic system."[124] Thus, in addition to the threat of attack when facing election or reelection, state court judges are more vulnerable to legislative retaliation when they issue unpopular decisions.

2. Participation in Activities that May Create Appearance of Partiality

Further, the Committee on Codes of Conduct for federal judges ("the Committee"), recently issued an advisory opinion expressly restricting federal judges and their clerks from participating in activities that may create the appearance of partiality.[125] After urging from several senators, the Committee addressed the issue of federal judges being members of, and participating in, events sponsored by various organizations that engage in public policy discourse.[126]

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[120] U.S. CONST. art. III; *see About Federal Judges*, *supra* note 89.

[121] Garnett & Strauss, *supra* note 60.

[122] *Id.*

[123] *See Legislative Assaults on State Courts - 2018*, BRENNAN CTR. FOR JUST. (Feb. 7, 2018), https://www.brennancenter.org/analysis/legislative-assaults-state-courts-2018.

[124] *Id.*; *see Q & A with Sandra Day O'Connor*, *supra* note 11.

[125] Adv. Op. No. 116, *supra* note 8; *see* Ellis Kim, *Judges, Clerks Warned to Avoid Partisan Training Programs*, LAW.COM: NAT'L L.J. (Mar. 6, 2019, 2:56 PM), https://www.law.com/nationallawjournal/2019/03/06/judges-clerks-warned-to-avoid-partisan-training-programs/?slreturn=20190728094822.

[126] Adv. Op. No. 116, *supra* note 8; *see* James P. Donohue, *The Federalist Society Just Became a No-Go Zone for Federal Judges*, WASH. POST (July 8, 2019, 6:37 PM), https://www.washingtonpost.com/opinions/the-federalist-society-just-became-a-no-go-zone-for-

In a February 2019 Advisory Opinion, the Committee determined:

> When a judge engages in law-related activity with political overtones, a judge should consider whether the express or implied values of other canons will be contravened. . . . Where participation would undermine public confidence in the impartiality of the judiciary, would give rise to an appearance of engaging in political activity and of undue influence on the judge, or would otherwise give the appearance of impropriety, the Committee has advised against attending a seminar or conference.[127]

In short, the Advisory Opinion narrowed federal judges' ability to attend or speak at conferences hosted by various organizations, especially organizations that may be considered to have political affiliations, so as to avoid the appearance of impropriety or compromising judicial independence.

Since the issuance of the Advisory Opinion, some have speculated that its purpose was to limit judges' interactions with specific organizations, including the Federalist Society[128] and the Heritage Foundation.[129] Discussions have also surfaced about whether state courts should uniformly follow suit.[130] Of course, some states already have similar restrictions on judges participating in politically aligned activities.[131] Due to states' autonomy in addressing these issues, any change in the states on this issue will likely lack uniformity.

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federal-judges/2019/07/08/dfb3ee56-9c45-11e9-b27f-ed2942f73d70_story.html?utm_term=.c93cc9397bbd; Kim, *supra* note 125.

[127] Adv. Op. No. 116, *supra* note 8.

[128] *See* Donohue, *supra* note 126 (describing the Federalist Society as a "network of conservative and libertarian lawyers and legal scholars" with over 60,000 members). Not only are a large number of Federalist Society members judges or judicial candidates, but their meetings are often keynoted by current federal judges, including U.S. Supreme Court Justices. *See, e.g.*, Michael D. Shear, *Trump Names Supreme Court Candidates for a Nonexistent Vacancy*, N.Y. TIMES (Nov. 17, 2017), https://www.nytimes.com/2017/11/17/us/politics/trump-supreme-court.html (showing Justice Gorsuch speaking at a Federalist Society Convention in November 2017).

[129] *See About Heritage*, HERITAGE FOUND., https://www.heritage.org/about-heritage/mission (last visited Jan. 21, 2020) (stating that the Heritage Foundation is an organization whose mission "is to formulate and promote conservative public policies" that hosts training events for judges and their clerks); *see also* Kim, *supra* note 125.

[130] *See* Raymond J. McKoski, *The Political Activities of Judges: Historical, Constitutional, and Self-Preservation Perspectives*, 80 U. PITT. L. REV. 245 (2018).

[131] *See, e.g.*, Fla. Code Jud. Conduct Canon 7.

III. JUDICIAL INDEPENDENCE AND THE RISE OF ATTACKS AGAINST THE JUDICIARY

"In creating the judiciary as a separate and co-equal branch of government, our Founders understood the importance of a fair and impartial judiciary—one that does not bend to the will of the majority, the other two branches of government, or special interests."[132] Yet, "[d]espite efforts since the 1970s to remove politics from the judicial selection and retention process, considerable pressure has arisen in our nation to yet again politicize our courts."[133] Particularly, since 2010, "the integrity of our state supreme courts is increasingly under threat from a torrent of special interest money, often from secret sources."[134]

"[I]n the decade leading up to the 2010 midterm elections," special interest groups spent "$2 million . . . on advertising in retention elections[.]"[135] Since 2010, attacks against state court judges for unpopular decisions have been on the rise.[136] For example, in Iowa's 2010 election, opponents of same-sex marriage successfully orchestrated a politically motivated campaign to oust three Iowa Supreme Court Justices after their Court issued a "unanimous decision striking down, as unconstitutional, Iowa's ban on same-sex marriage."[137]

Two years later, "inspired by the success" of the Iowa campaign,[138] special interest groups–specifically "conservative political groups"–targeted three Florida Supreme Court Justices who were on the ballot

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[132] Pariente & Kalmanson, *supra* note 16, at 27; *see Q & A with Sandra Day O'Connor*, *supra* note 11.

[133] Barbara Pariente, *What's Politics Have to Do with It? Reinvigorating Our Defense of State Courts*, A.B.A. J. (Aug. 23, 2018, 6:10 AM), http://www.abajournal.com/news/article/whats_politics_have_to_do_with_it_reinvigorating_defense_of_state_courts.

[134] *Brennan Center Report: Who Pays for Judicial Races?*, INFORMED VOTERS PROJECT: NAT'L ASS'N WOMEN JUDGES (Feb. 13, 2018), https://ivp.nawj.org/news/brennan-center-report-who-pays-for-judicial-races/. *See generally* Alicia Bannon et al., *Who Pays for Judicial Races?: The Politics of Judicial Elections 2015–16*, BRENNAN CTR. FOR JUST. (2017), https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf. While some states' highest court is not referred to as the state's "supreme court," the use of "supreme court" in this Article references the highest court of each state.

[135] Pariente & Robinson, *supra* note 14, at 1535.

[136] *Id.* at 1529.

[137] Pariente & Kalmanson, *supra* note 16, at 16.

[138] *Id.*

for retention election.[139] The groups launched attack advertisements against the Justices by mischaracterizing and spinning the Court's recent decisions as the Justices using "their own views to usurp the law and separation of powers[.]"[140] The attacks forced the Justices to "travel the state to speak to Florida voters and editorial boards, attempting to explain that the campaign against [them] was not based on [their] integrity, professionalism, or competence."[141] While ultimately unsuccessful,[142] these attacks show a great vulnerability of our state court judges. "Understanding these attacks and what motivated them is essential to understanding how to move forward; to make progress, we must learn from the past."[143]

Some argue that the increase in intensity and frequency of attacks against state court judges is due, at least in part, to the U.S. Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*.[144] A 2015 report from the Brennan Center explained that *Citizens United* "ultimately led to the invalidation of restrictions on corporate spending in 21 of the states that hold judicial elections[.]"[145] In 2010 alone, "$3 million was spent on state judicial-retention election advertising[.]"[146] Since then, "the amount of money spent on judicial retention elections has only increased, along with the acerbity of advertisements targeting sitting judges."[147]

But that was not even the decision's "greatest impact[.]"[148] The greatest impact *Citizens United* had "on state Supreme Court races has been on *how* money is spent."[149] The decision "led to a cultural shift, . . . normaliz[ing] [] outside campaign spending [by social welfare organizations] at levels never before seen."[150] In the 2013–14 election

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[139] Pariente & Robinson, *supra* note 14, at 1549.

[140] *Id.* at 1549–50.

[141] Pariente & Kalmanson, *supra* note 16, at 16.

[142] Pariente & Robinson, *supra* note 14, at 1550.

[143] Pariente & Kalmanson, *supra* note 16, at 22.

[144] 558 U.S. 310 (2010); *see* Greytak et al., *supra* note 22, at 2; Pariente & Robinson, *supra* note 14, at 1535, 1545. *See generally* Alicia Bannon, *Judicial Elections After Citizens United*, 67 DEPAUL L. REV. 169 (2018).

[145] Greytak et al., *supra* note 22, at 13.

[146] Pariente & Robinson, *supra* note 14, at 1535.

[147] *Id.*

[148] Greytak et al., *supra* note 22, at 13.

[149] *Id.*

[150] *Id.*; *see also* Bannon, *supra* note 62.

cycle, "state Supreme Court election spending took place in 19 states and exceeded $34.5 million—much of it coming from special interests."[151] That number has continued to grow.[152] The Brennan Center reported that "overall spending" for the 2015–16 election cycle "totaled an estimated $69.3 million, including candidate fundraising and outside spending by interest groups and political parties — the second highest spending level . . . since [the Brennan Center] began tracking supreme court elections in 2000."[153]

Some argue that the Trump Administration has further invigorated efforts to politicize the judiciary.[154] As Johanna Kalb and Alicia Bannon write,[155] President Trump's usual response when courts have blocked "his most prominent and divisive policies" is to "attack[] the courts, occasionally even . . . personally denounc[ing] judges who issue opinions that he dislikes."[156]

Of course, strong arguments exist in support of judicial accountability to the public—*i.e.*, voters.[157] But accountability is dramatically different than attacks on judges as a result of disagreement with their decisions. "[A] threat arises when the 'accountability' is based on one-sided attacks or mere disagreement with an isolated decision."[158] As the Supreme Court of Washington explained:

> Judicial independence does not equate to unbridled discretion to bully and threaten, to disregard the requirements of the law, or to ignore the constitutional rights of defendants. . . . Judicial independence requires a

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[151] Greytak et al., *supra* note 22, at 2.

[152] Bannon, *supra* note 62.

[153] Bannon et al., *supra* note 134, at 4.

[154] *See, e.g.*, Kalb & Bannon, *supra* note 16; Katherine Brewer, *All the President's Judges*, WBUR (Nov. 16, 2017), https://www.wbur.org/freakout/2017/11/16/judges-brett-taley-jeff-mateer-federalist-society.

[155] Johanna Kalb is Fellow in the Democracy Program at the Brennan Center and Alicia Bannon is the Deputy Director for Program Management in the Brennan Center's Democracy Program. Kalb & Bannon, *supra* note 16, at 1.

[156] *Id.*

[157] Pariente & Kalmanson, *supra* note 16, at 18 ("Accountability for the conduct of judges, like all public officials, is, of course, critical to a well-functioning democracy."). Scholars have presented various arguments as to the proper route to achieving accountability. *See, e.g.*, Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 756 (2018). *But see* Kalmanson, *supra* note 67, at 88 (responding to Robertson, *supra*).

[158] Pariente & Kalmanson, *supra* note 16, at 18 (citing Margaret H. Lemos, *The State of the Judiciary*, 101 JUDICATURE 52, 55 (2017), https://judicialstudies.duke.edu/wp-content/uploads/2017/08/Judicature-Fall2017-roundtable.pdf).

> judge to commit to following the constitution, the statutes, common law principles, and precedent without intrusion from or intruding upon other branches of government. It does not refer to independence from judicial disciplinary bodies (or from higher courts). Decision making is constrained by the evidence, by appropriate procedural rules, records and legal principles.[159]

In short, accountability should not come at the cost to the judiciary as an institution.[160]

Attacks on the judiciary, such as those explained above, are antithetical to the Framers' conception of an independent and non-political judicial branch of government.[161] In the words of Justice Stevens, "[i]t's part of the job to write unpopular decisions."[162] Judges should not be subject to attack for doing their jobs. At this time, when our country is increasingly polarized, protecting the judiciary as an institution is more important than ever.

IV. WHY STATE COURT JUDGES ARE MORE VULNERABLE TO ATTACK THAN FEDERAL JUDGES

In this "current political climate, one of the greatest challenges for state courts is to remain fair and free."[163] As this Part explains, key differences between federal and state courts–outlined above–render state court judges even more vulnerable to improper influence and attack than judges in federal courts. First, Section A explains that states' use of elections in the judicial selection process threatens judicial independence from even before a judge takes the bench. Second, Section B explains how states' use of shorter, renewable judicial terms makes state courts more vulnerable to attack because of the retention process.

A. State Court Judges Face Election for Judicial Selection

In the judicial selection context, the major difference between federal and state judges is that federal judges are not subject to

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[159] *In re* Hammermaster, 985 P.2d 924, 936 (Wash. 1999) (en banc) (citing Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 MERCER L. REV. 645 (1995)).

[160] Pariente & Kalmanson, *supra* note 16, at 19.

[161] *Id.* at 16.

[162] Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES (Sept. 23, 2007), https://www.nytimes.com/2007/09/23/magazine/23stevens-t.html.

[163] Pariente & Robinson, *supra* note 14, at 1536.

election—ever.[164] By providing for "lifetime tenure with removal only for high crimes and misdemeanors[,]"[165] the federal model virtually removes the threat of political influence on judicial election and retention.[166] As Justice Kennedy explained in his concurring opinion in *Republican Party of Minnesota v. White*, "[t]here is general consensus that the design of the Federal Constitution, including lifetime tenure and appointment by nomination and confirmation, has preserved the independence of the federal judiciary."[167]

In state courts, judicial elections cause one of the largest threats to judicial independence.[168] Decades of debate and change have made clear that "[e]lected judges and judicial independence have always been an awkward fit."[169] As we often see in other branches of government, judicial elections foster the public perception that the judge may be subject to improper influence such as political actors or the public's majority view.[170] Thus, this perception undermines the trust in the judiciary as the one independent branch of government where each citizen should expect to be treated equally under the law regardless of external variables.[171] The "election of state court judges and justices—whether partisan or nonpartisan—always creates the real risk of politicizing the judiciary and subjecting the judiciary to special interest influence."[172]

State court decisions, as with federal court decisions, "affect people's everyday lives in significant ways[.]"[173] Making those decisions under the threat of, or pressure from, an impending election can be difficult. Thus, elected state court judges are faced with the difficult task of balancing the requirement to remain fair and impartial when deciding local issues that may impact voters who ultimately determine

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[164] Pariente, *supra* note 133.

[165] *Id.*

[166] *Id.*

[167] 536 U.S. 765, 795 (2002) (Kennedy, J., concurring).

[168] Bannon, *supra* note 62; Bannon, *supra* note 20, at 1.

[169] Bannon, *supra* note 62.

[170] Bannon, *supra* note 20, at 1.

[171] *See* Bannon & Robbins, *supra* note 18.

[172] Pariente & Kalmanson, *supra* note 16, at 25.

[173] Greytak et al., *supra* note 22, at 2.

whether the judge remains on the bench.[174] Indeed, studies have shown that elections do in fact affect judges' decision-making.[175]

But the harm does not stop there. Studies also suggest "that the effects of big-money elections can cascade beyond the immediate race," subjecting the entire court and its system to the risk of undue influence.[176] As a result, several scholars suggest eliminating judicial elections both in the initial selection and reappointment process.[177] For example, the Brennan Center suggests "a *publicly accountable* appointment process for supreme court justices[.]"[178] As Alicia Bannon wrote in 2018, "state supreme court elections in today's super-charged political environment pose too great a threat to both the appearance and reality of evenhanded justice to be a desirable selection method."[179] Rather, states should employ methods of judicial selection that do not require judges to identify with a specific political ideology or campaign to voters.[180]

B. State Court Judges Have Shorter, Renewable Terms

Another significant difference between federal and state courts is the existence, much less the method, of judicial retention. Unlike federal judges, who enjoy lifetime tenure, state judges (with only a few exceptions) serve shorter terms subject to periodical renewal.[181]

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[174] *Id.* ("[T]he culture of influence from well-to-do donors and special interests may threaten the ability of judges to deliver impartial justice.").

[175] *New Analysis: Judicial Re-Election Pressures Tied to Harsher Criminal Sentencing*, BRENNAN CTR. FOR JUST. (Dec. 2, 2015), https://www.brennancenter.org/press-release/new-analysis-judicial-re-election-pressures-tied-harsher-criminal-sentencing (discussing Berry, *supra* note 21) [hereinafter *New Analysis*].

[176] Bannon et al., *supra* note 134, at 16.

[177] *E.g.*, Bannon, *supra* note 20, at 1.

[178] *Id.* at 6.

[179] *Id.*

[180] *See* Justice Sandra Day O'Connor & IAALS, *The O'Connor Judicial Selection Plan*, INS. FOR ADVANCEMENT AM. LEGAL SYS. 1, 7–8 (2014), https://iaals.du.edu/sites/default/files/documents/publications/oconnor_plan.pdf [hereinafter *O'Connor Plan*]. Eliminating judicial elections does not render judges free from rebuke for improper behavior. Pariente & Kalmanson, *supra* note 16, at 25. Even without elections, judges remain responsible for complying with state codes of judicial conduct. *Id.* at 26. Additionally, judges remain governed by each state's authority for ensuring that judges are held "accountable for violating judicial codes of conduct." *Id.*

[181] Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 L. & CONTEMP. PROBS. 79, 118 (1998).

While "[j]udicial selection debates usually focus on how judges first reach the bench, . . . it is the process for retaining sitting judges that can have the most pernicious effects on judicial behavior."[182] Some studies indicate that the pressure of retention affects judicial decision-making in state courts.[183] "[A] large body of research suggest[s] that elected judges take into account voter and donor preferences when deciding cases[,]" especially when an election is looming.[184] For example, a 2015 report from the Brennan Center concluded that "[e]mpirical studies across states, court level, and method of election find that proximity to re-election makes judges more punitive — more likely to impose longer sentences, affirm death sentences, and even override life sentences to impose death."[185]

This effect on judicial decision-making poses grave danger to the legitimacy of our courts. As Justice O'Connor said in 2012, "[i]f decisions are in fact not fair and impartial—or even if they are perceived as being biased—the basis for support for our courts crumbles."[186]

Thus, as several scholars and organizations have suggested, states should reconsider judicial reelections and judicial retention elections.[187] Regardless of the ultimate retention method, as with judicial selection, states should eliminate political alignment from the judicial retention process.[188] *The O'Connor Judicial Selection Plan* recommends "retention election[s] in which the judges are 'retained' in office or not on the basis of the vote of the electorate[,]" who is educated on candidates by objective judicial evaluations.[189] However, this plan would still require judges to stand for retention in the middle of their terms,[190] which could affect judicial decision-making, as explained above. Therefore, the optimal system may be one like that proposed by the Brennan Center in which either "justices serve a single fixed . . . term, providing for good behavior tenure," like the federal system, or

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[182] Bannon, *supra* note 20, at 2.

[183] *See, e.g.*, *id.* at 10; Berry, *supra* note 21, at 9; *New Analysis*, *supra* note 175.

[184] Bannon, *supra* note 20, at 11.

[185] Berry, *supra* note 21, at 13.

[186] *O'Connor Plan*, *supra* note 180, at 2.

[187] *See, e.g.*, *id.* at 8.

[188] Bannon, *supra* note 20, at 10.

[189] *O'Connor Plan*, *supra* note 180, at 8.

[190] *See* Pariente & Kalmanson, *supra* note 16, at 26.

"an independent commission [is vested] with the power to make reappointments."[191]

V. CONCLUSION

Regardless of political ideology, judicial independence is critical to the proper functioning of our government. "Public trust and acceptance of the deployment of government's power are the proper concern of all but are a special concern of courts and judges. . . . Courts and judges are the bulwark against the disintegration of the mutual trust sustaining the life of democratic government."[192]

It is important to discuss and maintain the independence of this country's judiciary as a whole. In doing so, we must pay close attention to state courts. State court judges are more vulnerable than federal court judges to improper outside influences and political attacks due to key differences between the two systems. Most notably, many state court judges face election in judicial selection and serve shorter terms that require judges to participate in retention processes. These differences mean that state court judges are oftentimes subject to campaigns and public votes.[193]

"[W]ithout a system comparable to federal judges' lifetime appointments (or at least a defined lengthy term) [state court judges] will always be vulnerable to removal, or fear of removal, for rendering 'unpopular' decisions, or those disapproved by public opinion, special interests, or the other political branches."[194] Thus, preserving the independence of state courts is critical to our democracy. In the words of Chief Justice John Roberts:

> *We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. . . . The independent judiciary is something we should all be thankful for.*[195]

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[191] Bannon, *supra* note 20, at 10.

[192] Carrington, *supra* note 181, at 80.

[193] Pariente, *supra* note 133 ("[J]udges and justices in states with partisan elections inevitably must campaign before the general public[.]").

[194] Pariente & Kalmanson, *supra* note 16, at 27.

[195] Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, AP NEWS (Nov. 21, 2018), https://apnews.com/c4b34f9639e141069c08cf1e3deb6b84?utm_medium=AP&utm_source=Twitter&utm_campaign=SocialFlow.