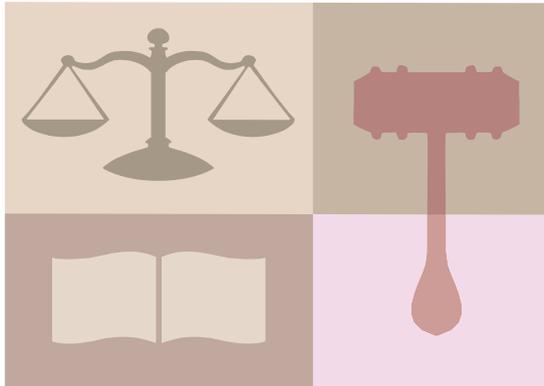


# JUDGES FOR ALL™

Reducing judicial campaign fundraising  
and increasing voter participation  
with the Retention Ballot<sup>1</sup>



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“Without public confidence, the judicial  
branch could not function.”

*In re Raab*  
100 N.Y.2d 305, 315-316,  
763 N.Y.S.2d 213, 218 (2003).

## **JUDGES FOR ALL™**

Reducing judicial campaign fundraising  
and increasing voter participation with the  
Retention Ballot<sup>2</sup>

This article proposes the adoption of the Retention Ballot as a means of improving Ohio's judicial elections. Simply stated, this ballot gives voters the choice of voting for or against retention of an incumbent judge, who runs without an opponent. Merit-selection states use it because they consider that judges nominated for appointment by "select commissions", having passed this initial screening, need not run against opposition in future elections. However four other states without Merit-selection also use it. A possible example is on the last page.

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Its current use in four states without Merit-selection proves that the Retention Ballot is adaptable to Ohio, where the Governor is not limited to nominees of “elite” panels in filling vacancies on the Bench. This article does not advocate changing this system of appointments. Therefore no amendment to our Constitution is required and the Retention Ballot can be adopted by the General Assembly under the authority of Article IV, Section 4.06(A)(4) of the Ohio Constitution.

The Retention Ballot can ameliorate the two major problems with our current system: (i) public cynicism about judicial campaign contributions, because elections will no longer be competitive, and (ii) low voter participation in judicial elections because voters will always be able to vote “yes” or “no”.

## **A. Campaign fundraising damages judicial credibility**

The election of judges in Ohio is like the election of other public officials except for the use of the nonpartisan ballot. Success in contested races depends upon campaign financing and “electable” names. The nonpartisan ballot gives no other information. For these reasons well-funded but less-qualified judicial candidates can be elected and often are, much to the dismay of the organized Bar and other civic groups.

While it may be argued that this is the unavoidable price of democratic elections, it can lead to a decline in both the quality as well as the credibility of justice. Quality depends upon electing the best candidates. Credibility depends upon other factors.

Lawyers who practice daily in our court system worry that the best candidates in terms of ability are not being elected, simply due to the cost of elections.

However, the very fabric of our society can suffer if the general public perceives that justice favors the wealthy. Unfortunately, this belief is more widespread than we perceive.

“According to several recent polls, more than three quarters of respondents believe that campaign cash influences rulings.”

Billy Corriher, *Strong Recusal Rules Are Crucial...* Center for American Progress, November 20, 2012.

“There is no question that justice is for sale in Ohio today.”

Justice William O’Neill, *The Columbus Dispatch*, May 10, 2013.

The numbers seem astronomical to the average voter who is fortunate to claim \$40,000 to \$50,000 of household income. They range from \$1 million for Supreme Court races to \$100,000 for the Common Pleas Courts. Polls indicate that the average voter finds it incredible that contributors of thousands of dollars to judicial candidates would expect nothing in return.

However, with the Retention Ballot, campaign funding is no longer an issue because all elections would be uncontested and, except for the rare challenge to retention, judges would not have to ask for campaign funds. According to the American Judicature Society, during 2000 - 2009 all retention elections cost only one percent of all other judicial elections, \$2.3 million vs. \$204 million.

Further, with a retention ballot, there is no opportunity for opposition candidates with “electable” names and little else but money to run for election. This dramatic reduction in the significance of campaign finance can help remove the negative impression of judicial partiality.

### **B. Voter drop-off can result from limiting voting rights.**

The other concern for our judicial system relates to the declining numbers of voters participating in judicial elections. Although democracy relies for its legitimacy upon the exercise by citizens of their voting rights, recent elections demonstrate that our judicial system rests upon an increasingly apathetic and uninformed electorate.

In the November, 2012 election in Franklin County, about 48% on average of those who voted for President did not vote for any of the candidates for the Common Pleas Court. In the Court of Appeals races voter drop off averaged 46%. In the Supreme Court races 28% did not vote for any candidate. Contested races occurred in both the Court of Appeals and Supreme Court elections, and therefore a great deal of money was spent on advertising in all these races. However, more was spent, proportionately, in the Supreme Court races. This may account for the dubious improvement of about 20% in the number of voters in those races.

Voter drop-off is not unique to Ohio, and is thought to be a problem even in Missouri, the original “Merit-selection” state.

“In 2010, the drop-off in Missouri judicial retention elections was 16 percent, a result of voters’ tendency to not vote should they not feel informed.”

Megan O’Neill, *Voter drop-off a threat to Missouri judicial elections*, *Missourian*, October 31, 2012.

Only 16%! Ohio’s statistics are far worse by comparison. This may be due to any number of reasons. Some suggest it is a matter of ballot placement. Local judicial races fall to the bottom of the ballot and we may be seeing symptoms of “voter fatigue”. However, this is not easily changed, as other candidates will resist the placement of their offices in a lower position. It has also been suggested, without evidence that this would improve voting numbers, that judicial races should be moved to separate dates so they don’t compete with other races.

This will also be resisted because of the cost of separate elections and the experience of fewer voters participating in primary and other local elections.

One fact is inescapable, however. Many voters do not participate in uncontested judicial elections in which the only choice the voter has is to accept the single name on the ballot. As many voters have remarked, this seems like a pointless exercise since their vote is meaningless. They understand that the single candidate is *always* elected. The result is entirely predictable. Although they don't think of it this way, it is also essentially as undemocratic as elections in single-party countries with only one candidate on the ballot.

In Franklin County, to the dismay of *The Columbus Dispatch*, six of eight Common Pleas races last November were uncontested. In these races voter drop-off averaged 53%! However, other local races were also uncontested. In these races, voter drop-off varied from 30% (Clerk of Court) to 47% (Engineer) and averaged 38%.

Let's see what happened in the local *contested* races in which voters had a choice. In the two judicial races, voter drop-off averaged 35.5%. In the three non-judicial races (Recorder, Sheriff and Treasurer) voter drop-off averaged 12.4%.

35.5 % (contested) may be a lower number than 53% (uncontested) but it's hardly something to brag about.

It could be concluded that if more judicial races are contested, more voters will participate. However, is this likely to happen? Let's look at statewide statistics. In all of Ohio, 90 judges in 31% of judicial races were unopposed, which is nearly a record.

Having more candidates contest elections is simply beyond our control. Elections cannot be contested if political parties and candidates are not willing to fill slots on the ballot and raise money for campaigns. If trends are any indication, elections will become less affordable to many potential candidates. Costs will continue to escalate, fueled with "outside" money in increasing sums as a result of *Citizens United*. The problem of unfilled slots on ballots will likely worsen.

Public funding of judicial campaigns is not a realistic option for solving this problem and there is only one alternative left, the Retention Ballot.

The Retention Ballot is the only device available to give voters a choice in elections in which they otherwise would have none. We can assume, without any definitive proof, that voters, once able to vote “yes” or “no” for the retention of a judge, will be more inclined to vote than if they can only vote “yes”. Examples abound from the Civil Rights Era that voters who are fully able to exercise their franchise will do so. In any event, there is nothing to lose by adopting the Retention Ballot where judges are unopposed. Few voters should object to this.

### **C. Non-partisan ballots increase voter drop-off**

Judicial election experts have long assumed that the nonpartisan ballot forces voters to consider more relevant factors than political affiliation. In reality, in highly contested races, the political parties ensure that voters are acquainted with the candidates' politics. Further, when a judge has been recently appointed, there is rarely any doubt that his party lines up with the Governor's.

What happens, however, when a candidate's political affiliation is not known to an individual voter? Is that voter more or less likely to vote? In the opinion of one writer, the answer is clear. That voter is less likely to vote.

“As with partisan elections, most voters in nonpartisan elections know little about the qualifications of the candidates. However, because the party voting cue is not available in nonpartisan elections, even more voters are relegated to basing their vote upon irrelevant factors, such as ballot position and name. Moreover, the empirical evidence suggests that voter drop-off is even more significant in nonpartisan judicial elections—voter apathy is endemic in most nonpartisan races. Because of these factors, incumbents overwhelmingly win re-election, regardless of ability.”

Peter D. Webster, *Selection and Retention of Judges: Is There One “Best Method?”*, Florida State University Law Review (1995)

This theory can be tested by examining some recent county-level elections in Ohio. If Mr. Webster is correct, voter drop-off in county judicial races should be greater than voter drop-off in county non-judicial races.

Candidates at this level have similar campaign problems. County Recorders, Coroners, Engineers and Judges rarely receive publicity, giving voters little information about job performance. The only difference in their ballots is that Judges' ballots are nonpartisan.

Looking again at the contested races in Franklin County last November, in the two judicial races, voter drop-off averaged 35.5%. In the three non-judicial races (Recorder, Sheriff and Treasurer) voter drop-off averaged 12.4%.

The results in two other major counties were similar. Voter drop-off in two contested judicial races in Hamilton County averaged 40% and in two contested non-judicial races it averaged 12%.

In Cuyahoga County, voter drop-off in ten contested judicial races averaged 40% and in the single contested non-judicial race was 25%.

The results support Mr. Webster's theory that the nonpartisan ballot reduces voter participation. Does this suggest a return to the traditional partisan ballot? In other words, should candidates continue to conceal their political affiliation on the ballot while their parties make no secret of their sympathies? Does this not seem like hypocrisy?

The nonpartisan ballot attempts to prevent voters from electing one candidate instead of another solely on the basis of party politics. What relevance does it have when only one candidate is running?

When the partisan ballot is used for two competing candidates, the *only* information presented in addition to their names is their party affiliation. Perhaps when judicial candidates are competing, this gives too many advantages to the majority party, which has ample resources to run advertising. However, if only one candidate is running, what is the risk of giving that candidate's party affiliation along with other "voting cues" such as age and years of experience? That candidate's party is not likely to run an expensive advertising campaign.

Further, political affiliation is a fact of life which can tell us a great deal about a person. In judicial elections there is very little information because of the relative obscurity of the daily functions of judicial office.

One Las Vegas columnist who failed to vote for judges in 2010 but attempted to do so in 2012 wrote:

“The election of judges is an utter farce. Perhaps my favorite piece of data in support of this assertion is that in the 2010 election, 466,000 voters in Clark County cast their vote for a candidate in the U.S. Senate race, while about 360,000 voters made a choice in the countywide judicial races. So, 100,000 people took a pass in the judicial races.”

“The problem, however, is that it’s never been clear to me how to make a good decision. In political races, the political party stands as a shorthand, albeit an imperfect one, for the person’s beliefs. Then, you try to get a decent sense of the candidates from TV debates and interviews, newspaper profiles and their websites. No such luck with the judges, who are nonpartisan and receive scant media coverage, other than editorial page endorsements and brief write-ups in voter guides.”

“This week I set out to put myself in the shoes of the average voter and try to determine how to pick a judge. I called some attorneys. None would go on the record to tell me the best candidates and most wouldn’t go on the record to talk at all.”

“So, who should you vote for? Here’s a first for this column: I’ll admit I remain confounded and have no opinion.”

J. Patrick Coolican, *Las Vegas Sun*, Oct. 28, 2012

Mr. Coolican’s article demonstrates that the problem is more serious than voters using the “wrong” information, such as political affiliation, to vote. Voters simply fail to vote for judges because they have little or no information to use. We therefore have a choice of either providing such “voting cues”, in the words of Mr. Webster, or allowing voter drop-off in judicial elections to grow.

At what point will the public and responsible officials perceive that certain judges no longer have a mandate to serve? Will a judge who is only elected by 25% of the voters command as much respect as a judge who is elected by more than 50%? Before that question ever arises, we ought to modify our ballots as necessary to encourage voting, no matter how imperfect such modifications may be.

Providing the political party of a judicial candidate on a Retention Ballot will not create a partisan ballot in the usual sense because there will be no opposition candidate supported by the opposing party. Campaign fundraising should not increase, and the only effect on the election will be a larger number of voters.

Similarly, with the additional space resulting from the absence of an opposition candidate it should be possible to include other information on the ballot, such as age and years of judicial experience.

Voters are entitled to base their votes on any information they have. While we hope that they will vote intelligently, we certainly do them and the judicial election process no service by eliminating all information they may consider relevant about a candidate from the ballot. These three bits of information, party affiliation, age and years of experience (in addition to gender, which is evident from the name of the candidate) give far more information that voters would consider relevant than the current nonpartisan ballot and therefore should reduce voter drop-off.

#### **D. Voter education is presently ineffective**

This writer has heard the argument made many times that the only problem with our current system is that voters need to be better informed. There is no disagreement with that statement and were it possible, other options would not be required. Many well-intentioned people and organizations have taken on that task and after each election they meet and resolve to do a better job the next time. However, the acid test of voter education comes when well-funded candidates compete with dueling campaigns. Being realistic, is it ever possible that voter education can affect the outcome of such races? One would not think so, based on a simple fact.

*Non-profit groups can never raise as much money as well-financed political campaigns.*

The fact of modern politics is that the candidate with the largest purse usually wins. This is the way campaigns operate in the present era. Most campaign advertising runs on television, which is an expensive medium. Non-profits simply cannot afford to spend money on television. The print media, where non-profits typically advertise, is presently the only place where substantive articles and editorials concerning judicial candidates can be found. However, voters increasingly do not read print media. Of a target population of more than 70 million adults age 18-34,, only 28.4% read printed or e-edition newspapers.

(Newspaper Association of America, March 18, 2013)

In fact, television is now the principal source of most of our information, which is a sad commentary on our culture:

“[M]ost citizens remain connected to conventional sources such as television for their information, and receive relatively little information that sticks or that motivates even minimal actions such as voting.”

W Lance Bennett, in *Media, Politics and Democracy*, Threshold, Fall 2004,

An advantage of the Retention Ballot is that substantive voter information does not have to compete with television campaigns. The simple reason is that in noncompetitive elections there usually is no television advertising. Therefore information published in the print media may have a better opportunity of attracting attention and winning an audience.

Voter education in Ohio is also woefully inadequate. Voter guides, including the highly esteemed guides of the League of Women Voters, only quote submissions by candidates without any independent evaluations. Bar Associations assign general ratings such as “qualified” or “well qualified”. Interviews of lawyers, court personnel, jurors and others who come into contact with a judge and the publication of their reports would require an expenditure of time and money, but the effort would be worthwhile. For an example of such a program which has proven successful in evaluating judicial performance for retention elections in Chicago, please see the Report of the 2012 Judicial Performance Commission of Cook County, Illinois (September 2012) at [www.voteforjudges.org](http://www.voteforjudges.org).

## **E. Ohioans have not rejected the Retention Ballot**

The argument has been made that Ohio voters have already rejected the Retention Ballot and any attempt to revive it would be unpopular. The election to which this argument refers is the failed 1987 attempt to amend the Ohio Constitution and adopt Merit-selection. It would be a mistake to make this assumption.

This was a complicated issue to install thirteen appointed nominating commissions, one for each appellate district and the Supreme Court, for the purpose of nominating three candidates for appointment to each judicial vacancy. Thereafter each appointee would stand for retention elections at normal intervals.

Limiting the Governor's power of appointment would have removed one of his most important political prerogatives and it was not surprising that the issue attracted powerful opposition and was defeated 2-1. The Retention Ballot was a minor part of the issue and was not singled out for condemnation. Therefore it cannot be said to have been rejected by the voters.

A fair test would be the introduction of a bill to amend the election law in both houses of the General Assembly. No criticism should attach to a measure that would actually increase voting rights in nearly a third of judicial ballots while leaving the Governor's power of appointment to judicial vacancies completely intact.

## **F. Retention elections with informative ballots will subject incumbents to greater scrutiny**

Finally, the argument may be made that retention elections will “protect” incumbents. If an informative ballot is used, which describes a judge’s political affiliation, age and judicial experience, more voters will actually have information that they currently do not have in uncontested races. They will also not be subjected to the confusing television “spot” ads of contested races. They can have the opportunity to focus on the incumbent alone, and are more likely to vote. Not only will their vote be more meaningful but they will have more information readily at hand. Rather than “protecting” an incumbent, this can make him the center of attention for many more voters in that race.

By reducing voter apathy and increasing voter participation, we can turn the *certainty* of today's uncontested elections to the *uncertainty* of tomorrow's retention elections. It is such uncertainty that attracts voters and ultimately strengthens democracy.

### **Conclusion**

How are Ohio voters likely to react to Retention Ballots for *all* elections, not just uncontested ones? At the present date, there have been no polls in Ohio with respect to use of the Retention Ballot. Last December respondents indicated in a *Quinnipiac University* survey that they prefer Supreme Court Justices to be elected rather than appointed. There was no question asked about what kind of elections they would prefer.

In order to survey voters about use of the Retention Ballot, it would be necessary to inform them of the basic facts about this novel idea. Otherwise the survey would tell us very little. For example, respondents might be told that the Retention Ballot is essentially an uncontested ballot in which they can vote “yes” or “no”. They could also be told that the experience with uncontested ballots is that judges do not have to raise money to campaign, and that in addition to the judge’s name the ballot would have the judge’s political party, age and years of experience. Then the respondent could be asked which he would prefer, the current practice in which two candidates compete for an election on a nonpartisan ballot, or the retention ballot as was described.

In the absence of such a survey, we can only suggest that trial legislation be introduced for public reaction and debate. Surely the effort to increase voting rights in uncontested elections would be appreciated. The offer of additional “voting cues” in all judicial elections should also be welcomed. Finally, explaining that all judicial elections would be “uncontested” for the purpose of eliminating fundraising would strike a responsive chord with voters’ groups who have long criticized this practice.

No progress is ever made without challenging complacency. The history of Ohio is replete with examples of far-sighted men and women who have done so. There are others today equally capable of this challenge. We hope they will rise to meet it.



Judges for All is a nonpolitical effort organized by citizens concerned with improving judicial elections. Comments and questions may be directed to [judges4all@outlook.com](mailto:judges4all@outlook.com) or by calling (614) 209-5010.

