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The Road Paved with Gravel: The Encroachment of South Carolina's Judiciary through Legislative Judicial Elections

Samantha R. Wilder

THE ROAD PAVED WITH GRAVEL: THE ENCROACHMENT OF SOUTH CAROLINA'S JUDICIARY THROUGH LEGISLATIVE JUDICIAL ELECTIONS

I. INTRODUCTION

In the recent showdown between two South Carolina Supreme Court justices for the position of chief justice, the failures of South Carolina's legislative judicial election system were thrust to the forefront of public discourse.[1] In one corner was the current chief justice and former legislator, Jean Hoefer Toal; in the other corner was current associate justice and former public defender, Costa M. Pleicones.[2] While Chief Justice Toal may prove the catalyst for reform, this highly contested election highlighted the blurred line between the legislative and judicial branches.[3] An observer of South Carolina judicial politics—and this

1. Cindi Ross Scoppe, Op-Ed., *Chief Justice Race About More than Pleicones v. Toal*, THE STATE, Nov. 7, 2013, at A6, *available at* http://www.thestate.com/2013/11/07/3081753/scoppe-more-at-stake-in-chief.html.

2. Corey Hutchins, *State Supreme Court Chief Justice Toal to Face Rare Opponent*, CHARLESTON CITY PAPER, Aug. 9, 2013, http://www.charlestoncitypaper.com/TheBattery/archives/2013/08/08/race-for-supreme-court-justice-set-for-this-winter.

3. *See* John Monk, *Toal-Pleicones A High Stakes Game of Thrones*, THE STATE, Jan. 26, 2014, at A1, *available at* http://www.thestate.com/2014/01/25/3227178/game-of-thrones-toal-

race in particular—noted that "the mind reels at where even the most honest and well-intentioned justices might be tempted to go when they meet behind closed doors with legislators who have votes to provide them . . . and requests to make of them."[4] Most judicial elections in South Carolina are decided before a formal election even takes place.[5] This election, however, was unprecedented because it marked the first time a sitting chief justice ran opposed for reelection since the 1800s.[6] While the nature of this election will likely reveal other issues in the already troubled judicial system, neither candidate expected third-party spending to influence the election's outcome.[7]

In 1996, South Carolina reformed its judicial elections and sought to remedy four specifically identified problem areas: the impact of prior legislative experience, the impact of a candidate's race, the impact of a candidate's gender, and the number of candidates running for judicial office.[8] But this reform proved unsuccessful in remedying these issues, failing to fully restore public confidence in the judiciary or alter the public's perception of the judiciary as a "good-old-boy" system.[9] Therefore, South Carolina should eliminate the 1996 system and move to an appointment with life tenure model based on the gubernatorial appointment model, which involves legislative confirmation of gubernatorial appointees. Specifically, South Carolina courts and the General Assembly should alter the judicial selection model to conform to the original intent of the Framers of the United States, as evidenced in the *Federalist Papers*

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pleicones.html. State Senator Greg Gregory's remarks—that "[a] lot of senators are terrified of this race" and "[s]ome of their professions are tied to it"—highlighted the blurred lines between the South Carolina General Assembly and the state's judiciary. *Id.* The line between the legislative and judicial branches will remain blurred, however, as Chief Justice Toal—a former legislator herself—was reelected to the position in a race that came down to politics. *See* John Monk, *Toal Victorious in Historic Duel: S.C. Chief Justice Race*, THE STATE, Feb. 6, 2014, at A1 [hereinafter Monk, *Toal Victorious in Historic Duel*], *available at* http://www.thestate.com/2014/02/05/3246421/toal-wins-historic-duel-for-sc.html.

4. Scoppe, *supra* note 1.

5. John Monk, *Pleicones vs. Toal in Supreme Court Chief Justice Race*, THE STATE, June 25, 2013, at A5, *available at* http://www.thestate.com/2013/06/24/2832791/justice-pleicones-will-face-toal.html ("Usually, elections are settled by quiet agreements between justices on succession, as well as lobbying behind the scenes to get enough votes from lawmakers so there doesn't have to be an election."); Hutchins, *supra* note 2.

6. Scoppe, *supra* note 1.

7. Corey Hutchins, *Could Dark Money Influence Rare Election for S.C. Supreme Court Chief Justice?*, FREETIMES (Aug. 21, 2013), http://www.free-times.com/news/could-dark-money-influence-rare-election-for-s.c.-supreme-court-chief-justi. However, South Carolina remains incredibly unregulated in the area of third-party spending. Hutchins, *supra* note 2. Furthermore, special interest groups such as the General Assembly's Black Caucus played a large role in Chief Justice Toal's reelection, as she received thirty-one of the thirty-six members' votes. *See* Monk, *Toal Victorious in Historic Duel*, *supra* note 3.

8. James H. Ritchie, Jr., *The Judicial Merit Selection Commission: History of the JMSC and the Screening Process for Judges in this State*, S.C. LAW., July-Aug. 2006, at 26, 30.

9. *See infra* notes 95–100 and accompanying text.

and the separation of powers doctrine underlying the U.S. Constitution.[10] A transition to this model would ensure that South Carolina courts remain a tool of countermajoritarian policies when appropriate. Additionally, a transition to this appointment model may restore the public's confidence in the state judiciary.

America's distrust of the judiciary—and all other forms or branches of government—dates back to its colonial history and break from British rule.[11] Colonial state governments experimented with a variety of judicial selection systems, including popular elections and appointment systems, to assuage the public's distrust of the legislature.[12] While the Framers were cautious not to pass judgment on individual states' governing structures,[13] their writings on democratic governance stressed the importance of separation of powers and an impartial, independent judiciary.[14] Moreover, throughout America's history, the judiciary—and the state judiciary in particular—has been a constant source of contention and focus of reformers nationwide.[15] Today, these discussions persist with enhanced vigor and statistical support in light of the increasingly polarized disposition of American society and highly contested nature of judicial elections.[16] In many ways, the continual whispers of dissatisfaction with state judicial systems, as well as the constant calls for reforming these systems throughout the various generations of American society, demonstrate that this area is an interminable frontier in America's experiment in governing.

Part II of this Note briefly explains the importance of judicial independence and its development through trial and happenstance in America—describing how judicial elections began and evolved into the most pervasive method of judicial selection in state governments, as well as the accountability mechanisms for the federal judiciary. Part III describes the three main types of state judicial

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10. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 705 (1995) ("One might well describe constitutionalism as the mechanism by which the democratic majority keeps itself faithful to certain important decisions it makes.").

11. *Id.* at 714 (citing THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776)).

12. *See generally* THE FEDERALIST NO. 47 (James Madison) (discussing the manner in which states allocated powers among the branches of government, including the judiciary); Croley, *supra* note 10, at 714–15 ("[S]ome early state constitutions provided for the election of some of their judges.").

13. *See* THE FEDERALIST NO. 47, at 342 (James Madison) (Benjamin Fletcher Wright ed. 1974). This caution was largely due to the Framers' respect for federalism and their belief that state governments should keep the federal government in check. *See id.*

14. Croley, *supra* note 10, at 720 ("Harris, agreeing in part with Stow, explained that in his view 'an independent judiciary' is 'the very soul of a free Constitution—without it the best system of government in the world is but a dead letter.'" (citing REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK, 1846, at 645 (Albany, Office of the Evening Atlas 1846) (statement of Mr. Harris))).

15. *See, e.g.*, Francis J. Menton, Jr., Book Review, 12 ENGAGE: J. FEDERALIST SOC'Y PRACTICE GROUP 130, 130 (June 2011) (noting that "the methods of selecting the judges of the supreme courts have come increasingly into focus").

16. *See, e.g.*, *id.* at 130–31 (reviewing a book about judicial elections that "focused on quantitative analysis of a limited number of questions that are subject to quantitative answers").

selection systems in detail prior to outlining South Carolina's system, a fourth method of judicial selection. Specifically, this Note highlights direct popular elections, the Missouri Plan, and the appointment system. Part IV explores the effects of the 1996 reform, along with the problems the reform sought to alleviate but failed to remedy. Finally, Part V sets forth the proposed recommendations for a new system or, alternatively, a series of minor reforms to the current system until South Carolina is ready to adopt the new system.

II. BACKGROUND

This Part sets forth the evolution of the independent federal judicial system—a framework South Carolina should use in reforming its judicial selection system. Part II also describes the environment that created the transition, evolution, and divergence of state judiciaries to a variety of selection methods as the foundation for the discussion of the various methods in Part III.

A. The Development of Judicial Independence

Despite the Framers' clear vision for an independent judicial branch, the independence of the federal judicial branch evolved slowly over time, through a muddled process, as the different branches of government struggled to find their role and spheres of influence in the new constitutional republic.[17] The first major development toward judicial independence occurred when, after the House of Representatives voted to impeach a sitting Supreme Court Justice as a political move, the Senate acquitted the Justice and thereby set the political precedent that "a judge's *judicial* acts may not serve as a basis for impeachment."[18] The second development came soon after the Civil War, when the Supreme Court held that, under Article III of the Constitution, Congress has the power to alter the Court's appellate jurisdiction without any judicial inquiry into the congressional motivation.[19] While this second event allowed Congress

17. *See* Hon. William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 579, 582 (2004).

18. *Id.* at 584, 589. The first major event in this saga occurred when President John Adams appointed the "Midnight Judges," which led to the impeachment trial against Supreme Court Justice Samuel Chase. *Id.* at 583–84. George Washington originally appointed Justice Chase in 1796. *Id.* at 584. The impeachment trial against Justice Chase was largely a political move from Jeffersonians, who were unhappy with the content of Chase's rulings from the bench and would have stifled the judiciary's independence had Justice Chase been convicted. *Id.* at 584, 588–89, 595. Instead, by voting to acquit Justice Chase, the Senate established the precedent that a judge's acts in the exercise of judicial duties should not be the basis for impeachment. *Id.* at 588–89.

19. *Id.* at 591 (citing *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). In *Ex parte McCardle*, the Court was expected to strike down the Reconstruction Acts as unconstitutional; however, while the Court was considering the case, Congress repealed the legislation providing the Court with the relevant appellate jurisdiction. *Id.* at 590–91, 595. The Court determined that it "could not inquire into the Congressional motive behind the legislation." *Id.* at 591 (citing

to retain some control over the judiciary, the Supreme Court ultimately survived as an independent institution with its own sphere of influence and retained most of its authority.[20] The third development occurred when public outcry and other factors protected the integrity of the institution by forcing President Franklin D. Roosevelt to abandon his attempt to enlarge the size of the Supreme Court.[21] Thus, regardless of America's distrust of the judiciary, this important branch of government authority and independence has always been protected from encroachments by the other branches.[22]

B. The Movement Toward Judicial Elections

As the three branches of government vied for power among one another during the struggle for judicial independence in this new constitutional republic, the American public also entered the equation and contested the appointment system for federal judges.[23] The appointment system was the prevalent system at the time; this system allowed the Executive Branch to appoint judges upon the advice and consent of the Senate.[24] The first major public outcry against this system occurred in the 1820s and focused on claims of abuses in the appointment of judges.[25] Instead of resolving this abuse problem, the public's switch in focus and prioritization of accountability over impartiality led to

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McCardle, 74 U.S. (7 Wall.) at 514). Therefore, the Court dismissed the case for lack of jurisdiction instead of striking down the legislation. *Id.* at 590–91, 595.

20. *See id.* at 591 (describing the outcome of the *McCardle* case as the "best conceivable one under the circumstances").

21. *See id.* at 591–95 (describing Roosevelt's proposal and its ultimate resolution). Additionally, "the switch in time that saved nine" reinforced the integrity of the institution when the Court upheld two pieces of New Deal legislation, rather than striking them down. *Id.* at 593–94 (citing FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 393 (1993)). An enlargement of the Court would have fundamentally changed its ideological balance, allowing Roosevelt to pass his legislation without the Court's challenge. *Id.* at 593. The enlargement also could have led to a severe loss in judicial independence by enabling every subsequent President to alter the number of Justices on the Court for ideological purposes. *See id.* at 592–93 (discussing Roosevelt's plan to allow the President to add additional members to the Supreme Court).

22. *See id.* at 595.

23. *See* Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 299 (2002) (discussing public involvement through Senate confirmation and retention elections).

24. *Id.* at 300.

25. Martin Scott Driggers, Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. L. REV. 1217, 1220 (1998) (citing Maura A. Schoshinski, Note, *Towards an Independent, Fair and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 846 (1994)). Notably, some states used popular elections for their judiciary at the time of the Constitutional Convention and, therefore, did not experience this transition to the same degree as discussed above. *See* Croley, *supra* note 10, at 714–15. Instead, Jacksonian Democrats used these states as examples to persuade other states to adopt election models for their own judiciaries. *See id.* at 716–17.

abuses of a different nature.[26] Subsequently, in the mid-nineteenth century, Jacksonian Democrats seized on this climate of unrest and convinced state legislatures to adopt models of popular elections for judges under the same partisan model as the executive and legislative branches.[27] In the early twentieth century, reformers called for a system that would incentivize higher quality judges to join the system—which led to today's structure—in which most states use either a nonpartisan election model or an appointment system with retention elections.[28]

Interestingly, throughout these reforms, proponents of an election model perpetuated their agenda through rhetoric filled with democratic principles, but largely avoided any discussion of the potential drawbacks of a switch to an election system.[29] One major drawback of the election system is that judges can become a tool of majoritarian politics instead of upholding the rule of law, becoming beholden to those who elect them rather than interpreting the law.[30] Additionally, the judicial branch is intended to serve as a guardian of minority groups in critical moments—such as the historical moment surrounding the *Brown v. Board of Education*[31] decision—when popular politics fails to protect marginalized groups.[32] This function of the judiciary is commonly referred to as the *countermajoritarian* nature of the courts, and one of the reasons the federal model of judicial selection is different than the other branches of government is to ensure the judiciary's independence and impartiality.[33]

C. Judicial Accountability

Perhaps anticipating the public outcry for an accountable judiciary, the Framers created important structural accountability mechanisms that can be used to override the decisions of the judiciary, while also insulating it from majoritarian politics.[34] Constitutional amendments can trump judicial decisions,

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26. Driggers, *supra* note 25, at 1220.

27. Menton, *supra* note 15, at 130.

28. *See id.*

29. Croley, *supra* note 10, at 722–23.

30. *See id.* at 720. Indeed, history showed the true danger of the election system when, "[b]y the early twentieth century, elective judiciaries were increasingly viewed as plagued by incompetence and corruption—a view that in 1913 led Herbert Harley, Albert Kales, Roscoe Pound, John Wigmore, and others to establish the American Judicature Society ("AJS") in the pursuit of judicial reform." *Id.* at 723.

31. 347 U.S. 483 (1954).

32. *Id.* at 495; Croley, *supra* note 10, at 722 & n.103.

33. *See* Croley, *supra* note 10, at 693, 722 n.103 (citing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (Yale 2d ed. 1986)) ("Perhaps the issue was not so important for the simple reason that state courts were not very involved in protecting rights . . . . On the other hand, some supporters of elective judiciaries implicitly acknowledged this role for state courts when they questioned whether the institution would be able to protect minority rights in the face of electoral pressures.").

34. *See id.* at 708, 709.

and a majority of Congress may change the jurisdiction of the courts.[35] Indeed, a majority of Congress can change judicial decisions by simply changing the law with appropriate legislation.[36] Additionally, judicial decisions require "sufficient support" of a majority willing to comply with these decisions for purposes of effectiveness and ensured execution.[37] Generally, a federal judge is appointed based on that person's position on constitutional and legal issues of the time.[38] Today, another important tool of accountability for the judiciary exists through the media's open access to courts, which—through increased transparency—could provide grounds for an impeachment trial.[39]

Similarly, the framers of the South Carolina constitution built in structural accountability mechanisms for the state's judiciary.[40] In South Carolina, the General Assembly can propose constitutional amendments to voters or pass legislation to change the jurisdiction of the courts to counteract any unpopular judicial decision.[41] Moreover, as South Carolina's lawmaking body, the General Assembly can change the law with appropriate legislation whenever necessary.[42] The South Carolina judiciary also relies on the General Assembly and Governor for approval of its operating budget, which inherently passes some control to the other branches.[43] While the budgetary process follows the federal model, the process still decreases the independence of the judiciary in South Carolina because, contrary to the federal model, the General Assembly hand selects members of the judicial branch. Thus, the General Assembly has power over the personnel and the purse strings of the judicial branch in South Carolina. The media, however, is relatively active in South Carolina and appears willing to expose various weak points in the political and judicial systems, which could provide the bases for impeachment trials.[44]

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35. *Id.* at 709.

36. *See id.*

37. *See id.* "[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." THE FEDERALIST NO. 78, at 490 (Alexander Hamilton).

38. Croley, *supra* note 10, at 709.

39. *See generally* Geoffrey Robertson QC, *The Media and Judicial Corruption*, *in* TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2007, at 108, 109 (2007) (discussing media training as a possible solution to decrease judicial corruption).

40. *See generally* Ritchie, *supra* note 8, at 27 ("Since 1776, these judges have been elected by the General Assembly.").

41. *See generally* S.C. CONST. art. V, § 5 (setting out the jurisdiction of the supreme court); *id.* art. XVI, § 1 (explaining the process by which the Constitution may be amended).

42. *See id.* art. III, § 1 ("The legislative power of this State shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'").

43. *See, e.g.*, Rick Brundrett, *Chief Justice Proposes Big Budget Hike, Faces Screening Hearing*, THE NERVE (Nov. 4, 2013, 8:00 AM), http://thenerve.org/news/2013/11/04/Judicial-budget/ (explaining how Governor Nikki Haley would review Chief Justice Toal's proposed judiciary budget before it was ultimately presented to the General Assembly).

44. *See, e.g.*, Rick Brundrett, *Judicial Income Disclosure Largely Hidden from Public*, THE NERVE (Jan. 22, 2014, 8:00 AM), http://thenerve.org/news/2014/01/22/Judicial-Income/ (pointing

III. METHODS OF JUDICIAL SELECTION

A. Popular Elections

Despite an American Bar Association (ABA) report calling for the end of all forms of contested judicial elections,[45] popular election is the most widely used system throughout the nation.[46] Today, thirty-three states use some form of direct vote—either partisan or nonpartisan.[47] Unfortunately, hotly contested elections are increasingly becoming the trend, and even judicial elections are becoming incredibly expensive—particularly with the growing involvement of lawyers and powerful interest groups.[48] The volatile nature of these elections creates an additional layer of concern, but uncontested elections would similarly threaten the independence of the judiciary.[49] A major concern is the effect of the campaign contributions of lawyers and private citizens that later appear before those same judges.[50]

B. The Appointment System

Under the federal model, the President—or, from an institutional standpoint, the Executive Branch—is entrusted with the appointment power of judges, who are then subject to legislative confirmation with the advice and consent of the

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out that information about judges' income is not readily available to the public); Jamie Self, *Report: S.C. Gets 'F' for Disclosure - Judiciary*, THE STATE, Dec. 4, 2013, at 11, *available at* http://www.thestate.com/2013/12/04/3137683/report-gives-sc-an-f-for-disclosure.html (noting that South Carolina is one of ten states that does not ask its judges for information about investments, financial liabilities, or the employment of their spouses); *see generally* S.C. CONST. art. XV, § 2 ("All impeachments shall be tried by the Senate . . . .").

45. Menton, *supra* note 15, at 130.

46. Kevin Eberle, *Judicial Selection in South Carolina: Who Gets to Judge?*, S.C. LAW., May–June 2002, at 20, 20 (citing Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1201–02 (2000)).

47. *Id.* (citing Maute, *supra* note 46, at 1201–02).

48. Menton, *supra* note 15, at 130–31; *see, e.g.*, Andrew Cohen, *An Elected Judge Speaks Out Against Judicial Elections*, THE ATLANTIC (Sept. 3, 2013, 2:04 PM), http://www.theatlantic.com/national/archive/2013/09/an-elected-judge-speaks-out-against-judicial-elections/279263/ (discussing judges who have spoken out against judicial elections); Ian Millhiser, *Justice Ginsburg: Elections Are 'A Dreadful Way to Choose People for Judicial Office,'* THINK PROGRESS (July 30, 2013, 11:37 AM), http://thinkprogress.org/justice/2013/07/30/2380321/justice-ginsburg-elections-are-a-dreadful-way-to-choose-people-for-judicial-office/ (discussing Justice Ginsburg's opinion that "electing judges is a 'dreadful' idea"); Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, AM. CONST. SOC'Y FOR LAW & POLICY, June 2013, at 1, 9 ("The increasing competitiveness and expense of judicial elections offers interest groups the opportunity to influence judicial outcomes.").

49. *See* Cohen, *supra* note 48 (highlighting that "judicial elections impair the fair administration of justice by fostering impermissible appearances of impartiality," which would be problematic regardless of whether the election was contested).

50. Menton, *supra* note 15, at 130–31.

Senate.[51] The Constitution safeguards the impartiality of federal judges by barring the reduction of their salaries throughout their tenure on the bench, as well as insulating these judges from the undue political pressures associated with campaigning.[52] Unfortunately, only four states presently retain lifetime tenure: New Hampshire, New Jersey, Massachusetts, and Rhode Island.[53] Indeed, lifetime tenure may be the most critical component of the federal model's protection of judges' impartiality.[54] The federal model was the most prevalent method of selection used by states during the founding of America, but it lost popularity with the rise of the Jacksonian Democrats.[55] Today, only a handful of states use a variation of the federal model, including California, New Jersey, and Maine.[56]

C. The Missouri Plan Hybrid

In contrast, the Missouri Plan[57]—or the "merit selection" model—is a hybrid system that preserves elections, but seeks to alleviate some of the negative effects of popular judicial elections.[58] This plan uses a nonpartisan state nominating commission for judges who are then appointed by either the legislature or the Governor.[59] Then, judges face uncontested retention elections by the public, which are similar to votes of no confidence.[60] If a judge loses, then the process starts over with a new nomination and subsequent appointment.[61] Today, fourteen states use the Missouri Plan as the method of selection for their state judges.[62]

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51. *See* COAL. FOR JUSTICE, AM. BAR ASS'N, JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES 5 (2008); Behrens & Silverman, *supra* note 23, at 300.

52. U.S. CONST. art. III, § 1; Behrens & Silverman, *supra* note 23, at 300 (citing U.S. CONST. art. III, § 1).

53. Behrens & Silverman, *supra* note 23, at 301.

54. *See id.* at 300 n.143 (citing THE FEDERALIST NO. 78, at 495 (Alexander Hamilton)).

55. COAL. FOR JUSTICE, *supra* note 51, at 4.

56. *Id.* at 5–6; Behrens & Silverman, *supra* note 23, at 300.

57. Croley, *supra* note 10, 724. The plan, originally developed by Albert Kales—a faculty member of Northwestern Law School—was named after the first state to adopt it. *Id.*

58. *See id.*

59. *See id.*; Elberle, *supra* note 46, at 22; Menton, *supra* note 15, at 130.

60. Croley, *supra* note 10, at 724; Eberle, *supra* note 46, at 22; Menton, *supra* note 15 at 130.

61. Croley, *supra* note 10, at 724.

62. Eberle, *supra* note 46, at 22. Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Missouri, Oklahoma, Tennessee, and Wyoming use the Missouri Plan. *Methods of Judicial Selection*, AM. JUDICATURE SOCIETY, http://www.judicialselection.com/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Mar. 24, 2014).

D. South Carolina's Hybrid System

Only two states, South Carolina and Virginia, use a hybrid system of merit selection coupled with legislative elections.[63] Although this system remains the prevalent system known and used in South Carolina, in reality, South Carolina uses three of the four judicial models—popular election, appointment, and this hybrid system—at varying levels of its judiciary.[64] The South Carolina constitution establishes a supreme court, court of appeals, and circuit court and sets forth a series of requirements individuals must meet to be eligible for a position on any of these courts.[65] In particular, at the time of election, an individual must be (1) a citizen of the United States, (2) a citizen of South Carolina for at least five years prior to election, (3) at least thirty-two years old, and (4) a licensed attorney for at least eight years.[66] Additionally, the Judicial Merit Selection Commission (JMSC) must nominate the individual.[67] Finally, while the South Carolina constitution imposes a mandatory retirement age of seventy-two for trial and appellate court judges, it does not limit the number of terms served.[68]

The South Carolina General Assembly elects justices of the supreme court to staggered ten-year terms—to ensure that a judicial election occurs every two

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63. Ritchie, *supra* note 8, at 28; *see also* Eberle, *supra* note 46, at 20 (stating that Connecticut, Virginia, and South Carolina are the only states that use legislative selection to select judges (citing Daniel R. Deja, *How Judges are Selected: A Survey of the Judicial Selection Process in the United States*, 75 MICH. B.J. 904, 904–05 (1996))). Deja's article states that Connecticut uses legislative selection as well. Deja, *supra*, at 904, 905. Today, however, Connecticut uses a commission that makes recommendations to the Governor. *Methods of Judicial Selection: Connecticut*, AM. JUDICATURE SOC'Y, http://www.judicialselection.com/judicial_selection/methods/selection_of_judges.cfm?state=CT (last visited Mar. 24, 2014). The Governor then chooses nominees from these recommendations, and the legislature appoints nominees in a manner prescribed by law. *Id.*; CONN. CONST. art. V, § 2.

64. *See generally* Karen L. Huelson, *A Snapshot of the South Carolina Court System*, S.C. LAW., Nov. 2012, at 34 (describing the different levels of the court system in South Carolina). The South Carolina General Assembly elects supreme court justices for "staggered, 10-year terms." *Id.* at 34 (citing S.C. CONST. art. V, § 3; S.C. CODE ANN. § 14-3-10 (2009)). The General Assembly elects court of appeals judges for six-year terms. *Id.* at 37 (citing S.C. CONST. art. V, § 8; S.C. CODE ANN. § 14-8-20(a) (Supp. 2013)). The Governor appoints masters-in-equity, with the advice and consent of the General Assembly, for six-year terms. *Id.* at 39 (citing S.C. CONST. art. V, § 26; S.C. CODE ANN. § 14-11-20 (Supp. 2013)). Probate judges, however, are elected to a four-year term by "popular vote of the qualified electors in their respective counties." *Id.* at 41 (citing S.C. CODE ANN. § 62-1-309 (2009)). "The governor, with the advice and consent of the Senate," appoints magistrate judges. *Id.* at 42 (citing S.C. CONST. art. V, § 26).

65. S.C. CONST. art. V, § 1; *see generally id.* § 27 (establishing the Judicial Merit Selection Commission to oversee the "qualifications and fitness of candidates for all judicial positions" on the Supreme Court and other courts filled by election in the General Assembly); Huelson, *supra* note 64, at 34 (explaining that individuals running for judgeships filled by election of the General Assembly must be nominated by the Judicial Merit Selection Commission).

66. S.C. CONST. art. V, § 15; Huelson, *supra* note 64, at 34.

67. S.C. CONST. art. V, § 27; Huelson, *supra* note 64, at 34.

68. S.C. CODE ANN. §§ 9-8-40, -60 (1986 & Supp. 2013); Huelson, *supra* note 64, at 34.

years—whereas the court of appeals and circuit court judges' terms last six years.[69] Proponents laud this system for partially freeing its judges from public concern, while producing a judiciary that is in line with public sentiment via elections by the General Assembly.[70] This argument in favor of the system, however, relies on the critical assumption that the General Assembly is also in sync with popular sentiment.[71] Moreover, critics point out that judges are only freed until the next legislative election.[72]

In 1996, South Carolina notably undertook a major reform of its judicial selection model, but the General Assembly ultimately retained its control over the election of judges.[73] The 1996 reform came after a highly publicized election in 1995 that showed just how partisan and personal elections had become.[74] During this 1995 election, the current chief justice, Jean Toal, faced opposition for her seat on the bench.[75] Chief Justice Toal was personally attacked for being "out of touch with the taxpayer" and labeled a liberal.[76] Ultimately, Chief

69. S.C. CONST. art. V, § 3 ("The members of the Supreme Court shall be elected by a joint public vote of the General Assembly for a term of ten years, and shall continue in office until their successors shall be elected and qualified, and shall be classified so that the term of one of them shall expire every two years."); *id.* art. V, § 8 ("The members of the Court of Appeals shall be elected by a joint public vote of the General Assembly for a term of six years and shall continue in office until their successors shall be elected and qualify. In any contested election, the vote of each member of the General Assembly present and voting shall be recorded. Provided, that for the first election of members of the Court of Appeals, the General Assembly shall by law provide for staggered terms."); S.C. CODE ANN. § 14-3-10 (1976) ("The Supreme Court shall consist of a Chief Justice and four associate justices, who shall be elected by a joint viva voce vote of the General Assembly for a term of ten years and shall continue in office until their successors are elected and qualified. They shall be so classified that one of them shall go out of office every two years. The successors of the Chief Justice and associate justices shall each be elected at the session of the General Assembly next preceding the expiration of their respective terms."); *id.* § 14-8-20(a) (Supp. 2013) ("The members of the Court shall be elected by joint public vote of the General Assembly for a term of six years and until their successors are elected and qualify; provided, however, that of those judges initially elected, the Chief Judge (Seat 5) and the judge elected to Seat 6 shall be elected for terms of six years each, the judges elected to Seats 3 and 4 shall be elected for terms of four years each, and the judges elected to Seats 1 and 2 shall be elected for terms of two years each.").

70. Eberle, *supra* note 46, at 22.

71. *See id.*

72. *See id.*

73. *Id.*

74. *See* Driggers, *supra* note 25, at 1217–18. Interest groups even participated by holding press conferences on their opinion of the proper candidate and outcome of the election. *Id.* at 1217 (citing Cindi Ross Scoppe & Lisa Greene, *Voting Opens for Toal, Ervin: Supreme Court Seat*, THE STATE, Feb. 6, 1996, at B1).

75. *See id.* at 1217. *See generally* Scoppe & Greene, *supra* note 73 (discussing the election and noting that Jean Toal was the incumbent supreme court justice in the election).

76. Driggers, *supra* note 25, at 1217 & n.2 (citing Cindi Ross Scoppe & Lisa Greene, *Politics Set Stage for Toal Hearing*, THE STATE, Jan. 17, 1996, at A1). *See generally* Scoppe & Greene, *supra* note 73, at B1 (noting that Jean Toal was the incumbent supreme court justice in the election).

Justice Toal won her reelection and her opponent withdrew, but the stage was set for the 1996 reform.[77]

Under the pre-1996 system, a committee oversaw the judicial selection process and issued findings on qualifications, but this committee had no defined qualification criteria and a finding of *unqualified* did not bar an individual from being considered or elected.[78] Additionally, nothing prevented legislators from running for judicial office during their service in the General Assembly, and nothing restricted the number of candidates that could run for a judicial election.[79] In sum, these factors created a public sentiment that the judiciary was simply a retirement plan for legislators, thus perpetuating the good-old-boy network.[80]

The most significant reform in 1996 was the establishment of the JMSC.[81] The JMSC was a revolutionary change to the judicial selection process because it introduced candidate screening—a process based on objective criteria.[82] The JMSC uses the following criteria: "(1) constitutional qualifications; (2) ethical fitness; (3) professional and academic ability; (4) character; (5) reputation; (6) physical health; (7) mental stability; (8) experience; and (9) judicial temperament."[83] Next, the reforms limited the number of individuals the General Assembly could consider for election to the three candidates found qualified and nominated by the JMSC, which has some discretion to determine the three individuals best qualified for the available position.[84] More importantly, the reforms barred members of the General Assembly from being elected to a judicial position for one year after either serving in the General

77. *See* Driggers, *supra* note 25, at 1218; *see generally* Scoppe & Greene, *supra* note 73 (noting that Jean Toal was the incumbent supreme court justice in the election).

78. Driggers, *supra* note 25, at 1229 (citing S.C. CODE ANN. §§ 2-19-10 to -60 (1986), *amended by* S.C. CODE ANN. §§ 2-19-10 to -120 (Supp. 1997)).

79. *Id.* at 1229–30.

80. Ritchie, *supra* note 8, at 27 ("In fact, in the early to mid-90s, all five Supreme Court Justices and more than half of the circuit court judges had served in the General Assembly prior to being elected to the bench. Calls for reform escalated when, in 1995, two former legislators who were elected to judgeships were found 'not qualified' by the South Carolina Bar.").

81. *See id.*

82. *See* Eberle, *supra* note 46, at 22 ("The most notable change to the [judicial selection] process was the creation of the Judicial Merit Selection Commission."); *see, e.g.*, S.C. CODE ANN. §§ 2-19-10, -35 (2005) (setting out the criteria for the JMSC to use when screening judicial candidates); Ritchie, *supra* note 8, at 28 (explaining how the statutes empower the JMSC with an objective criteria to screen judicial candidates).

83. § 2-19-35(A); Ritchie, *supra* note 8, at 28; *see generally* S.C. CONST. art. V, § 27 (describing the general function of the JMSC).

84. § 2-19-80(A)–(B) ("[The commission] shall review the qualifications of all applicants for a judicial office and select therefrom and submit to the General Assembly the names and qualifications of the three candidates *whom it considers best qualified for the judicial office under consideration* . . . . The nominations of the commission for any judgeship are binding on the General Assembly, and it shall not elect a person not nominated by the commission.") (emphasis added); Ritchie, *supra* note 8, at 28.

Assembly or failing to file for reelection.[85] Additionally, the reform requires that the JMSC provide a written report on its findings to each member of the General Assembly to allow lawmakers the opportunity to make informed decisions with regard to the elections.[86] These JMSC reports are considered final after forty-eight hours, at which time the candidates may begin campaigning for pledges from members of the General Assembly.[87]

In cases of pledge rule violations,[88] the JMSC is empowered to consider the issue when deliberating a candidate's qualifications; report an individual's violation to the House or Senate Ethics Committee; report a nonlegislative individual's violation to the South Carolina State Ethics Commission; and, upon conviction of a misdemeanor, fine an individual no more than one thousand dollars or order imprisonment for up to ninety days.[89] The JMSC is also required to consider race, gender, national origin, and other demographic factors when making its nominations.[90]

Additionally, the 1996 reform inserted the public into the process by allowing the chairman of the JMSC, when advised by the commission, to select individuals to serve on Citizens Committees on Judicial Qualification.[91] These citizens provide their opinions on the candidates to the JMSC in the form requested and in accordance with the rules adopted by the commission.[92] The JMSC relies heavily on these committees, five of which were established in different geographic locations throughout the state.[93] Finally, the JMSC is

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85. § 2-19-70(A) ("No member of the General Assembly may be elected to a judicial office while he is serving in the General Assembly nor shall that person be elected to a judicial office for a period of one year after he either: (1) ceases to be a member of the General Assembly; or (2) fails to file for election to the General Assembly in accordance with Section 7-11-15."); Ritchie, *supra* note 8, at 28.

86. § 2-19-80(D) ("The commission shall accompany its nominations to the General Assembly with reports or recommendations as to the qualifications of particular candidates."); Ritchie, *supra* note 8, at 28, 29.

87. Ritchie, *supra* note 8, at 29.

88. § 2-19-70(C); Ritchie, *supra* note 8, at 29 (describing what constitutes a *pledge* and explaining the prohibition on accepting pledges).

89. § 2-19-70(E); Ritchie, *supra* note 8, at 29. No cases, however, cite to this subsection of the statute.

90. § 2-19-35(B); Ritchie, *supra* note 8, at 28 (stating that the aim of this requirement is "to ensure nondiscrimination to the greatest extent possible as to all segments of the population of the State" (quoting § 2-19-35(B))).

91. § 2-19-120(A) ("The Chairman of the Judicial Merit Selection Commission, upon the advice of the commission, shall select members to serve on Citizens Committees on Judicial Qualifications for each geographic district set by the commission. These committees shall, under the rules adopted by the commission, advise the commission concerning judicial candidates."); Eberle, *supra* note 46, at 24 (citing § 2-19-120); *Citizens Committees on Judicial Qualifications: Mission Statement*, S.C. LEGISLATURE, http://www.scstatehouse.gov/judicialmeritpage/CITIZENSCOMMITTEESONJUDICIALQUALIFICATIONS041613.pdf (last updated Apr. 17, 2013).

92. § 2-19-120(A); Eberle, *supra* note 46, at 24; *Citizens Committee Mission Statement*, *supra* note 91.

93. *See Citizens Committee Information*, *supra* note 91.

encouraged to reach out to members of the South Carolina Bar for assessments of candidates for judicial election.[94]

IV. EFFECTS AND SHORTCOMINGS OF THE 1996 REFORM

The 1996 reform has proved largely unsuccessful because of its failure to adequately address the four major themes underlying this change in the law: (1) the impact of prior legislative experience, (2) the impact of a candidate's race, (3) the impact of a candidate's gender, and (4) the number of candidates running for judicial office.[95] A survey conducted in the spring of 2005 by the state Senate Judiciary Committee showed that the reform led to some progress in the caliber and experience of judicial candidates.[96] The same survey, however, showed that even after the creation of the JMSC, the diversity of judicial candidates on the bench only increased slightly.[97] Prior South Carolina Bar President Betsy Gray acknowledged the shortcomings of the 1996 reform by stating that, while the reform made the system slightly better, the changes did not make the system perfect.[98] Arthur Vanderbilt, past President of the ABA, acknowledged that "[j]udicial reform is no sport for the short-winded."[99] If the results of the 1996 reform are any indication, Vanderbilt was correct. In the aftermath of the 1996 reform, South Carolina's judicial branch remains plagued by various issues, including lack of diversity, lack of impartiality and fair administration of justice, lack of public confidence, and lack of separation of powers among the branches of government.[100]

A. Diversity

Even after the reform, the lack of diversity continues to be a major issue for the composition of the bench in South Carolina.[101] Not only does the intentional and systemic exclusion of groups based on race or gender undermine the perceived legitimacy of legal institutions, it also undermines the political system

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94. § 2-19-25 ("The Judicial Merit Selection Commission is authorized to investigate and obtain information relative to any candidate."); Ritchie, *supra* note 8, at 29.

95. *See generally* Ritchie, *supra* note 8, at 30 (explaining the four issues the reform was attempting to address and explaining that, while there have been some positive effects, "there is still a long way to go").

96. *See id.*

97. *See id.* at 29–30 (noting that this fact is particularly alarming considering the wide diversity of people that call South Carolina home).

98. *See* Eberle, *supra* note 46, at 25.

99. *Id.* (citing CHARLES HENNING, THE WIT & WISDOM OF POLITICS 107 (1989)) (internal quotation marks omitted).

100. *See generally infra* Part IV (discussing each of these issues within the South Carolina judiciary).

101. *See generally* Ritchie, *supra* note 8, at 30–31 (noting that women and African-Americans made little progress after judicial selection reform).

as a whole.[102] Ironically, proponents of judicial elections regularly claim that one major benefit of elective judicial systems is that they open access to historically marginalized groups, enabling members of these groups to secure judicial offices.[103] However, studies of election-based states versus nonelection-based states have invalidated this claim.[104] In fact, with regard to state high courts or intermediate appellate courts, one study found that only 29% of female justices were elected to the bench.[105] This study also found that, in the same levels of state judiciaries, only 27% of black justices were elected to the bench.[106] Accordingly, "the argument for open access to the judiciary if anything argues against, certainly not in favor of, elective judiciaries, which explains some elective states' troubles under the Voting Rights Act."[107]

The recent experience in South Carolina parallels this 1993 study and indicates that race continues to impact a candidate's likelihood for success.[108] From 1997 to 2004, 26.96% of Caucasian, or other, candidates were elected to the bench in South Carolina.[109] Conversely, only 10.76% of African-American candidates were successful.[110] In fact, as of 2010, minorities filled only 8 of the 118 judicial positions in South Carolina.[111] These statistics reflect the likelihood of a candidate's success based on race, [112] which may be attributable to the JMSC recommendation and nomination process.

In light of the 1996 reform, women have fared moderately better in elections than other underrepresented groups, but still fall below their male counterparts.[113] In South Carolina, women accounted for 52% of the state

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102. Croley, *supra* note 10, at 784.

103. *See id.*

104. *Id.* at 784–85. The appendices to Croley's article describe a series of empirical tests that support these statements. *See id.* at 784–85 n.252. In particular, Table 1 provides data on state appellate courts—both intermediate appellate and high courts—counting retention election states as elective states. *See id.* at 791. Table 2 provides similar data, except it counts retention election states as nonelective states. *Id.* Finally, Table 3 provides the "Chi-Square Test of Association" between elective and nonelective judicial systems, as well as data on the representation of women on those appellate courts, counting retention election states as elective states. *Id.* at 792.

105. *See id.* at 786 (noting that, out of the 166 women judges and justices, 48 won elections to get to the bench).

106. *See id.* (noting that 17 out of the 62 sitting black judges and justices were elected to the bench). It is important to note, however, that this statistic comes from a 1993 survey. *See id.* at 791 n.263 (noting that the data for the tables was prepared by the American Judicature Society in 1993).

107. *Id.* at 786.

108. *See generally* Ritchie, *supra* note 8, at 29–30 ("[D]iversity on the bench has not progressed as well as expected.").

109. *See id.* at 31 (quoting remarks made by state Senator Glenn McConnell on June 2, 2005).

110. *Id.* (quoting remarks made by state Senator Glenn McConnell on June 2, 2005).

111. SAFEGUARDING U.S. DEMOCRACY: QUEST FOR A MORE DIVERSE JUDICIARY, LEAGUE OF WOMEN VOTERS, THE STATE OF DIVERSITY IN THE SOUTH CAROLINA JUDICIARY (2010), *available at* http://www.lwvsc.org/files/brochure.pdf (noting this is equivalent to seven percent).

112. *See generally id.* (describing the different systems for judicial elections and how those systems can affect diversity).

113. *See* Ritchie, *supra* note 8, at 30 (quoting remarks made by Senator Glenn McConnell on June 2, 2005).

population and 35% of the state's lawyers as of 2010.[114] Nevertheless, women filled only 22% of state judgeships.[115] Although six states with merit selection systems now require diversity among their commissioners to ensure the commissioners' nominations are diverse, South Carolina has no such provision.[116] Moreover, ten states with merit selection systems have formal provisions that prohibit discrimination in the nominating process.[117] Once again, the South Carolina Code contains no similar provisions.[118]

B. Lack of Impartiality and Fair Administration of Justice

The lack of both impartiality and the fair administration of justice continue to burden the judicial system.[119] Nationally, empirical data today shows that a direct and significant statistical relationship exists between business contributions to state supreme court justices and the way those justices vote in cases involving business disputes.[120] In fact, the data shows that, when justices receive at least half of their campaign donations from business groups, one can generally expect them to vote in favor of business interests about two-thirds of the time.[121] This data shows that judges may be swayed by campaign contributions.[122] The reality of these studies is that campaign contributions are affecting judges and jeopardizing fair and impartial justice, irrespective of the form of such influence.[123] This impact must be curtailed, especially given that spending on judicial races is increasing exponentially.[124]

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114. LEAGUE OF WOMEN VOTERS, *supra* note 111.

115. *Id.*

116. *Id.* ("A study of merit selection systems found that a more diverse nominating commission is more likely to recommend persons of color and women.").

117. *Id.*

118. *Id.*; *cf.* S.C. CODE ANN. § 2-19-35(B) (2005) ("In making nominations, race, gender, national origin, and other demographic factors *should be considered* by the commission to ensure nondiscrimination to the greatest extent possible as to all segments of the population of the state.") (emphasis added).

119. *See, e.g.*, Cohen, *supra* note 48, at 1 (explaining how statistics prove that judicial elections lead to impartiality and cause judges to lose their neutrality).

120. *See id.* (quoting Shepherd, *supra* note 48, at 1).

121. *Id.* (quoting Shepherd, *supra* note 48, at 1).

122. *See generally id.* (discussing the study which "confirm[s] a significant relationship between business group contributions to state supreme court justices and the voting of those justices in cases involving business matters" (quoting Shepherd, *supra* note 48, at 1)).

123. Shepherd, *supra* note 48, at 9 ("Whether the campaign contributions determine which judges are on the bench or they influence how the judges on the bench decide cases—or both—the rising tide of campaign contributions from interest groups is placing fair and impartial justice at risk.").

124. *See* Cohen, *supra* note 48 ("Between 2000-2009, campaign fundraising was three times greater in states with partisan elections; candidates in these races raised $153.8 million across nine states, compared to $50.9 million raised in the thirteen states with nonpartisan elections." (quoting Shepherd, *supra* note 48, at 5)).

Additionally, in South Carolina, some legislators are lawyers that either currently practice or may return to private practice upon the conclusion of their time in the General Assembly.[125] Therefore, some legislators currently appear in court before the very judges they helped elect,[126] which raises serious concerns about the fair administration of justice and impartiality of judges.[127] On the other hand, the 1996 reform's ban on the selection and recommendation of sitting legislators for judicial positions for one year after serving in the General Assembly was aimed at decreasing the appearance of impropriety.[128] This ban, however, has done little to restore public confidence in South Carolina's judicial selection process.[129]

These issues are such notable concerns that Supreme Court Justices have cautioned against judicial election models.[130] Sandra Day O'Connor, who was an elected judge prior to her appointment to the U.S. Supreme Court,[131] stated that judicial elections lead to a decline in peoples' perceptions of judicial credibility and impartiality.[132] In a July 2013 interview, Justice Ruth Bader Ginsburg stated:

> Judges are to be impartial. They are to judge without fear or favor. They are not to be beholden to any group. But it may be a little hard, if a group of lawyers has funded your campaign, for you to be impartial, or even if you are, to project the appearance of being impartial.[133]

All of these reasons led to her conclusion that electing judges is a "dreadful" idea.[134] Although these sentiments are largely directed at "pure" popular election systems, many perceive judicial elections by the South Carolina General Assembly in the same manner.[135]

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125. *See generally* Teresa Nesbitt Cosby, *Picking the Supremes: The Impact of Money, Politics, and Influence in Judicial Elections*, 4 FAULKNER L. REV. 73, 118 (2012) (citing Interview with anonymous lawyer, Feb. 11, 2011); Interview with anonymous elected judge, Apr. 13, 2011)) (discussing the "growing concern over lawyer/legislator conflicts of interests").

126. *See generally id.* (describing how judges can give deference to the legislators who helped get them elected).

127. *See generally id.* (discussing the impartiality concerns that lawyers have about the current judicial selection process in South Carolina and Virginia).

128. *See* Driggers, *supra* note 25, at 1230.

129. *See generally* Brundrett, *supra* note 44 (discussing how judicial candidates with legislative connections all recently won their elections).

130. *See, e.g.*, Millhiser, *supra* note 48 (stating that Justice Ruth Bader Ginsberg called electing judges a "'dreadful' idea").

131. Craig Joyce, *Afterword: Lazy B and the Nation's Court: Pragmatism in Service of Principle*, 119 HARV. L. REV. 1257, 1262 (2006) ("In 1974, she was elected a state court trial judge.").

132. *See* Cohen, *supra* note 48.

133. Millhiser, *supra* note 48 (internal quotation marks omitted).

134. *See id.* (internal quotation marks omitted).

135. *See generally* Self, *supra* note 44, at 11 ("In Public Integrity's ratings, South Carolina tied for 32nd among the 50 states—with Texas, Georgia and Mississippi.").

Further complicating the lack of impartiality and fair administration of justice in South Carolina is the state supreme court's exclusive jurisdiction over direct appeals in cases concerning "a final judgment from the circuit court pertaining to elections and election procedures."[136] Additionally, if a case concerns an issue of significant public interest, then the supreme court can move to review the case on its own and bypass the court of appeals.[137] Therefore, the judicial branch—elected by the General Assembly—has final review and jurisdiction over its own elections.[138] This grant of jurisdiction creates a conflict of interest, the appearance of dishonesty, and the opportunity for abuse of power by the judiciary.[139] Ideally, a branch of government not directly affected by the election, such as a state assembly in a system without judicial elections, would be responsible for providing checks and balances to the election procedures of the judiciary to ensure the integrity of the institution.[140]

In the 2010 case of *Segars-Andrews v. Judicial Merit Selection Commission*,[141] Judge Segars-Andrews appealed a JMSC ruling to the South Carolina Supreme Court.[142] The supreme court, however, denied her request after the JMSC determined that, because of her failure to recuse herself from a case, Judge Segars-Andrews failed to meet the "ethical fitness" criteria for reelection to the bench.[143] Prior to filing for reelection with the JMSC, Judge Segars-Andrews' decision to remain in the case was supported by an ethics expert, as well as reviews by the South Carolina Court of Appeals and the Commission on Judicial Conduct.[144] In this instance, the JMSC recognized that a judge's ruling must be made "in a manner that promote[s] public confidence in the integrity and impartiality of the judiciary."[145] Thus, the very concerns

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136. Huelson, *supra* note 64, at 36 (citing S.C. CODE ANN. § 14-8-200(b) (Supp. 2013)).

137. *Id.* at 38 ("When a case is still pending in the Court of Appeals and involves an issue of significant public interest, a legal principle of major importance, or in other appropriate instances, the Supreme Court may in its discretion, on motion of any party to the case, on request by the Court of Appeals or on its own motion certify the case for review by the Supreme Court." (citing § 14-8-210(b))).

138. *See id.* at 36, 38 (discussing the supreme court's jurisdiction over final judgments from the court of appeals and discretionary appellate review for the cases invoking the public interest (citing §§ 14-8-200(b), -210(b))).

139. *See generally* Cosby, *supra* note 125, at 118 (explaining how conflicts of interests can arise when legislator–lawyers appear before judges whom they helped get elected); Cohen, *supra* note 48 (stating that judicial elections "foster[] impermissible appearances of impartiality"); Millhiser, *supra* note 48 (reporting Justice Ruth Bader Ginsburg's concern that judicial campaigns can lead to impartiality).

140. *See generally* Rehnquist, *supra* note 17, at 579, 581 ("Judicial independence is one of the touchstones of our constitutional system of government.").

141. 387 S.C. 109, 691 S.E.2d 453 (2010) (per curiam).

142. *Id.* at 114, 116, 691 S.E.2d at 456, 457; John P. Freeman, *Appearance of Impropriety, Recusal, and the* Segars-Andrews *Case*, 62 S.C. L. REV. 485, 508 (2011) (citing *Segars-Andrews*, 387 S.C. at 116, 691 S.E.2d at 597).

143. *Segars-Andrews*, 387 S.C. at 115, 116, 691 S.E.2d at 456, 457.

144. Freeman, *supra* note 142, at 503.

145. *Id.* at 511 (quoting Cannon 2A, Rule 501, SCACR) (internal quotation marks omitted).

created by the supreme court's final review over judicial elections arose as recently as 2010.[146] Unfortunately, one proper ruling in the past does not guarantee the propriety of the system in the future.

Another problem with the unfair administration of justice in South Carolina is that the state requires a higher burden of proof than the U.S. Constitution with regard to plaintiffs' recusal arguments.[147] In *Caperton v. A.T. Massey Coal Co.*,[148] the U.S. Supreme Court held that "a due process violation can be premised on evidence that falls short of 'proof of actual bias.'"[149] Conversely, the standard in South Carolina requires a plaintiff to prove actual prejudice.[150] The imposition of a higher burden of proof on plaintiffs in South Carolina directly contradicts the *Caperton* Court's observation that "the codes of judicial conduct provide more protection than due process requires."[151]

C. Lack of Public Confidence

According to one scholar, "Almost 90 percent of voters and 80 percent of judges believe that by means of campaign contributions, interest groups are trying to use the courts to shape policy."[152] These national statistics are alarming, particularly considering that "[t]he Code of Judicial Conduct defines a good judge as one who avoids the appearance of partiality."[153] Ironically, the interest groups that are perceived to benefit from judicial elections, including big business and tort reform groups, are against popular election models.[154] While South Carolina does not use a popular election model, the concerns about

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146. *See generally id.* (stating that *Segars-Andrews*, decided in 2010, demonstrated that not only must judges decide cases correctly, they must also do so in a manner that appears impartial to the public).

147. *See id.* at 511–12 (citing Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009)).

148. 556 U.S. 868 (2009).

149. Freeman, *supra* note 142, at 491 (quoting *Caperton*, 556 U.S. at 883).

150. *Id.* at 494 (citing Simpson v. Simpson, 377 S.C. 519, 525, 660 S.E.2d 274, 277 (Ct. App. 2008) (per curiam)).

151. *Caperton*, 556 U.S. at 890; *see also* Freeman, *supra* note 142, at 494 ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today." (quoting *Caperton*, 556 U.S. at 889–90)).

152. Shepherd, *supra* note 48, at 1 (citing GREENBURG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 9 (Oct. 30 – Nov. 7, 2001), http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf; GREENBURG QUINLAN ROSNER RESEARCH INC, JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 9 (Nov. 5, 2001–Jan. 2, 2002), http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf). Additionally, "in a national survey of more than 2000 judges about a decade ago, nearly half of state court judges—46 percent—believe that campaign contributions have some or at least 'a little influence' on their decisions." Cohen, *supra* note 48 (quoting a response he received from Adam Skaggs, Alicia Bannon, and Matt Menendez of the Brennan Center for Justice).

153. Freeman, *supra* note 142, at 513.

154. *See* Cohen, *supra* note 48 (quoting an email from Texas Supreme Court Justice Don Willett, an elected jurist).

interest group influence remains real because any reform to the system can only occur through the General Assembly, which maintains the largest outside interest in retaining the current model.[155]

Furthermore, the lack of demarcation and clear distinction between the roles of the judicial branch and the legislative branch—especially when members of both branches are required to campaign for their positions—undermines the public's confidence[156]: in the eyes of the public, judges appear more like politicians than impartial interpreters of the law.[157] This issue is particularly relevant in South Carolina, where prior legislative experience increases one's chances for election to the judiciary.[158] As previously discussed, the simple appearance of impropriety—which the impact and decline of public confidence could indicate—may be enough to raise constitutional due process concerns.[159] If, however, South Carolina can remedy its diversity problems, then the judiciary may—at least to some extent—be able to restore public confidence in the fairness and impartiality of the courts.[160]

D. Lack of Separation of Powers

The Framers of the U.S. Constitution prudently crafted a document that created three distinct and separate branches of government with carefully delineated powers.[161] The underlying principle of separation of powers is of fundamental importance to America's government and is best captured in the

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155. *See* Cosby, *supra* note 125, at 118–19 (explaining how attorney–legislators have a "vested financial interest in maintaining the status quo" (quoting Elizabeth Harring, *Judicial Selection in Virginia: An Inherently Flawed Process*, JEFFERSON POL'Y J., Mar. 17, 2009, http://jeffersonpolicy/journal.com/?400)).

156. *See* Cohen, *supra* note 48 ("In seeking votes, in acting like politicians, judges invariably lose what they ought to prize most: their perceived credibility as neutral arbiters of cases and controversies.").

157. *See id.*

158. *See* Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 LAW & SOC'Y REV. 579, 584 (1972) (stating that the practice of legislators choosing judges from among themselves is frequent in South Carolina).

159. *See* Cohen, *supra* note 48; Freeman, *supra* note 142, at 491 (citing Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 877, 884, 886 (2009)).

160. *See generally* Ritchie, *supra* note 8, at 30 (explaining how diversity on the bench is still a problem in South Carolina); Norman L. Greene, *The Judicial Independence Through Fair Appointments Act*, 34 FORDHAM URB. L.J. 13, 17 (2007) ("Diversity in the nominating process is responsive to core American values and essential to building public confidence in the appointment system.").

161. *See* Richard W. Miller, Simmons v. Greenville Hospital*: An Unusually Stringent Rule Against Retroactive Legislation*, 56 S.C. L. REV. 707, 707 (2005) (citing Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1539 (1991)) (highlighting the importance of separation of powers).

Founding Fathers' own writings.[162] James Madison wrote that "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."[163] Thus, each branch provides checks and balances for one another but must not usurp the powers carefully allocated to another branch, nor exercise control over another branch.[164] According to Alexander Hamilton, the permanency of judicial appointments is the "citadel of the public justice and the public security" and essential to the maintenance of judicial independence.[165] Hamilton also reasoned that "[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the judiciary's] necessary independence."[166] Nevertheless, South Carolina continues to operate under a judicial selection model that relies on periodic selections and muddies the boundaries between the legislative and judicial branches of the state's government, with the General Assembly retaining practical control over the judiciary.[167]

Currently, the JMSC has the power to appoint and nominate judicial candidates—which, at first glance, appears to retain the independent nature of the process.[168] However, this process violates the separation of powers principle because three legislators—the Speaker of the House of Representatives, the Chairman of the Senate Judiciary Committee, and the President Pro Tempore of the Senate—hold the power to nominate commission members.[169] Thus, these three legislators retain enormous control and influence over South Carolina's judiciary, which could lead to future abuses of the system.[170] The three legislators are undoubtedly products and beacons of partisan politics acting out of necessity to obtain political success.[171] Conversely, a governor's work requires working with both parties to successfully accomplish an agenda.[172] In the most recent election, the brother of the Speaker of the House sat on the screening panel for both candidates for chief justice.[173] This seemingly minor overlap may signal the beginning of these three legislators' abuses of power.

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162. *See, e.g.*, *id.* at 707 & n.2 (discussing a constitutional amendment proposed by James Madison that expressly separated the branches of government (citing Brown, *supra* note 163, at 1539)).

163. THE FEDERALIST NO. 47, at 338 (James Madison).

164. *See id.* at 337–38 ("There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates, or, if the power of judging be not separated from the legislative and executive powers . . . ." (internal quotation marks omitted)).

165. *See id.* at 491 (Alexander Hamilton).

166. *Id.* at 495.

167. *See supra* notes 63, 69–73, 130–35, 138–39 and accompanying text.

168. *See* Driggers, *supra* note 25, at 1230 (citing S.C. CODE ANN. § 2-19-80(B) (2005)).

169. *See id.* at 1231 (citing § 2-19-10(B)).

170. *Id.*

171. *See id.*

172. *See id.* at 1231.

173. *See* Brundrett, *supra* note 44.

Additionally, the current allocation of power to three experienced legislators creates a substantial likelihood that the JMSC may be warped into another tool of partisan politics with a distinctly political agenda for the judicial nominees.[174] Thus far, the JMSC's nominations have mostly been nonpartisan.[175] In fact, under the 1996 system, there has been a substantial increase in the number of candidates without prior legislative experience—with 57.73% of candidates without legislative experience filing to run for a judicial position from 1975 to 1996, versus 84.85% of candidates without legislative experience filing to run for a judicial position from 1997 to 2004.[176] The recent showdown, however, has drawn lines and tested political alliances in the General Assembly, which demonstrates just how quickly forward progress can unravel.[177]

Despite the increase in judicial candidates who have not served as legislators, legislative experience remains a significant factor in determining South Carolina's judicial elections.[178] Additionally, the bench's past reputation as a retirement center for legislators makes this factor a very real concern for South Carolina's future.[179] One judge observed that "[a]ny attempt to make the courts partisan . . . is, at best, a misconception of the judicial role and, at worst, an effort to prostitute the courts and subvert their assigned function . . . ."[180]

V. RECOMMENDATIONS

The 1996 reform has not remedied the problems that plague South Carolina's judicial system.[181] Therefore, South Carolina should eliminate legislative judicial elections in favor of a selection system similar to the federal model.[182] In particular, South Carolina's Governor should appoint members to the judiciary with confirmation hearings in the General Assembly. These judges

174. *See* Driggers, *supra* note 25, at 1231.

175. *But see id.* at 1232 (explaining how party allegiances could become important after the nominations are made).

176. *See* Ritchie, *supra* note 8, at 30 (quoting remarks made by Senator Glenn McConnell on June 2, 2005).

177. *See generally* Monk, *supra* note 3, at A1 (quoting state Senator Joel Lourie, a Democrat representing Richland County: "In my 16 years of service, this is probably one of the most competitive races I've experienced. Both sides think they have the edge, which to me means it's too close to call.").

178. Ritchie, *supra* note 8, at 30 (quoting remarks made by Glenn McConnell on June 2, 2005).

179. *See id.* at 27.

180. Driggers, *supra* note 25, at 1221 (quoting William H. Hastie, *Judicial Role and Judicial Image*, 121 U. PA. L. REV. 947, 951 (1973)).

181. *See* Cosby, *supra* note 125, at 128 ("Periods of time when [South Carolina's] system has worked moderately well in selecting qualified judges are, at best, byproducts of happenstance, not the results of a well-designed selection method."); *supra* notes 95–98 and accompanying text.

182. *See* Croley, *supra* note 10, at 692–93.

should have lifetime tenure[183] because the previously discussed mechanisms for countering unpopular judicial decisions or engendering impeachment trials still exist within the state model.[184]

Currently, South Carolina faces a very practical problem: a lack of public trust in its most recent governors.[185] Therefore, the public and the General Assembly may be hesitant to increase the power of that office. If that remains the case, then South Carolina should move to a modified version of the Missouri Plan and retain the JMSC. Similar to some versions of the Missouri Plan, this modified version would move the recommendations of the JMSC to the Governor rather than the General Assembly.[186] The modified version would remove retention elections, replacing these elections with lifetime appointments for judges who may be removed only through impeachment trials.[187]

If, however, the South Carolina General Assembly refuses to give up this control once again, a series of minor reforms set forth in a variety of sources may help alleviate some of the issues with the judicial system if implemented as a comprehensive reform package. Indeed, "[t]he task for reformers is to locate their system's particular vulnerabilities and to design a programme [sic] that deals with the multiple facets of independence in a way that limits corrupt incentives and provides prompt and impartial justice."[188] With this need for a solution tailored to the unique issues and history of the state's judicial system, South Carolina should adopt more specific provisions addressing discrimination in the JMSC's nominating process.[189] Moreover, South Carolina should increase the length of terms between retention elections to further increase the independence of the judiciary from the General Assembly.[190]

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183. *See generally* Mary Noel Pepys, *Corruption Within the Judiciary: Causes and Remedies*, *in* GLOBAL CORRUPTION REPORT 2007, *supra* note 39, at 7 (discussing the importance of lifetime tenure for judges).

184. *See supra* notes 40–44 and accompanying text.

185. *See generally* Andrew Shain, *2014 Governor's Race: Sheheen Ahead of Haley*, THE STATE, Dec. 12, 2012, at B1 (quoting gubernatorial candidate Senator Vincent Sheheen attributing his success in the polls over Governor Nikki Haley to "the distrust the people of South Carolina have in state government").

186. *See generally* Eberle, *supra* note 46, at 22 (discussing the different variations of the merit-based system); *supra* Part III.C.

187. *See generally* Pepys, *supra* note 183, at 7 (discussing how the security of tenure, with removal only for misconduct, can enhance the independence of the judiciary).

188. *See* Susan Rose-Ackerman, *Judicial Independence and Corruption*, *in* GLOBAL CORRUPTION REPORT 2007, *supra* note 39, at 24.

189. *See generally* Cosby, *supra* note 125, at 75 ("[S]tates should implement a method to choose judges that structurally promotes judicial independence and also respects the diversity and interests of its citizens."). States that allow campaign accounts should provide candidates with the opportunity to obtain public grants for their election campaigns, rather than requiring personal or special interest group funding. *See generally* Roy A. Schotland, *Judicial Elections in the United States: Is Corruption an Issue?*, *in* GLOBAL CORRUPTION REPORT 2007, *supra* note 39, at 30 (discussing the possibility of public funding for judicial campaigns).

190. *See id.* at 30.

To avoid the appearance of impropriety and comport with the constitutional requirements of due process, South Carolina should clearly identify procedures and standards for the recusal of judges.[191] These standards should then be publicized to increase judicial accountability.[192] Finally, the courts should help create training on legal principles for the media.[193] This training would allow the media to better identify defects in the legal system and incidents of political corruption that may occur from overlap between the judiciary and the General Assembly.[194] Further, the media's recognition of these problems could provide grounds for impeachment trials when necessary.

VI. CONCLUSION

The rule of law and democracy itself are endangered when the judicial branch is beholden to electoral majorities.[195] Additional concerns exist because, generally, the qualities associated with a good judge are far from the qualities associated with a successful campaigner.[196] The integrity and independence of the judiciary has been the cornerstone to America's success in its creation of a new form of government.[197] In South Carolina, however, the General Assembly continues to stifle this success through its perversion of and control over the judicial branch.[198] The road to judicial independence in America was paved long ago, but in South Carolina this road remains paved with gravel as the General Assembly hinders the path to true justice and an independent judiciary.[199]

Samantha R. Wilder

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191. *See* Pepys, *supra* note 183, at 9 (discussing how codes of conduct can "strengthen the integrity of judges and improve public perception of the courts").

192. *See generally id.* at 14 ("The perception of corruption can be as insidious as actual corruption since both have the same effect of undermining public trust in the justice system. Judiciaries have much to gain by increasing transparency of their operations.").

193. Robertson QC, *supra* note 39, at 109.

194. *Id.* ("But the greatest advantage of such training is that it would improve their ability to detect defects in the legal system and incidents of venality or political corruption in the professionals who operate it.").

195. Croley, *supra* note 10, at 787.

196. *Id.* at 783.

197. *See* Rehnquist, *supra* note 17, at 579.

198. *See supra* Part IV.C.

199. Shepherd, *supra* note 48, at 5 (quoting former Justice Leah Ward Sears, Georgia Supreme Court: "Without justice we have no rights, no peace, and no prosperity. Judicial independence is the cornerstone of justice. This means that judges, who are empowered to ensure that justice always reigns supreme, must never be beholden to any particular political party or special interest group. Nor should they have favored financial backers. Their only 'constituency' must be the law and the law alone. You need only open your daily newspaper to the international section to read about countries where judicial independence doesn't exist to see how bad things can become.").