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TWENTY
YEARS

RETHINKING
JUDICIAL SELECTION
IN STATE COURTS

Alicia Bannon

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INTRODUCTION

When most people think of the courts — or talk about judicial selection — they focus on the federal courts, particularly the U.S. Supreme Court. But while federal courts get the most attention, Americans are far more likely to find themselves before state court judges. Ninety-five percent of all cases are filed in state court, with more than 100 million cases coming before nearly 30,000 state court judges each year.¹ In recent years, state supreme courts have struck down tort reform legislation,² ordered state legislatures to equalize funding for public schools,³ and declared a state's death penalty unconstitutional.⁴

Because state courts have a profound impact on the country's legal and policy landscape, choosing state court judges is a consequential decision. And, in recent decades, judicial selection has become increasingly politicized, polarized, and dominated by special interests — particularly but not exclusively in the 39 states that use elections to choose at least some of their judges. Growing evidence suggests that these dynamics impact who is reaching the bench and how judges are deciding cases.

Pennsylvania's 2015 supreme court election for three open seats exemplifies many of the problems with judicial selection today. The election, which set a new spending record for state supreme courts, was largely funded by business interests, labor unions, and plaintiffs' lawyers — all groups that are regularly involved in cases before the court.⁵ Millions of dollars went into negative ads that characterized candidates as issuing “lenient sentences” and “failing to protect women and children”⁶ — amid growing evidence that such attacks make judges more likely to rule against criminal defendants.⁷ And, in a state where people of color make up more than 20 percent of the population,⁸ none of the 2015 candidates in the general election was a racial or ethnic minority, and the Pennsylvania Supreme Court remains all-white.⁹

Having monitored judicial elections and other state court issues for almost two decades, the Brennan Center has chronicled numerous threats to the fairness and integrity of state courts that are closely tied to how states choose their judges:

- ***Outsized role of money in judicial elections:*** A flood of special interest spending in judicial elections is undermining the fairness of state courts. Judges regularly hear cases involving campaign supporters, and, in one survey of state court judges, nearly half said they thought campaign contributions affected judges' decision-making.
- ***Politicization of campaigns:*** Judicial campaigns have also become more overtly political, regularly including partisan language and statements on contested political issues such as gun rights or religious liberty. For neutral arbiters, this heightened political temperature risks exacerbating pressures to decide cases based on political loyalty or expediency, rather than on their understanding of the law.
- ***Lack of judicial diversity:*** Neither elective *nor* appointive systems of choosing judges have led to a bench that represents the diversity of the legal profession or of the communities that courts serve. Research suggests that diverse candidates face numerous challenges in reaching the bench, from fundraising difficulties, to inadequate pipelines for recruitment, to bias, both explicit and implicit. The resulting lack of diversity undermines public confidence in the courts and creates a jurisprudence uninformed by a broad range of experience.

- ***Job security concerns affect outcomes:*** A growing empirical literature suggests that in both elective and appointive systems, concerns about job security are affecting how judges rule in certain high-salience cases, putting judicial impartiality at risk. Numerous studies have found, for example, that when judges come closer to reelection, they impose longer sentences on criminal defendants and are more likely to affirm death sentences. “Reselection” pressures impact judges across the country: In 47 states, judges must be elected or reappointed in order to hold onto their seats.

Recent efforts at reform have focused on either mitigating the role of money in elections through public financing and stronger recusal rules (which govern when judges must step aside from cases), or moving away from contested elections altogether, typically to a “merit selection” system in which a nominating commission vets potential candidates, who are then appointed by the governor and later stand for periodic yes-or-no retention elections. But these reforms have failed to either gain traction or to adequately address the challenges facing courts today.

In the face of growing threats to state courts’ legitimacy and to the promise of equal justice for all, we need to rethink how we choose state court judges.

Identifying the problems facing state courts is only the first step. Any alternative system of choosing judges will have its own advantages and disadvantages, and may advance or impede important values related to the selection of judges — including judicial independence, accountability and democratic legitimacy, judicial quality, public confidence in the courts, and diversity on the bench. Rethinking judicial selection therefore raises important empirical questions about the likely impact of different systems on these values. It also raises normative questions about how to balance these values when they come into tension. To make these judgments, we need to understand how different selection systems actually operate today and what tradeoffs are posed by potential alternatives.

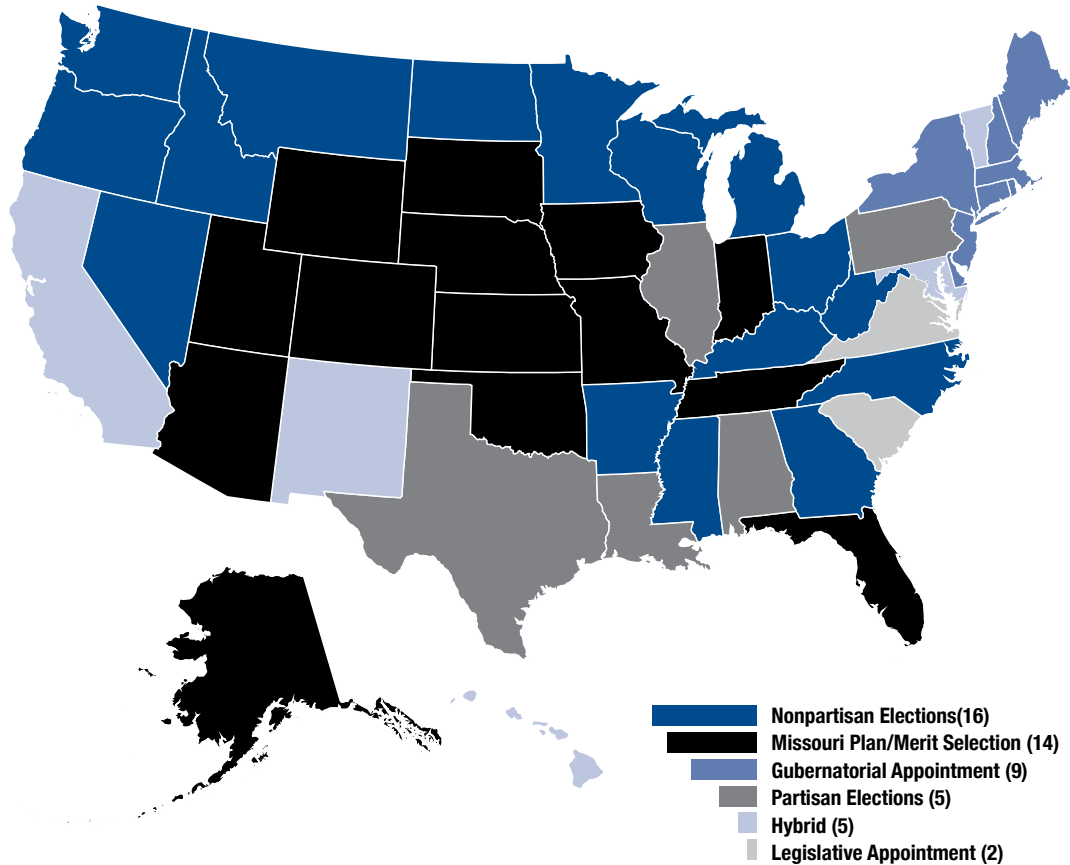
This paper offers a framework for considering these important questions. Part I of the paper looks more closely at some of the problems plaguing our state court systems today, many of which are closely linked to states’ systems for choosing judges. Part II discusses the basic values that judicial selection should promote and describes what we know from existing research about how different selection systems impact these values. Part III suggests a series of unanswered questions and other considerations that should inform inquiries into potential reforms.

Learning More About Judicial Selection

Despite state courts' importance, relatively little is known about how judicial selection operates in the states. Accompanying the release of this paper, the Brennan Center is introducing new resources to make it easier to study state courts.

- **Interactive map on state judicial selection:** Available at judicialselectionmap.brennancenter.org, this data visualization tool provides comprehensive information about judicial selection in all 50 states and the District of Columbia, as well as summary statistics and statutory references.
- **A hub for research, scholarship, and data:** Available at www.brennancenter.org/rethinking-judicial-selection, this site collects research, scholarship, and data related to judicial selection.¹⁰

JUDICIAL SELECTION TODAY: A BACKGROUNDER



How are judges selected in the states? The vast majority of states use one of four basic models for choosing judges.

- **Contested elections:** In contested elections, multiple candidates vie for a single seat — similar to how candidates run for executive and legislative offices. In partisan elections, party labels appear on the ballot next to candidate names. In nonpartisan elections, party labels do not appear on the ballot. At the supreme court level, 5 states utilize partisan elections and 16 states utilize non-partisan elections. Contested elections are even more common in lower courts. At the trial court level, 21 states utilize nonpartisan elections and 8 states utilize partisan elections.

- **Merit selection, also known as the “Missouri Plan”:** In merit selection systems, a nominating commission screens and vets prospective judges and then presents a slate to the governor, who must choose from that group. An appointed judge may stand for additional terms in periodic, unopposed “yes-or-no” retention elections. At the supreme court level, 14 states utilize this system. At the trial court level, only nine states do.

While nominating commissions are a central feature of merit selection systems, their structure varies substantially. Some states vest the governor with exclusive authority to appoint nominating commissioners, while in others the state’s bar association or lawyers within the state select a portion of the commission. The state legislature or the judiciary may also have the power to appoint commissioners.

- **Gubernatorial appointment:** Gubernatorial appointment systems have no elective element. Judges are appointed by the governor, and, in those states where judges serve multiple terms, they are subject to reappointment by the governor. At the supreme court level, nine states utilize this model. Each of these states provides for some kind of “confirmation” of the governor’s nomination by the legislature or other elected body, such as a “governor’s council.” Each also provides for input by a nominating commission, similar to how Missouri Plan systems operate, although in three states the commission’s recommendations are non-binding.
- **Legislative appointment:** In legislative appointment systems, judges are selected by the legislature. Two states, South Carolina and Virginia, utilize this system (at the supreme court, intermediate appellate, and trial court levels). One state, South Carolina, utilizes a nominating commission as part of its process.

Many states also use **hybrids or other variations** of these four main systems. In Hawaii, for example, the governor makes judicial appointments after vetting by a judicial selection commission, with confirmation by the state senate. But for the judge’s reappointment, it is the judicial selection commission itself that makes the decision, without the involvement of the governor or legislature.

States also vary in the **length of judges’ terms**. At New York’s highest court, for example, judges serve 14-year terms, while in Texas their terms are only six years. Three states provide life tenure for judges, either with or without an age limit. Each of these three states (Massachusetts, Rhode Island, and New Hampshire) provides for the appointment of judges by the governor, with confirmation. No state that uses elections provides for life tenure or a single term for judges.

For more information on judicial selection in the states, see the Brennan Center’s interactive map at judicialselectionmap.brennancenter.org.

I. THE PROBLEM: BROKEN JUDICIAL SELECTION SYSTEMS THREATEN THE FAIRNESS OF STATE COURTS

State courts are facing challenges to their basic fairness and legitimacy, many of which are tied to states' systems for choosing judges. Several of the most serious threats to equal justice stem from the growing politicization of judicial elections — including evidence that campaign spending impacts judges' decisions on the bench. Yet other problems cut across selection methods, including a lack of diversity on the bench and evidence that concerns about job security impact judges' decisions in controversial cases.

A. Politicized Judicial Elections Undermine Judicial Integrity

Judicial elections increasingly look similar to the rough and tumble of political campaigns — from attack ads, to super PACs, to million-dollar elections — bringing politics to the courtroom and undermining the integrity of courts. For many years, judicial elections were generally low-cost and staid affairs.¹¹ But over the past few decades, and particularly in the last 16 years, judicial races, at least at the state supreme court level, have become, in the words of one observer, “nastier, noisier, and costlier.”¹² Less is known about how lower-court races operate, although there is anecdotal evidence that at least some jurisdictions have seen similar patterns.¹³

1. “Buying a Vote”: Special Interest Election Spending Shapes Courts and Judicial Rulings

Since 2000, special interests have increasingly turned their attention — and wallets — toward supreme court races. Money should not be able to buy justice, but there is evidence that big spending is affecting outcomes on the bench in at least two ways: First, judges face pressure to decide cases in a way that will please donors and avoid politicized attacks, rather than based on their understanding of the facts and the law. And second, wealthy interests are able to shape the ideological direction of the courts by spending large amounts of money on judicial candidates who share their worldview.

The rise of high-cost supreme court elections

In the past 15 years, high-cost supreme court races have become commonplace. In the 2000-09 decade, 20 of the 22 states that use contested elections to select judges set spending records,¹⁴ and new records for contested elections have already been set in five states since 2010.¹⁵ More recently, retention elections, where a judge runs unopposed and faces a yes-or-no vote, have seen similar patterns. Average spending per seat in retention elections nationwide has increased tenfold from 2001-08 to 2009-14 (from an average of \$17,000 per seat to \$178,000 per seat, respectively).¹⁶ In Florida, a 2012 retention election for three supreme court justices saw nearly \$5 million in spending and was the second most expensive judicial election in the country that year. During the entire previous decade, Florida Supreme Court retention elections had seen a paltry \$7,500 in spending (all in 2000).¹⁷

These spending trends have occurred against the backdrop of a series of U.S. Supreme Court decisions that weaken states' capacity to regulate campaign finance. Most notably, after *Citizens*

United v. FEC,¹⁸ which barred restrictions on independent spending by corporations and unions, spending by outside groups has surged. In 2013-14, outside spending as a portion of total spending in state supreme court elections set a new record — much of it coming from groups that do not disclose their donors.¹⁹ In 2009-10, outside spending was 16 percent of total spending; in 2013-14, it was 29 percent.²⁰

These trends also reflect new attention by interest groups in judicial elections, most often rooted in battles over tort reform and the perceived business-friendliness of state courts.²¹ Nearly two-thirds of contributions to supreme court candidates in 2013-14 came from business interests, lawyers, and lobbyists — all interests that regularly appear in state court. While outside spending is harder to track due to weak disclosure laws, many of the recent high spenders, such as the Republican State Leadership Committee (which spent \$3.4 million in total on judicial races in five states in 2014) and Pennsylvanians for Judicial Reform (which spent \$3.4 million on Pennsylvania's 2015 supreme court election), are funded either by business interests or the plaintiffs' bar.²² (Although both sides have participated in the spending arms race, in the aggregate, groups supporting conservative justices have far outspent the other side.²³)

Why does a tobacco company care about monitoring bracelets for convicted sex offenders?

One way that special interests shape state courts is through campaign ads. Notably, the content of these ads often has little to do with groups' actual interest. For instance, business-oriented groups regularly run ads praising candidates as tough on crime, or criticizing them for being soft on crime, because they know crime resonates with voters.

From 2011-14, 18 organizations ran criminal justice-themed ads in state supreme court elections. Only three described criminal justice as an issue of concern on their websites.²⁴ One of the nastiest ads in 2014 was in North Carolina, which characterized a sitting justice as someone who “sides with child predators” because of a decision



Justice for All NC PAC, *Protect Us* (copyright Kantar Media/CMAG 2014)

that monitoring bracelets could not be imposed after a defendant had already been sentenced.²⁵ The ad was sponsored by a group funded by the Republican State Leadership Committee, which is in turn largely funded by corporate donors. Two of its major North Carolina donors are Reynolds American and Lorillard Tobacco, frequent litigants in North Carolina courts over consumer issues — but not companies with any apparent interest in criminal justice.²⁶

Impact on the courts

Does money buy outcomes? Ohio Supreme Court Justice Paul Pfeifer observed that in his experience, “Everyone interested in contributing has very specific interests....They mean to be buying a vote.”²⁷ While Justice Pfeifer argued that “it’s hard to say” whether these interests have been successful,²⁸ research suggests that money impacts outcomes in at least two ways.

First, the importance of campaign dollars puts pressure on judges to favor campaign supporters when they appear before them in court. Ninety-five percent of the public believes that campaign spending impacts judges’ rulings.²⁹ Remarkably, nearly half of state court judges agree. In a 2001 survey of state supreme court, appellate, and trial judges, 46 percent said they believed campaign contributions had at least some impact on judges’ decisions.³⁰ As Richard Neely, a retired chief justice of the West Virginia Supreme Court of Appeals, observed, “It’s pretty hard in big-money races not to take care of your friends. It’s very hard not to dance with the one who brung you.”³¹ While not establishing a causal relationship, studies have also shown a strong correlation between campaign contributions and favorable rulings. A 2006 study by *The New York Times*, for example, found that on the Ohio Supreme Court, justices voted in favor of contributors 70 percent of the time.³²

Indeed, judges regularly hear cases involving campaign supporters — including lawyers and litigants with cases pending at the very time they are spending on a judge’s campaign.³³ In 2014, for example, Ohio Supreme Court Justice Judith French received almost \$60,000 in contributions to her reelection campaign from parties, lawyers, and groups that filed amicus briefs in a case involving the regulation of fracking that was before the Court. Three months after the election the Court ruled in favor of the fracking interests in a 4-3 decision. Justice French authored the opinion.³⁴ A study of the Nevada Supreme Court found that in 60 percent of the civil cases decided in 2008-09, at least one of the litigants, attorneys, or firms involved in the case had contributed to the campaign of at least one justice.³⁵

The importance of campaign cash also shapes outcomes in a second way: It gives deep-pocketed interests disproportionate influence in shaping the composition of courts. This is particularly so because judicial elections are low-information races; in the words of one Texas Supreme Court justice, “voters know far more about their *American Idol* judges than their Supreme Court judges.”³⁶

In 2013-14, over 90 percent of contested supreme court seats were won by the candidate who raised the most money.³⁷ While this relationship almost certainly has many causes, research suggests that in judicial elections, spending does make a difference in the outcome of races, improving the odds for challengers and for incumbents who were initially appointed. (Incumbents who were previously elected, and who are therefore likely to be better known and have an established track record, do not benefit in the same way from additional spending.)³⁸

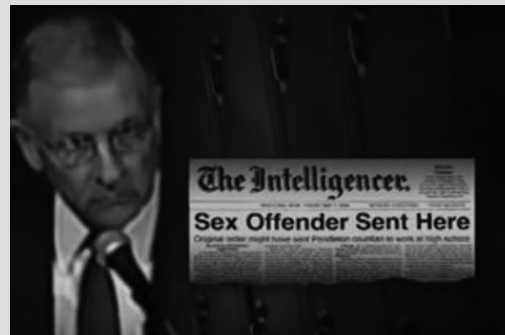
Indeed, an influx of spending has corresponded with shifts in the ideological composition of at least eight state supreme courts since 2000.³⁹ Spending is also frequently highest in states with closely-divided courts.⁴⁰

The concern that money may buy outcomes is exacerbated by inadequate safeguards against special interest influence. Weak recusal rules, which govern when judges have to step aside from cases, mean that judges face few barriers in hearing cases involving major financial supporters, particularly when that support takes the form of independent expenditures, which are less regulated. At the same time, only two states currently offer public financing for appellate court elections. In many states, judges facing the reality of a high-cost election may therefore have little choice but to fundraise from interests likely to appear before them. With big-spending races showing no signs of abating, special interest influence poses a fundamental threat to equal justice.

***Caperton v. Massey:* From the Ballot Box to the U.S. Supreme Court**

Big spenders in supreme court races are often repeat litigants — but sometimes their interest in a judicial race is more immediate. West Virginia mining company Massey Energy stood to lose \$50 million in damages after a jury found the company liable for fraudulent misrepresentation and other harms, in a case brought by Harman Mining Corp. In 2004, Massey readied itself for an appeal to the West Virginia Supreme Court — at the same time an election for a seat on the Court began to heat up.⁴¹

Massey's CEO, Don Blankenship, set his sights on the election, spending \$3 million to defeat incumbent Justice Warren McGraw and elect attorney Brent Benjamin to the high court. The funds included a \$2.5 million contribution to a PAC called "And for the Sake of the Kids,"⁴² which put out a series of nasty attack ads targeting McGraw. One ad alleged that McGraw voted "to release a child rapist" and "agreed to let this convicted child rapist work as a janitor in a West Virginia school,"⁴³ while another



And For the Sake of the Kids, McGraw Too Dangerous
(copyright Kantar Media/CMAG 2004)

described him as "too soft on drugs, too dangerous for our families."⁴⁴ More than 60 percent of total spending in support of Benjamin's campaign came from Blankenship.⁴⁵

When the West Virginia Supreme Court finally heard the Massey case, Benjamin refused to step aside from hearing the appeal — and ultimately cast the deciding vote in overturning the \$50 million verdict.⁴⁶ Harman's owner, Hugh Caperton, sought review by the U.S. Supreme Court, which ruled that Benjamin should have stepped aside as a matter of due process. The Court explained that under the circumstances, Blankenship's election spending created "serious, objective risk of actual bias."⁴⁷

B. Judges as Partisan “Backstops”: Judicial Campaigns Have Become More Overtly Political and Partisan

At the same time judicial election spending has grown, judicial races have also become increasingly political and partisan. Justice requires that judges put aside their political preferences and loyalties when deciding cases, and rule based on their understanding of the law and the facts at issue. But when judges look no different than other politicians during the election season, it creates the appearance — and perhaps also the reality — that they will not be able to avoid political biases when they sit in the courtroom.

Judicial campaigns were once typically staid affairs, focusing on judges’ backgrounds and experience, and avoiding references to partisanship or hot political issues.⁴⁸ But as spending in these races has ratcheted up in this century, so has the rhetoric.

Judges now regularly describe themselves in overtly political terms. For example, in the Ohio Supreme Court’s 2014 election, an ostensibly non-partisan race, sitting Justice Judith French described herself as a “backstop” for the Republican governor and legislature, announcing on the campaign trail:

I am a Republican and you should vote for me. . . . Let me tell you something: the Ohio Supreme Court is the backstop for all those other votes you are going to cast. Whatever the governor does, whatever your state representative, your state senator does, whatever they do, we are the ones that will decide whether it is constitutional; we decide whether it’s lawful. . . . So forget all those other votes if you don’t keep the Ohio Supreme Court conservative.⁴⁹

Kansas: Battle Brews Between Courts and Political Branches

Politicized rhetoric has infiltrated state courts in other ways as well. In 2014, Kansas Gov. Sam Brownback criticized the state supreme court during his reelection campaign as too “liberal,” and the governor and legislature have sparred with the courts over a series of rulings finding that the state’s public school funding system violates the state constitution.⁵⁰ Since then, the court system, particularly the state supreme court, has been targeted by a series of legislative efforts to weaken its power, including a law (successfully challenged in court by the Brennan Center and co-counsel⁵¹) that weakened the budgetary and administrative power of the supreme court,⁵² and a second law (also challenged in court by the Brennan Center and co-counsel⁵³ and later eliminated by the legislature) that tied the court’s entire judicial budget to the outcome of the earlier litigation.⁵⁴ Other recent legislative efforts include an attempt to give the governor and legislature more control over judicial selection by eliminating judicial nominating commissions, and an attempt to expand the basis for impeaching supreme court justices to include decisions that “usurp” the power of other branches.⁵⁵

Television ads, which have become commonplace in supreme court elections, also routinely use political signals, such as touting a judge’s “conservative” values. In 2012, for example, Texas Supreme Court Justice Don Willet put out an ad that quoted the state’s then-attorney general (now governor), Greg Abbott, describing Willet as “the judicial remedy to Obamacare.”⁵⁶ In 2011, a Wisconsin justice was described in an attack ad as a “rubber stamp” for Gov. Scott Walker.⁵⁷ In 2016, an Arkansas Supreme Court candidate emphasized an NRA endorsement.⁵⁸

One cause of this shift in rhetoric is a 2002 U.S. Supreme Court decision, *Republican Party of Minnesota v. White*, in which the Court ruled that a state’s code of judicial conduct, which establishes standards of ethical behavior for judges and judicial candidates, could not bar candidates from announcing their views on disputed legal or political issues.⁵⁹ Along with the flood of new money, *White* opened the door to a new kind of campaigning — with judges increasingly willing to signal partisan and ideological alliances.⁶⁰

The rise of outside spending has also contributed to this change in tone, because outside groups are more likely than candidates to air negative advertisements. In supreme court races during the 2013-14 cycle, more than 90 percent of “traditional” television ads, which focused on a candidate’s background and experience, came from candidates themselves. In contrast, more than 85 percent of negative ads were sponsored by outside groups, including ads describing justices as supporting higher taxes or helping advance Obamacare.⁶¹

As a retired Wisconsin justice argued, when judicial campaigns look more like other elections, “I think people lose faith that the court is anything but a political machine.”⁶² Even more worrying is that judges themselves may believe their own rhetoric — and consider cases on the basis of political loyalty or expediency, rather than what is required by law.

Do Similar Dynamics Exist in States That Use Judicial Appointments?

The rise of high-cost and politicized judicial elections has been well-documented — and scrutinized — in recent years. What is less understood are dynamics in states that use various appointment-based methods. This will be an important research question in developing effective reforms.

For instance, the current Senate standoff over President Barack Obama’s nomination of Merrick Garland to the U.S. Supreme Court is a powerful example of how partisanship can undermine the judicial appointment process. Are state appointment processes similarly politicized? There are some indications they may be becoming more so. In New Jersey, a dispute between the governor and state senate over whether a Democrat or Republican should fill a supreme court seat kept a vacancy open for six years.⁶³ In other states, political leaders describe judicial appointments in overtly partisan terms. In Tennessee, when a justice appointed by a Democrat announced he was stepping down, giving the Republican governor an opportunity to shift the court’s majority, the state’s Lieutenant Governor announced it was “our turn” to put judges “capable of rendering conservative decisions” on the bench.⁶⁴

Likewise, while special interest influence in supreme court elections is well-documented, some critics of judicial nominating commissions, which are often used to vet judicial candidates for appointment,⁶⁵ have argued that these commissions are themselves frequently “captured” by interest groups, such as the state bar.⁶⁶ Others have argued that in some states, nominating commissions are too closely aligned with elected officials.⁶⁷ There has been little research to-date testing the veracity of these critiques, or exploring how such dynamics may impact judges’ work.

C. “The Crocodile in Your Bathtub”: Threats of Political Retaliation Put Pressure on Judges in Deciding Cases

Another threat to the fairness of courts is rooted in pressures around the *reselection* of judges currently on the bench. Judges often hear cases relating to high-profile issues, such as reproductive rights or the death penalty. While judicial rulings have always been — and should be — fair game for criticism, judges must nevertheless follow their understanding of what the law requires, even if it is unpopular.

Yet there is a growing body of evidence that concerns about job security — in both elective and appointive systems — impact how judges decide cases. In the words of the late California Supreme Court Justice Otto Kaus, deciding controversial cases when you know you will be facing an election is like “finding a crocodile in your bathtub when you go in to shave in the morning.

You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."⁶⁸ Only three states provide for life tenure for judges (with or without age limits). In every other state, regardless of how a judge initially came to the bench, judges must seek additional terms through an election or reappointment. Social science research supports the concern that in these states, judges may avoid making unpopular rulings in order to hold onto their jobs.

For example, research suggests that criminal defendants may not be accorded fair and impartial treatment in states where voters decide judges' fates. Numerous studies have found that when judges come closer to reelection, they impose longer sentences on criminal defendants and are more likely to affirm death sentences.⁶⁹ Indeed, criminal justice rhetoric is routinely part of judicial campaigns. In one recent Kentucky election, a judge lost after being the subject of a racially-charged attack ad about a ruling she participated in, which reversed the convictions of two African-American defendants who were described as having "ruthlessly murder[ed] pregnant women."⁷⁰ In Tennessee, three supreme court justices were attacked as soft on crime, and narrowly held onto their seats after touting their record of upholding "nearly 90% of all death sentences."⁷¹ Nor are election pressures limited to criminal justice issues. Research suggests that, more generally, elected judges tend to decide cases according to the political preferences of voters — and that when voters' preferences change, judges' behavior follows.⁷²

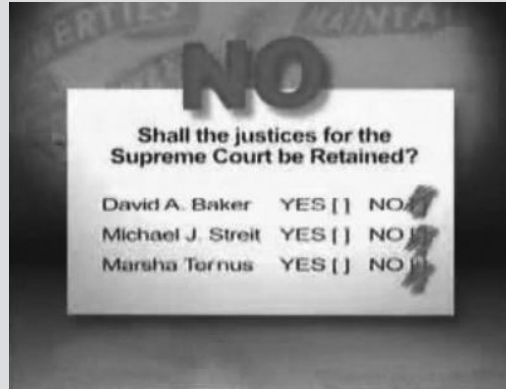
Appointment pressures are often less transparent, but as one legal historian has observed, "the politics of reappointment . . . can be just as unseemly and corrupt as modern judicial elections."⁷³ In New Jersey, reselection pressures moved into public debate when Gov. Chris Christie declined to reappoint the state's only African-American Supreme Court justice in 2010, asserting that the justice had contributed to "out of control" activism on a court known for ruling against the state in cases involving school funding and housing segregation.⁷⁴ It was the first time since the ratification of New Jersey's constitution in 1947 that a sitting justice was not reappointed by the governor.⁷⁵ Yet even when selection pressures are less public, evidence suggests that judges still worry about their job security. For example, in appointment states, judges are more likely to support government litigants who are responsible for their reappointment.⁷⁶

Taken together, the evidence we have so far suggests that reselection pressures pose unique and serious threats to the fairness of courts.

Marriage Equality and Iowa's Long Shadow

Iowa never had a single dollar spent on a retention election for its supreme court until 2010, when a million-dollar anti-retention campaign was launched against three justices who joined a unanimous decision extending the right to marry to same-sex couples.⁷⁷ Ads described the justices as “liberal, out of control judges,” and asked “what will they do to other long established Iowa traditions and rights?”⁷⁸ The justices lost their seats, and Iowa’s experience has served as a warning to other judges hearing high-profile cases in the years since.⁷⁹

In 2014-15, for example, members of the Arkansas Supreme Court, who are chosen via elections, used procedural mechanisms to avoid ruling in a marriage equality suit for two years, ultimately waiting for the U.S. Supreme Court to resolve the issue first. Two justices openly criticized the other members of the Court for the delay. One member wrote a public letter stating that the Court



Iowa for Freedom, *Send Them a Message* (copyright Kantar Media/CMAG 2010)

had “created out of whole cloth an issue to delay the disposition” of the marriage equality lawsuit.⁸⁰ Another recused himself from the case over the delays, saying that he could not ethically be “complicit in ... depriving justice to any party before this court.”⁸¹ The apparent lack of justification for the delay — coupled with the public criticism by two justices — strongly suggests that the Court had deliberately sought to avoid issuing a controversial ruling.

D. Courts Do Not Reflect the Diversity of the Communities They Serve, or the Diversity of the Legal Community

Courts are also undermined by a lack of diversity on the bench, which harms public confidence in the courts and creates a jurisprudence uninformed by a broad range of experiences.

In 2010, only 8.4 percent of state court judges were people of color, compared with 27.6 percent of the national population. Women made up 26.4 percent of the bench, compared with 50.8 percent of the national population.⁸² A 2009-10 survey found that 26 state supreme courts were all white and three were all male.⁸³ The state court bench also fails to represent the diversity of the legal profession: Those with prosecutorial and corporate backgrounds dominate state (and federal) courts.⁸⁴

Importantly, inadequate diversity is an issue in both appointive and elective systems. Indeed, research suggests that many of the barriers to achieving a diverse bench “operate across both types of systems, appointive or elective,”⁸⁵ and that “both elective and appointive systems are producing similarly poor outcomes in terms of the diversity of judges.”⁸⁶ Money, old-boys networks, biases — both explicit and implicit — and inadequate pipelines for diverse candidates are all contributing factors.

For example, in the 36 states that use judicial nominating commissions to vet judicial candidates in at least some circumstances, commissioners serve as both the gatekeepers and recruiters for judicial candidates. But while there is evidence that diverse nominating commissions are more likely to suggest a diverse slate of judicial candidates,⁸⁷ in practice, many nominating commissions continue to be dominated by white men.⁸⁸

Florida, for instance, has 27 separate judicial nominating commissions to fill vacancies at different levels of the state courts.⁸⁹ A 2014 survey by the state bar association found that nominating commissioners were 80 percent white,⁹⁰ in a state where only 56 percent of the population identifies as white (non-Hispanic).⁹¹ Although research consistently shows that recruitment is essential to promoting judicial diversity,⁹² half of the commissioners surveyed in Florida stated that they did not think that greater outreach would help them garner more applications from African-American or Hispanic lawyers.⁹³ One commissioner observed, “We don’t want judges who can’t even figure out how to apply on their own.”⁹⁴

In judicial elections, fundraising is another barrier to a more diverse bench.⁹⁵ As election costs have soared, there is evidence that minority candidates face obstacles to accumulating sufficient war chests.⁹⁶ The pressure to fundraise may also dissuade candidates from entering races in the first place.⁹⁷

Racial and gender biases among voters are another hurdle for judicial candidates from diverse backgrounds. Scholarship suggests that when voters face low-information elections — as judicial elections typically are — they may, consciously or unconsciously, rely on racial and gender stereotypes as “shortcuts” in determining their choice.⁹⁸ For instance, Justice Steven González, who had been appointed to the Washington Supreme Court and was its first Mexican-American justice,⁹⁹ faced a surprisingly close election campaign in 2012. His opponent, lawyer Bruce Danielson, did not campaign or spend any money on his election,¹⁰⁰ and was either unrated or rated “inadequate” by bar and lawyers associations vetting judicial candidates.¹⁰¹ While González held onto his seat, Danielson garnered 75 percent of the vote in some of the (predominantly white) eastern and central parts of the state.

Was González’s Hispanic last name a factor in these regions? A study by a University of Washington professor found substantial racial block voting in these areas, where voters also lacked access to voter guides or other information about the candidates and where the non-partisan ballot left voters without any clues about the candidates’ ideologies. The results held even when controlling for voters’ ideological preferences, leading the study’s author to conclude that “racial voting bias distorted the González-Danielson race in certain Washington counties.”¹⁰² Justice González observed: “Frankly[,] I want voters to know the candidate they’re voting for and vote because of that candidate’s qualifications[,] not because of their reaction to a last name.”¹⁰³

Wisconsin: Racially Charged Television Ad Targets Justice

Some ads speak more directly to racial bias. In Wisconsin, Justice Louis Butler lost his seat on the Wisconsin Supreme Court in 2008 after his opponent ran a racially-charged attack ad. The ad falsely suggested that Butler used loopholes to allow a child rapist to go free, resulting in an assault on another child. The ad juxtaposed a photograph of Butler with a photograph of the defendant, both of whom were black. The ad was incredibly deceptive: Butler did not decide the case as a judge — he provided representation as a public defender before joining the court. Furthermore, the



Michael Gableman, *Shadowy Special Interests* (copyright Kantar Media/CMAG 2008)

defendant in the case did not “go free.” He served his full term before committing his subsequent crime.¹⁰⁴

E. Recent Reform Efforts Do Not Solve the Problem

In the face of mounting evidence that courts’ capacity to provide basic fairness is at risk in many states, numerous bar associations, scholars, task forces, and legislators have suggested reforms.¹⁰⁵ Many groups, including the Brennan Center, have urged action. Yet these proposals have both struggled to gain traction and fail to address many of the most troubling aspects of how judicial selection is currently functioning.

Most proposals fall into two categories. One set of reforms focuses on mitigating the impact of money and special interests in judicial elections, typically through public financing systems and stronger recusal rules, which govern when judges have to step aside from cases.

These reforms are vital to promoting the integrity of the courts in states that hold elections. However, they address only part of a broader problem, at least given how elections are currently structured in states around the country. For example, when an outside group spends six- or seven-figure dollar amounts attacking a judge as soft on crime, neither public financing nor recusal can remedy the pressure this places on a judge in hearing other cases, knowing that he or she may face similar attacks during the next election.

Additionally, states have lagged in adopting either reform. Only six states have recusal rules addressing when judges must step aside from cases in the face of independent expenditures, for example.¹⁰⁶ Public financing has faced even greater hurdles. Only two states — West Virginia and New Mexico — offer public financing for judicial elections. Two other states — Wisconsin and North Carolina — had programs that were recently eliminated.

The second set of proposals has focused on judicial selection reform, most commonly to replace contested elections with a merit selection system, which generally utilizes nominating commissions, appointment by the governor, and periodic retention elections. Merit selection went through a period of broad adoption, with 14 states currently opting to use the system for supreme court elections, and several others utilizing hybrid systems.¹⁰⁷ But no state has moved from contested elections to a merit selection system in more than 30 years.¹⁰⁸ Nor has any other judicial selection reform gained traction. While a handful of states moved from partisan to nonpartisan contested elections over the past decade, few states have adopted major changes in how they choose judges since the 1980s, and recent changes have not reflected any consistent trends.¹⁰⁹

Even more importantly, merit selection raises its own problems. Merit selection proposals typically call for the use of retention elections, which have become increasingly high-cost and politicized and put troubling pressures on judges deciding controversial cases. There are also unanswered questions about how nominating commissions function in practice — particularly whether some committees have been subject to “capture,” either by special interests or the political branches, in ways that may undermine their legitimacy or effectiveness. Nor have states that use merit selection had success in ensuring a diverse bench, raising questions about their processes for recruiting and vetting judicial candidates.

To be sure, these are not the full universe of proposals for addressing the problems facing state courts today. A wide range of alternative reforms have been suggested in recent years, including:

- Continuing to elect judges, but to a single, lengthy term, thus eliminating reelections and the pressures of job security. In Wisconsin, a state bar committee in 2013 proposed continuing the state’s system of nonpartisan elections, but limiting judges to a single, 16-year term;¹¹⁰
- Modifying merit selection to eliminate retention elections. In one proposal, a judicial nominating commission would be responsible for not only initially vetting judicial candidates but also reappointing judges.¹¹¹ This is the system currently utilized in Hawaii;¹¹²
- Modifying how judicial nominating commissions are constituted. Among other ideas, one proposal suggests popularly electing a portion of the nominating commission.¹¹³

But little work has been done to understand how such proposals are likely to function in practice, including the extent to which they are likely to respond to existing problems, or create new ones.

Judicial Selection Systems Reflect History of Reform

There is a long history of judicial selection reform in the states, with each movement responding to the perceived threats to the fairness of the courts that animated the day. The diverse selection methods that exist today reflect this series of reform movements over the past two centuries.¹¹⁴

In the Founding era, all states chose their judges through gubernatorial or legislative appointments.¹¹⁵ The first major change to state judicial selection came in the middle of the 19th century with the adoption of partisan judicial elections. Interestingly — and perhaps surprisingly for modern readers — proponents of judicial elections justified them as enhancing judges' independence, arguing that appointed judges had been captured by corrupt legislatures and governors, and that elected judges were more likely to enforce limits against legislative overreach.¹¹⁶ In the words of one election supporter, “unless your judges are elected by the sovereign body, by the constituent, you will look in vain for judges [who] can stand by the constitution of the State against the encroachments of power.”¹¹⁷

Mississippi was the first state to adopt partisan elections in 1832, but the reform accelerated in the mid-1840s, spurred by an economic crisis that many blamed on profligate state legislatures — and judges that were insufficiently independent from the political branches.¹¹⁸ By 1909, 35 states chose their judges through partisan elections.¹¹⁹ And, in fact, a study of 19th century rulings found that the first generation of elected judges blocked substantially more legislation than judges from prior eras.¹²⁰

In the early 20th century, during the Progressive era, there was another wave of state constitutional conventions, and this time nonpartisan judicial elections gained favor. Concerned that party-affiliated judges were instruments of party machines and special interests, and frustrated that state courts were striking down progressive legislation, reformers sought to minimize party influence by removing party labels from the ballot.¹²¹ In the words of one proponent, courts were “composed of lawyers who owe their position, not so much to legal attainment and professional learning, as they do to political services rendered.”¹²² Nineteen states adopted nonpartisan elections in the 1910s and 1920s.¹²³

Merit selection, which includes the vetting of judicial candidates by nominating commissions, followed by gubernatorial appointment and periodic retention elections, has been the most recent reform movement, taking hold in the latter half of the 20th century. The move toward merit selection was led by the American Bar Association, the American Judicature Society, and state bar associations, and was supported by progressive reformers who wanted a more professional bench. Proponents argued, among other things, that merit selection's elite-driven system would lead to better qualified jurists than in contested elections, and that it would more effectively insulate judges from politics. At the same time, they argued that its use of retention elections would preserve democratic accountability.¹²⁴

The first state to adopt merit selection was Missouri in 1940 (although California adopted a similar hybrid in 1934),¹²⁵ and merit selection became known as the “Missouri Plan.” Other states followed, with reform accelerating in the 1960s and 1970s.¹²⁶ In many states, calls for a more “professional” judiciary were prompted by scandals. Florida, for example, introduced merit selection for its appellate courts after a series of corruption scandals in the early 1970s led to the resignation of three supreme court justices. Among other things, a lawyer representing the public utilities industry before the court ghost-wrote a decision, while a dog track with a case pending before the court paid for a Las Vegas gambling junket for one justice.¹²⁷ Beginning in 1940, 14 states adopted a version of the Missouri Plan for their supreme courts, and still others adopted aspects of the plan, such as retention elections or the vetting of candidates by nominating commissions.¹²⁸ The last state to move from contested elections to merit selection was South Dakota in 1980.¹²⁹

II. JUDGING JUDICIAL SELECTION: WHAT VALUES SHOULD BE FORWARDED IN JUDICIAL SELECTION AND HOW SHOULD REFORMS BE ASSESSED?

Choices about judicial selection frequently require tradeoffs among values, each important to a functioning judiciary. In different eras particular problems have had greater salience, and values have been balanced differently. In order to assess potential reforms, it is therefore vital to be thoughtful, and transparent, about the values against which they are being measured.

Judicial selection debates are most often framed as a struggle between judicial independence and accountability. But these terms raise more questions than they answer: Independent from what? Accountable to whom? Moreover, what other important values are implicated by the choice of judicial selection method, such as the quality of the bench, public confidence in the courts, and judicial diversity? Thinking through what matters in judicial selection is central to assessing existing models and options for reform.

A. Judicial Independence

At its core, judicial independence means, in the words of legal scholar Charles Geyh, “the capacity of individual judges to decide cases without threats or intimidation that could interfere with their ability to uphold the rule of law.”¹³⁰

Pressure on judges can manifest in many ways — a powerful governor angry that her signature law was struck down as unconstitutional; a media campaign funded by a deep-pocketed interest group concerned about the outcome of a high-stakes lawsuit; public anger about an unpopular ruling in a hot-button case. While all of these actors may have a legitimate interest in how a court rules, it is fundamental to the rule of law that judges decide cases based on their understanding of what the law requires — and not out of fear of political consequences.

One form of independence concerns the amount of insulation a judge has from negative consequences for his or her decisions. When the U.S. Supreme Court ordered the desegregation of Kansas’s schools in *Brown v. Board of Education*, “impeach Earl Warren” signs cropped up across the South. But Justice Warren and his colleagues were protected from political retaliation by the Constitution’s grant of life tenure, along with prohibitions against reducing judicial salaries and high standards for impeachment that make political retribution difficult.

On this measure, state courts generally enjoy less independence than the federal system. In all but three states, judges are periodically reconsidered for their jobs, whether through elections or reappointment. State constitutions are also generally easier to amend than the federal constitution, opening the door to changing a state court’s structure and powers if powerful interests are dissatisfied with unpopular rulings. These dynamics can put pressure on judges, which, in the words of the U.S. Supreme Court, “might lead [them] not to hold the balance nice, clear and true.”¹³¹ Evidence that reselection pressures impact judicial decision-making highlights the seriousness of this concern.¹³²

Judicial independence also has a relative component. As legal historian Jed Shugerman has observed, “In the switch from one form of selection to another, judges become more independent from one set of powers but more accountable to another.”¹³³ The switch in many states from appointments to elections, for example, gave judges more independence from the governor and state legislatures, but less independence from majoritarian politics and party bosses. In assessing today’s threats to the courts, then, the question is

not only how to best insulate judges from political forces, but also *which* political forces — including the political branches, special interests, political parties, and majority rule — pose the gravest threat to judicial independence.

B. Judicial Accountability and Democratic Legitimacy

In debates over judicial selection, the value of “independence” is most often contrasted with “accountability.” Accountability is important to ensure that judges do not simply impose their own personal or political preferences under the guise of law. As discussed below, it is also closely connected to the concept of democratic legitimacy — that because judges with different philosophies and values may decide hard cases differently, judges should be selected in a manner that gives voice to citizens’ views about the role and appropriate conduct of the courts.

Accountability is most often framed as the need for a majoritarian check on judges, and cited as an argument for judicial elections. In the words of political scientist Melissa Gann Hall, because “judges often have significant discretion and rely on their own political preferences to make decisions,” we should reject the premise that “any form of constituency pressure is negative.” Why, asks Hall, are “a judge’s unconstrained preferences . . . any less dangerous (or consistent with the rule of law) than the threat of majority tyranny”?¹³⁴

Hall and other proponents of electoral accountability raise important questions about the nature of courts in a constitutional democracy. Indeed, Hall is plainly correct that “judges are not mere technocrats”¹³⁵ — one need only look at the ongoing debates over when and how to select Justice Antonin Scalia’s replacement on the U.S. Supreme Court to appreciate the political and policy significance of who sits on the bench.

At the same time, judges are also not simply politicians in robes. In a democracy, judges act within the constraints of law, “anchored,” in the words of Bruce Fein and Burt Neuborne, “to one of a number of theories that the American people have come to accept as a legitimate part of judging.”¹³⁶ It is undeniable that judges’ decisions are shaped by their experiences, presuppositions, judicial philosophies, and even political instincts. Yet a belief in the rule of law means a belief that judging is — or should be — constrained by legal principles and interpretative norms in a way that makes it different than the exercise of raw political power. This is particularly important because judges are often a counter-majoritarian force protecting the rights of minorities and pushing back against illegal actions by the government’s political branches.

The challenge, then, is to identify a judicial selection method that fits comfortably within our democratic system without transforming judges into ordinary politicians. One part of the answer is that there are numerous accountability mechanisms that do not depend on judicial selection. For example, appellate review of lower court judges allows for the correction of legal errors, while disciplinary rules police unethical conduct.¹³⁷ Judges are also constrained by the expectation that they will give reasons for their decisions, frequently through written opinions. But accountability requires more than discipline and error correction. Another aspect of accountability is democratic legitimacy.

Courts make high-stakes decisions, and as a result, the choice of who sits as a judge has high stakes as well. It is both inevitable and appropriate that the public — including advocates, interest groups, and ordinary citizens — care about who becomes a judge, and that they prefer judges who share their values. To meet the value of democratic legitimacy, judicial selection must be capable of channeling citizens’ legitimate preferences about the operation of our courts.

While accountability is often equated with elections, other selection systems can, and do, provide for democratic legitimacy. Federal judges, for example, are unelected but are nevertheless tethered to our democratic institutions because they are nominated and confirmed by democratically-elected bodies.

Yet, other forms of judicial selection are less closely linked to democratic institutions. In Germany, for example, judges take written and oral exams and must complete a probationary period, with promotions determined by more senior judges.¹³⁸ Closer to home, 27 states provide for the appointment of judges by governors whose discretion is circumscribed by judicial nominating commissions, who vet potential nominees and identify a short-list of qualified candidates.¹³⁹ Similar nominating commissions are also used by some U.S. senators in recommending judicial nominees to the president (itself a practice not part of the formal federal appointment process but done as a matter of tradition).¹⁴⁰ In some states, membership in judicial nominating commissions includes individuals without a connection to a democratically-elected body, such as lawyers selected by the state bar.

While constraining the governor's discretion through the use of nominating commissions has salutary benefits — including promoting judicial independence by helping insulate judges from the political branches — it raises hard questions from the democratic legitimacy perspective. Many states mitigate these concerns through retention elections, which provide for public input at the back end of the process. But as retention elections themselves grow increasingly costly and politicized, the question of how to insulate judicial selection from the negative aspects of political pressure while ensuring democratic legitimacy becomes even more difficult.

C. Quality Judges

Judicial quality is another value to be advanced by a state's choice of selection system. Given the importance of judges' work, it is vital that they have the appropriate temperament, show integrity and a lack of bias, bring diverse perspectives and experiences to their work, and have the competence and expertise to interpret and apply the law.

A state's choice of judicial selection system will create particular pathways for would-be judges — paths that may reward, or even incentivize, certain backgrounds and character traits. Research into whether particular selection systems tend to yield higher "quality" judges, however, has been inconclusive.¹⁴¹ One reason for the lack of clear data is a measurement issue — common proxies such as citation counts or the number of opinions issued are extremely rough measures of quality. Other potential measures, such as misconduct allegations, are often not publicly available. Moreover, a host of state-specific factors impact such measures, making cross-state comparisons difficult. While differences in quality may well exist, they are hard to identify. Similarly, little is known about whether a state's choice of judicial selection method impacts substantive outcomes, such as whether judges are more likely to rule on the side of corporations.¹⁴²

Given the lack of clear evidence, supporters of fair and impartial courts should think broadly and creatively about how to select quality judges, including options for promoting judicial diversity, strengthening ethical rules and professional standards, developing robust judicial performance evaluations, and strengthening judicial discipline. That said, it is also plainly the case that choices about judicial selection methods will advantage, or disadvantage, different candidates based on their particular backgrounds or temperaments. In assessing existing systems and considering new reforms, it is important to think critically about what kind of judges each route to selection will attract and benefit.

D. Public Confidence

The public's confidence in the fairness and impartiality of the judiciary is another important value in assessing judicial selection. As Sherrilyn Ifill, president and director-counsel of the NAACP Legal Defense and Educational Fund, has observed: "The importance of public confidence to the legitimacy of our courts cannot be overstated. Judges possess neither armies nor battalions. What courts rely on is the public's acquiescence, the public's sense that when a court issues a decision that decision is to be obeyed."¹⁴³ When the public has confidence in the courts, it can discourage retaliatory assaults on judicial independence by political actors because such efforts are more likely to be viewed as illegitimate by voters. It also legitimizes court decisions, even to litigants on the losing side. For these reasons, it is important that judicial selection operates to promote confidence in judicial institutions.

While the courts tend to be seen more favorably by the public than the political branches,¹⁴⁴ polling data by the National Center for State Courts suggests that today's public nevertheless has serious concerns about the fundamental fairness of state courts. Nearly 70 percent of voters think that the courts give preference to large corporations and the wealthy.¹⁴⁵ Moreover, less than one-third of African Americans believe state courts provide equal justice, compared with 57 percent of all Americans.¹⁴⁶

There are many reasons for these perceptions — not least that there is in fact a vast justice gap in America, and one which disproportionately harms minorities. Moreover, courts — and judges — have been complicit in everything from penalizing the poor through the imposition of onerous criminal justice fees and fines to failing to vigorously police prosecutorial misconduct.¹⁴⁷ Inadequate diversity on the bench, including a lack of racial diversity and the underrepresentation of public defenders and other lawyers with criminal justice or civil rights backgrounds, has doubtlessly contributed to these dynamics.

There is also evidence that the growing cost and politicization of judicial elections is increasing public concerns that justice is for sale. A 2004 survey found that 71 percent of voters believe that campaign contributions from interest groups have at least some influence on judges' decisions in the courtroom.¹⁴⁸ By 2013, the number had risen to 87 percent.¹⁴⁹

Research by political scientist James Gibson similarly suggests that spiraling judicial election spending diminishes the legitimacy of courts in the eyes of the public.¹⁵⁰ At the same time, however, Gibson argues that judicial elections, all else being equal, *enhance* judicial legitimacy in the view of the public, "most likely by reminding citizens that their courts are accountable to their constituents, the people."¹⁵¹ Gibson also found that many judicial campaign activities, such as making policy promises, do not damage the public's opinion of courts' legitimacy.¹⁵²

Together, this evidence suggests that courts, and judges, have a reservoir of public support that enhances their legitimacy, particularly when compared to the other branches of government, but also that this reservoir is under strain. In assessing options for choosing judges, it is important to consider the legitimacy-enhancing role that elections can play, but also how campaign spending by special interests, along with a lack of diversity on the bench, can undermine public confidence.

E. Judicial Diversity

Finally, diversity is a key value to be promoted by judicial selection. Diversity is closely linked to other important values. Diversity — including racial, gender, socio-economic, and professional diversity — is vital to a well-functioning court system, one that draws from as broad a pool of talented lawyers as possible, fosters robust deliberation that reflects different life perspectives, and engenders confidence within the communities it serves. As Ifill has observed, “the public’s confidence in the judiciary must be earned.”¹⁵³

The importance of a diverse bench to decision-making is frequently emphasized by judges themselves. Retired U.S. Supreme Court Justice Sandra Day O’Connor noted in a tribute to Justice Thurgood Marshall that his life experiences as an African American and a civil rights lawyer impacted not just his perspective on the bench, but also her own: “Occasionally, at Conference meetings, I still catch myself looking expectantly for his raised brow and twinkling eye,” she recalled after his death, “hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world.”¹⁵⁴ And, as Judge Harry T. Edwards of the Court of Appeals for the D.C. Circuit observed, “[I]t is inevitable that judges’ different professional and life experiences have some bearing on how they confront various problems that come before them. And in a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better informed discussion.”¹⁵⁵

Existing research has not shown any clear relationship between the method of judicial selection and diversity outcomes, leaving more questions than answers about how judicial selection can be structured to best foster diversity.¹⁵⁶ For example, it seems likely that local circumstances — such as the extent to which there is racially polarized voting, or the commitment of a state’s governor to ensuring a diverse bench — may advance or hinder diversity.¹⁵⁷ Selecting judges from local districts, as opposed to statewide, may also have an impact on diversity. Likewise, members of different underrepresented groups may face different challenges in reaching the bench.

These considerations suggest that those interested in potential reform must look beyond aggregate studies, including considering how individual jurisdictions have (or have not) created meaningful pathways for diverse candidates. It also suggests that judicial selection reform must be coupled with other measures to promote such pathways, be it a public financing system for elections or an outreach mandate for judicial nominating commissions.

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All of these values are important — and no judicial selection system can meet them all in equal measure. In rethinking judicial selection, we must consider the magnitude of the likely tradeoffs, evaluate whether other reforms can compensate for any deficiencies, and ultimately, make judgments about which tradeoffs are most acceptable.

III. RETHINKING JUDICIAL SELECTION

While it is clear that many of the current systems for judicial selection fall short on important values, this is only a partial answer to the question of whether reform is warranted. The other — and more difficult — question is whether another option would better advance these values. As described in this paper, there are numerous important considerations and unanswered questions about judicial selection that should frame future reform efforts.

Beyond Merit Selection vs. Elections

Most debates over judicial selection reform have centered on the advantages and disadvantages of merit selection systems. Supporters of merit selection typically argue that it leads to higher quality judges, and insulates judicial selection from partisanship and the operation of political machines. The American Bar Association Coalition for Justice argued in a 2008 report, for example, that merit selection “encourages community involvement in judicial selection, limits the role of political favoritism, and ensures that judges are well qualified to occupy positions of public trust.”¹⁵⁸ Conversely, supporters of contested elections frequently argue that merit selection systems simply transfer political influence behind the scenes, while weakening mechanisms for holding judges accountable for overreach,¹⁵⁹ or that adopting merit selection would harm diversity on the bench, at least in some jurisdictions.¹⁶⁰

Advocates should consider reframing this traditional debate.

First, while elective and appointive systems are often described in opposition to each other, the majority of states have elements of both systems. States generally design their judicial selection systems to address three distinct phases:

1. filling a seat when a judge steps down at the end of his or her term;
2. filling a seat when a sitting judge finishes a term and wishes to stand for a new one; and
3. filling an interim vacancy, when a seat becomes vacant before the end of a judge’s term.

At the supreme court level, 38 states use some kind of election in at least one of these phases, including 22 states that use elections to fill an open seat on the bench, and 38 states that use elections in connection with subsequent terms.¹⁶¹ At the same time, almost every state gives the governor the power to make appointments for interim vacancies when a seat opens before the end of a judge’s term. Notably, in some states that provide for elections, judges routinely step down before the end of their terms so as to provide the governor with an appointment. In Minnesota, North Dakota, and Georgia, for example, *all* current supreme court justices were initially appointed to the bench.¹⁶² It is therefore important to understand how judicial selection operates — and the incentives it creates — at each of these phases, which frequently include both elective and appointive elements.

Importantly, some of the strongest empirical evidence on how selection impacts judicial independence suggests that *reselection* pressures — whether through elections or appointments — pose severe challenges to fair courts.¹⁶³ Yet, this is an area where the safeguards are almost uniformly weak. Only three states — Massachusetts, New Hampshire, and Rhode Island — have life tenure (with or without a mandatory retirement age) for judges. More attention needs to be paid to protecting judges from the “crocodile in the bathtub” — the effect job security can have on decision-making in high-salience cases. Surprisingly, relatively little attention has been paid to *reselection* as such, and how these unique pressures might be mitigated, regardless of how a judge initially made it onto the bench.

On the question of the initial or interim selection of judges to fill vacant seats, here too those considering reform should look at a wide range of options. This might include alternative ways of structuring appointment systems. For example, can nominating commissions be more effective at promoting democratic legitimacy and diversity? Does the federal system provide any lessons? While problems associated with judicial elections have been well-documented, far less is known about how judicial appointment systems in the states function in practice. Those considering reform options might also take a hard look at the extent to which changes in the structure of judicial elections — such as the adoption of a robust public financing system — would alleviate concerns about how these contests are working today.

Considering Differences

State conditions also vary widely, including population size, concentration, demographics, polarization, and political party dominance. Simply put, a judicial selection system that may be suitable for a small, homogenous state controlled by a single party may not be appropriate for a large, diverse, and politically polarized one. In considering reforms, it is therefore important to consider how to take account of the differences among states yet, at the same time, let states achieve goals such as diversity, independence, and accountability.

Another consideration is that different levels of courts may benefit from different selection systems. Most of the existing research on judicial selection has examined state supreme or appellate courts. It is plausible that judicial selection problems may present differently at lower levels. Moreover, lower court judges perform different tasks than their counterparts on high courts. While lower courts may hear trials and sentence defendants, their decisions are non-precedential and do not play the same “policy” role as state supreme courts. And, there is evidence that in certain jurisdictions, diverse candidates may do better in local elections than they would in an appointive system, but fare less well in statewide races such as for the supreme court.¹⁶⁴ Each level of court plays an important, but different, role in the judiciary, and reformers must look at how their actions will affect the courts at every level.

Looking Forward

The way we select judges has a profound impact on the kind of courts, judges, and ultimately, justice that we have in our country. In many states today, judicial selection is not working. While there is growing recognition of the problems facing state courts, many of the proposed solutions have not been fully responsive to these challenges. With the release of this paper and other resources, we hope to spur an important conversation — and innovation — regarding how states choose their judges.

ENDNOTES

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- 108 *Id.* Note that in New Mexico, a 1988 amendment to the state constitution established that judicial vacancies are filled by commission-assisted appointment. Appointees must then stand in contested partisan elections during the first general election after their appointment and, if successful, serve the remainder of their unexpired term. At the conclusion of a full term, judges may stand for retention for subsequent terms. *Judicial Selection: An Interactive Map*, *supra* note 65.
- 109 See William Raftery, Nat'l Ctr. for State Courts, *Judicial Selection in the States*, TRENDS IN STATE COURTS (Dec. 2013), <http://www.ncsc.org/sitecore/content/microsites/future-trends-2013/home/Monthly-Trends-Articles/Judicial-Selection-in-the-States.aspx>.
- 110 STATE BAR OF WISCONSIN JUDICIAL TASK FORCE, REPORT AND RECOMMENDATION (2013), *available at* <http://www.wisbar.org/SiteCollectionDocuments/Publications/JudicialTaskForce-September2013-FINAL.pdf>.
- 111 Hon. R. William Riggs, *A Proposal for Change*, 39 WILLIAMETTE L. REV. 1439 (2003), *available at* <http://heinonline.org/HOL/LandingPage?handle=hein.journals/willr39&div=37&id=&page>.
- 112 *Judicial Selection: An Interactive Map*, *supra* note 65.
- 113 SHUGERMAN, *supra* note 73, at 261.
- 114 For a lengthier discussion of the history of judicial selection reforms, see JOHN F. KOWAL, BRENNAN CTR. FOR JUSTICE, JUDICIAL SELECTION FOR THE 21ST CENTURY (2016).
- 115 SHUGERMAN, *supra* note 73, at 27-29. Some elected officials also had judicial responsibilities during this era. *Id.*
- 116 *Id.* at 105.
- 117 *Id.* at 97 (quoting Michael Hoffman, a leading proponent of judicial elections in New York).
- 118 *Id.* at 66-77, 84-86.
- 119 Charles G. Geyh, *Methods of Judicial Selection and Their Impact on Judicial Independence*, 137 DAEDALUS 86, 88 (2008), *available at* <http://www.repository.law.indiana.edu/facpub/54>.
- 120 SHUGERMAN, *supra* note 73, at 125.
- 121 *Id.* at 159-73.
- 122 *Id.* at 168 (quoting Nebraska Governor Chester Aldrich).

- 123 *Id.* at 160.
- 124 *Id.* at 208-40.
- 125 *Id.* at 286.
- 126 *Id.* at 286-87.
- 127 MARTIN A. DYCKMAN, A MOST DISORDERLY COURT: SCANDAL AND REFORM IN THE FLORIDA JUDICIARY 1-21 (2008).
- 128 SHUGERMAN, *supra* note 73, at 286-87. Note that this paper differs from Shugerman's count because it excludes California's and Maryland's hybrid systems. See *Judicial Selection: An Interactive Map*, *supra* note 65.
- 129 *Id.*
- 130 Geyh, *supra* note 119, at 86. Geyh has also emphasized that judges are "colored by their ideological (and other) predilections," but argues that independence "enables judges acculturated to respect law, process, and justice, to protect and promote those objectives." CHARLES GARDNER GEYH, *COURTING PERIL* 9 (2016).
- 131 *Tumey v. Ohio*, 273 U. S. 510, 532 (1927).
- 132 See BERRY, *supra* note 7, at 7 ("Several studies have found that re-election and retention pressures cause judges to (1) sentence more punitively and (2) vote less frequently in favor of criminal defendants on appeal."); *id.* at 9 ("Researchers have found that appellate judges facing re-election are more inclined to affirm death sentences, and less inclined to dissent from orders affirming them.").
- 133 SHUGERMAN, *supra* note 73, at 7.
- 134 Brandon Bartels, *Bright Ideas: Political Scientists Chris W. Bonneau and Melinda Gann Hall on the Judicial Elections Controversy*, CONCURRING OPINIONS (June 17, 2010), <http://concurringopinions.com/archives/2010/06/bright-ideas-political-scientists-chris-w-bonneau-and-melinda-gann-hall-on-the-judicial-elections-controversy.html>.
- 135 *Id.*
- 136 Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 JUDICATURE 58, 59 (2000), available at http://www.brennancenter.org/sites/default/files/legacy/d/fein_neuborne.pdf.
- 137 Geyh, *supra* note 119, at 90, 99.
- 138 Mary L. Volcansek, *Appointing Judges the European Way*, 34 Fordham Urb. L.J. 363, 373-74 (2007).
- 139 *Judicial Selection: An Interactive Map*, *supra* note 65.
- 140 DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., *ROLE OF HOME STATE SENATORS IN THE SELECTION OF LOWER FEDERAL COURT JUDGES* 9-10 (2013), available at <https://www.fas.org/sgp/crs/misc/RL34405.pdf>.
- 141 See Stephen Choi, Mitu Gulati, & Eric Posner, *Professional or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2008), available at http://www.ericposner.com/professionals_or_politicians.pdf (finding that elected judges publish more opinions than appointed judges but appointed judges are more frequently cited than elected judges); Malia Reddick, *Judging the Quality of Judicial Selection Methods: Merit Selection, Elections, and Judicial Discipline*, AMERICAN JUDICATURE SOCIETY (2010), available at http://www.judicialselection.us/uploads/documents/Judging_the_Quality_of_Judicial_Sel_8EF0DC3806ED8.pdf (finding merit-selected judges were disciplined less often than elected ones over the studied period).

What judicial quality means will also depend on the nature of the court; for example, the experience, skills, and temperament that would make someone good at presiding over trials may be different than what would make them a good choice for a state supreme court justice, where much of the work involves writing precedential opinions.

- 142 Due to methodological difficulties in comparing selection systems across states, it is difficult to draw clear conclusions about how selection systems impact substantive outcomes. A few studies that have explored aspects of this question include F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 207 (1999), available at http://www.jstor.org/stable/10.1086/468050?seq=1#page_scan_tab_contents (finding support for the idea that appointed judges are more independent than elected ones through levels of litigation); Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. ECON. REV. 341 (2002), available at http://www.jstor.org/stable/pdf/42705415.pdf?seq=1#page_scan_tab_contents (finding strong support for the hypothesis that elected state judges have stronger incentives to redistribute wealth from out-of-state businesses to in-state plaintiffs, with partisan-elected judges showing the strongest correlation); and Joanna Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589 (2009), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1409&context=dlj> (finding that judges facing gubernatorial or legislative reappointments are biased in favor of government litigants).
- 143 Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 45, 48 (2009), available at http://www.greenbag.org/v13n1/v13n1_ifill.pdf.
- 144 For example, polls about trust in the federal government consistently find that the courts are more trusted than the executive or legislative branches. See, e.g., *Trust in Government*, GALLUP, <http://www.gallup.com/poll/5392/trust-government.aspx> (longitudinal polling data on trust in each branch of government).
- 145 MARK CADY ET AL., THE STATE OF STATE COURTS: A 2015 NCSC PUBLIC OPINION SURVEY 9 (2015), available at http://www.ncsc.org/-/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Presentation.ashx.
- 146 *Id.* at 10.
- 147 See ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY I (2010), available at <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> (describing the use of fees for representation by a public defender and late fees, payment plan fees, and interest that penalize those unable to pay their fees at once); Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xxxv-xxxvi (2015), available at http://georgetownlawjournal.org/files/2015/06/Kozinski_Preface.pdf (“[J]udges seem strangely reluctant to name names when it comes to misbehaving prosecutors.”).
- 148 *March 2004 Survey Highlights*, JUSTICE AT STAKE I (Mar. 2004), http://www.justiceatstake.org/media/cms/ZogbyPollFactSheet_54663DAB970C6.pdf.
- 149 *National Poll 10/22-10/24*, *supra* note 29, at 3.
- 150 JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 68 (2012).
- 151 *Id.* at 130.
- 152 *Id.*
- 153 Ifill, *supra* note 143, at 48.
- 154 Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1220 (1992).

- 155 Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 329 (2002); *see also* Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 10 ASIAN AM. L.J. 127, 140 (2003).
- 156 *See, e.g.*, Esterling & Anderson, *supra* note 87, at 28-29 (examining how merit selection operates in practice in 10 states and finding that while nominating commissions often affirmatively select minority applicants as nominees, particularly when commissions are diverse, there is variability in governors' proclivities to select minority appointees); MALIA REDDICK, MICHAEL J. NELSON & RACHEL PAINE CAUFIELD, AM. JUDICATURE SOC'Y, EXAMINING DIVERSITY ON STATE COURTS: HOW DOES THE JUDICIAL SELECTION ENVIRONMENT ADVANCE—AND INHIBIT—JUDICIAL DIVERSITY? (2010), *available at* http://www.judicialselection.us/uploads/documents/Examining_Diversity_on_State_Courts_2CA4D9DF458DD.pdf (finding through empirical research that while merit and pure gubernatorial appointment “placed more minorities on high courts than did contested elections,” “neither appointive nor elective methods were consistently more successful, or less successful, in diversifying state judiciaries” overall); Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47 (2008) (examining diversity in state and federal appellate courts in the U.S. in 2005 and finding that diverse judges “appear not to be systematically disadvantaged or benefited by any specific selection method”); Myers, *supra* note 82, at 51 (finding that “minority and female judges are no more or less likely to reach the bench through merit selection or judicial elections,” but that “merit selection provides the opportunity to identify diversity as an institutional priority”).
- 157 LAWYERS COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 88, at 11-12, 16-18.
- 158 ABA COAL. FOR JUSTICE, AM. BAR ASS'N., *supra* note 105, at 7.
- 159 *See* Ware, *supra* note 66, at 764-66.
- 160 LAWYERS COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 88, at 11-12.
- 161 *Judicial Selection: An Interactive Map*, *supra* note 65.
- 162 MINNESOTA JUDICIAL BRANCH, <http://www.mncourts.gov/SupremeCourt.aspx> (last visited May 3, 2016); NORTH DAKOTA SUPREME COURT, <http://www.ndcourts.gov/Court/COURT.htm> (last visited May 3, 2016); SUPREME COURT OF GEORGIA, <http://www.gasupreme.us/court-information/biographies/> (last visited May 3, 2016).
- 163 *Supra* notes 68-76 and accompanying text.
- 164 LAWYERS COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 88, at 11-12, 16-17.

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