

JUDICIAL SELECTION FOR THE 21ST CENTURY

By John F. Kowal

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ABOUT THE AUTHOR

John F. Kowal is the Brennan Center's vice president for programs, responsible for supervising its substantive programs on democracy, justice, and liberty and national security. He also oversees the Center's Washington, D.C. office and fellows program. Before joining the Center, John developed and led grantmaking programs at the Open Society Institute and Ford Foundation, where he focused on democracy and justice issues. He began his career as a litigation associate in two New York City law firms — Cravath, Swaine & Moore and Schulte Roth & Zabel —and is a graduate of New York University and Harvard Law School.

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Introduction

Going back to the founding of the Republic, Americans have periodically had to rethink how state court judges were selected, balancing the twin ideals of judicial independence and judicial accountability. We began with the idea that governors and legislatures should choose. Then, concerned about capture of the courts by political elites, 19th century reformers posited that the people should choose via the ballot box. By the early 20th century, concerns about partisanship in elections led to the creation of merit selection — introducing a nonpartisan commission to screen for qualifications. Each of these selection systems continues today in at least some states.

Now, at the start of the 21st century, the way we choose judges is raising a new set of challenges calling for 21st century solutions.

Over the past several decades, judicial selection has become increasingly politicized. We can trace this trend to the 1980s, when special interests from lawyers to corporations to politicians looked to the selection of state court judges and saw an opportunity to shape the courts to advance their goals. Rather than settle for a fair, impartial, and independent judiciary, they saw how easy it would be to mold a “friendly” one.

We have witnessed this phenomenon most starkly in states that elect judges. Eighty-seven percent of state court judges face the voters in elections of one sort or another. And interest groups have figured out that investing in judicial races — often by funding ads urging voters to hold judges accountable for rulings in controversial cases — is an inexpensive way to shape policy: cheaper than lobbying, cheaper than supporting the campaigns of governors and state legislators.

The judicial selection wars started as a competition between plaintiffs’ lawyers and business interests in a few states. Over time, as other interest groups joined in, money poured into more and more judicial races. From 2000–2009, state supreme court candidates raised \$206.9 million, more than doubling the \$83.3 million raised in the prior decade. This new surge of campaign cash, from lawyers and business interests mostly, fueled an escalating barrage of costly TV attack ads.

Increasingly, judicial elections — once fairly tame — began to look like any other election, with ugly attack ads increasingly setting the tone. But politicized elections pose a real threat to the fairness and impartiality of the judiciary. Judges, after all, should not make promises to campaign contributors the way politicians do. Their job is to remain impartial: to decide cases based on the law and the facts. Legal scholar Roy Schotland was one of the first to sound the alarm in 1998. “The greatest current threat to judicial independence is the increasing politicization of judicial elections,” he warned. “They are becoming nastier, noisier, and costlier.”¹

Other factors have also fueled the explosive growth of money in judicial races. As a campaign consultant foresaw in “Justice for Sale,” a 1999 *Frontline* documentary that investigated whether the influx of campaign cash, then just a trickle, was corrupting the courts, “[y]ou’re just not a real candidate if you’re not on television.”² TV ad buys cost money — as do pollsters, campaign staff and the other trappings of modern political campaigns. Moreover, in an increasingly deregulated campaign finance system, judges feel increased pressure to raise campaign war chests to fend off attacks from shadowy independent groups.

But where does a judge raise campaign funds? Two sources, primarily: lawyers who come before the court, and those with a stake in judicial outcomes. This comes at a cost. Americans believe overwhelmingly that campaign contributions affect judges’ decisions on the bench.³ Even judges themselves concede that raising money from lawyers and litigants has at least some influence.⁴ It’s hard to disagree with Theodore Olson, former Solicitor General and a prominent litigator, who argues: “The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today.”⁵

The Brennan Center, in collaboration with its partner organizations Justice at Stake and the National Institute on Money in State Politics, has documented this growing politicization of judicial elections in biennial *New Politics of Judicial Elections* reports, which began with the 2000 campaign. Our data helped foster critically needed awareness. The national media, which once barely covered the state courts, has elevated the issue as a serious problem. Key stakeholders — including many prominent judges — have repeatedly and urgently called for a solution. Governors and legislators in at least a dozen states with judicial elections have proposed reforms. And reformers have worked tirelessly to advance these measures.

But paradoxically, just as the conditions to advance reform could not be riper, there has been little progress. How can that be?

For the past 85 years, the gold standard for many in the reform community has been merit selection of judges, based on “the Missouri Plan” — named after the first state to adopt it. While the details vary from state to state, merit selection systems typically feature a nonpartisan commission of lawyers and non-lawyers that recruits and evaluates candidates for judgeships. The commission presents a slate of nominees to the governor, who then makes an appointment from that list. Most merit selection systems require appointed judges to periodically face voters in single-candidate retention elections in which voters are asked to decide whether the judge should remain on the bench.⁶ In other states, the governor or legislature decides whether to extend a judge’s tenure for another term.

From 1940 to 1994, 23 states implemented some version of merit selection, propelled by support from business interests and the bar.⁷ For the most part those systems have operated well. But since 1994, every attempt to expand merit selection to other states has fallen short.

There have been many explanations for why merit selection reforms have not succeeded in recent years. Polls show Americans like to vote for their judges. And many are skeptical of a system ostensibly based on “merit.” Some key constituencies — unions, plaintiffs’ lawyers, and communities of color — voice concerns about the accountability of appointed, elite

commissions, particularly when it comes to ensuring diversity. Meanwhile, some in the business community, which once played a major role in advancing merit selection, have raised their own objections to the fairness of commissions, claiming they are captured by plaintiffs' lawyers.

The interest groups opposing merit selection share one thing in common: They believe contested judicial elections can still work to their advantage. As a result, reformers who have sought to introduce merit selection systems have had difficulty building the broad-based coalitions needed to win. Significantly, many advocates of merit selection, recognizing this reality, have focused their energies on the narrower goal of fixing judicial elections.

Changing judicial selection typically requires amending a state constitution. And the process of amendment can be difficult: Reformers usually must obtain legislative approval, sometimes in more than one session, and then win a referendum before the voters. Over the past few decades, a number of reform measures have foundered at the legislative approval stage. But voters in five states — Ohio (1987), Nevada (1988 and 2010), Louisiana (1989), Florida (2000), and South Dakota (2004) — have rejected merit selection by wide margins.⁸

Meanwhile, merit selection has problems of its own. It has not been immune to the political pressures that have corroded judicial elections. The critical vulnerability in merit selection systems is the requirement that judges be periodically *reselected* to keep their jobs. In eight of the 24 states with merit selection, judges must win approval from the governor or legislature to extend their tenure. In the remaining 16 merit selection states, judges run unopposed in retention elections where voters decide whether the jurist deserves another term. Judicial terms can be as short as four years.

Retention elections were intended to depoliticize judicial elections while giving the voters a say. For many years they attracted little interest, since elections without competition rarely excite voters. But partisans and special interests are figuring out how to game them too. The most recent *New Politics* report noted this emerging trend:

[I]n a handful of states, retention campaigns have become intense, high-profile, and expensive — frequently in response to a decision in a controversial case or when there is an opportunity to change the ideological composition of a court. Average per seat spending in retention elections in 2009-14 reflects a tenfold increase from the average over the previous eight years. Overall, nearly \$6.5 million was spent on retention races in three states in 2013-14. Multi-million-dollar elections in Illinois and Tennessee were some of the most expensive and contentious races this cycle. The trend puts new pressures on judges who had previously been largely insulated from politicized judicial elections.⁹

Not only has merit selection not been gaining ground, it has come under attack by politicians who either seek to weaken the independence of the commission process, or who wish to end merit selection altogether and choose judges through partisan elections or gubernatorial appointment. Since 2010 there have been efforts to weaken or eliminate merit selection in seven states — nearly a third of the 23 states that use it.¹⁰ Kansas recently eliminated merit selection for intermediate appellate judges, instituting a system of gubernatorial appointment with senate confirmation.¹¹

Given merit selection's struggles, some reformers have looked instead for ways to improve judicial elections. In 2004, North Carolina was the first state to adopt a public financing scheme for judicial races, a reform that relieved judicial candidates of the need to raise money from special interests. The measure enjoyed bipartisan support and, by most reports, it worked well. Three additional states followed: New Mexico (2007), Wisconsin (2009), and West Virginia (2009). But the North Carolina and Wisconsin programs were later undone by hostile Republican legislatures.¹² Since then, the momentum for public financing has stalled.

Recent Supreme Court cases, starting with *Citizens United*, have also shifted the terrain, expanding the role of shadowy independent groups whose untraceable spending on attack ads can dwarf the war chest of even the best-funded candidates. And the Court's 2011 ruling in *Arizona Free Enterprise Club v. Bennett* killed a critical feature in public financing schemes — the trigger funds that protected publicly-financed candidates from being vastly outspent.¹³

Reformers looking to improve judicial elections have also focused on voter education (promoting voter guides and judicial evaluation programs to give voters more meaningful information about judges and judicial candidates) and recusal reform (strengthening rules to require judges to step down from cases where their impartiality can be questioned — say, after receiving a large campaign contribution from a litigant). As long as states elect their judges, this is critically valuable work. But after a period of experimentation with improving judicial elections, it is worth asking whether fixing judicial elections is enough.

So it is time to ask: If judicial elections are now untenable, as many believe, can we revive (and improve) the Missouri Plan model to win the broad public support that has eluded it? Or, is it time to go back to the drawing board and develop a workable, *winnable* reform that meets the challenges of the 21st century?

In addressing these questions, we should take our cue from history. In the 19th and 20th centuries, reformers devised a new way select judges. With a new set of challenges, what selection method can best serve the needs of the current century?

A Brief History of State Judicial Selection Methods

Broadly speaking, state judges are chosen in one of five ways: gubernatorial appointment, legislative appointment, partisan elections, nonpartisan elections, and commission-based selection. Each selection method arose at a different period in the nation's history, responding to specific needs and concerns of the day. But they were all intended to ensure an appropriate balance of independence and accountability. Whether they still achieve that goal is a matter of debate.

At the founding, Americans were deeply unhappy with the British colonial court system. Historian Jack Rakove explains that as Britain began to develop a more professional and independent judiciary in the 18th century, with protections for judicial tenure and salaries, “colonial judges, down to the local justices of the peace who were the bedrock of the system, were both appointed and removable by the Crown.” This led to numerous disputes over the courts. While colonial assemblies tried to protect judges from the prospect of arbitrary dismissal, colonial governors forbade them from

doing so.¹⁴ In the Declaration of Independence, the list of grievances against King George III included this indictment: “He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”¹⁵

In response, most state constitutions during the Articles of Confederation period sought to limit judges’ dependence on the executive. But newly-empowered state legislatures couldn’t resist the temptation to manipulate the courts, presenting a threat to judicial independence. As legal historian Jed Handelsman Shugerman recounts in *The People’s Courts*, his comprehensive history of state courts, “early legislatures frequently vacated court decisions, suspended lawsuits, annulled judgments, granted new appeals and new trials, ruled on the merits of suits, and cancelled executions.”¹⁶

Because of this legislative interference, the framers of the U.S. Constitution came to see it was essential to protect judicial independence by placing limits on political retribution by the executive and legislative branches. In *Federalist No 78*, Alexander Hamilton saw the federal courts as “bulwarks of a limited Constitution against legislative encroachments.” Under the new federal model, the judiciary would be a co-equal branch of government. The president would appoint judges subject to the advice and consent of the Senate. To protect judicial independence, judges would be appointed for life and their salaries protected. And they could only be removed from office for high crimes and misdemeanors.¹⁷

By the dawn of the 19th century, states chose their judges in one of two ways. Some hewed to the federal model, with the governor making judicial appointments subject to legislative confirmation. Others vested the appointing power in the legislature. Currently, only three states use gubernatorial appointments akin to the federal model, and two states choose judges legislatively.¹⁸

Populist reform in the 19th century. During the Jacksonian era of the 1820s and 1830s, populist reformers argued that judges were too dependent on the governors and legislators who appointed them. They argued that judges chosen by the people would be more faithful to the law than the cronies of the powerful who populated the bench. Their solution: Let the people choose judges via the ballot box.

While many who prefer judicial elections today tout them as a check on excessively independent judges, 19th century reformers saw them quite differently. They believed that allowing the people to vote on judges would promote judicial independence and separation of powers. As Shugerman explains:

Reformers defined judicial independence as insulation from a certain kind of insider politics: the partisan patronage politics of appointments. Open partisan politics, out-of-doors, was their solution, not the problem. In that moment, reformers believed that direct elections gave “the people,” mobilized by more participatory political parties, a check on insider politics. Intriguingly, they believed that partisan elections promised a *less* partisan and *less* politicized bench that would be emboldened to act as a stronger check and balance against the other branches.¹⁹

In the early 1800s, Vermont, Georgia, and Indiana experimented with electing local judges. And in 1832, Mississippi became the first state to choose all its judges via partisan elections.²⁰ But it was not until the economic depression of the 1840s — which fueled a movement to rein in profligate state legislatures — that the idea of vesting judicial selection in the hands of the people began to take off. An 1846 constitutional convention brought judicial elections to New York, then the most populous state, lending credibility to the idea.²¹ In short order, judicial election reforms spread across the country. Most of the states entering the Union in the mid-1800s enshrined judicial elections in their state constitutions. And other states scrapped their appointive systems for elections.

By 1909, 35 states selected their judges through partisan election contests.²² Today this method is far less prevalent. Only six states use it for their supreme courts,²³ six for their intermediate appeals courts,²⁴ and nine for their lower level trial courts.²⁵

Shugerman’s scholarship reveals that “[l]ate nineteenth-century judicial races were hotly competitive and intensely partisan in many states, with special interests taking an active role in party nominations.”²⁶ For that reason, as the 20th century dawned, many came to view judicial elections as a problem in need of a solution. To get on the ballot, judicial candidates often had to curry favor with party bosses who had little interest in selecting the most qualified people for the job. Progressives, unhappy with the pro-business tilt of many state judiciaries, complained that partisan elections facilitated the capture of courts by special interests.²⁷

Progressive reform in the 20th century. In an incremental reform, Ohio introduced nonpartisan judicial elections in 1912. Judicial candidates appeared on the ballot without party affiliation. Political scientist Matthew Streb explains: “This Progressive reform was designed to cripple the powerful city machines’ control over the nomination process and remove divisive national partisan interests from state and local elections.... Nonpartisan judicial elections were perceived as a way to clean up corruption and cronyism in the judicial selection process while still keeping judges accountable to the people.”²⁸ By 1930, 12 states chose their appellate judges in this manner.²⁹ Today, 15 do so, while 21 states use nonpartisan elections for some or all of their trial court judges.³⁰

But from the outset, critics saw nonpartisan contests as an insufficient cure for the problems plaguing judicial elections. Removing the party label left voters with little information to distinguish one candidate from another. And in some states, political parties continued to play a role by nominating or endorsing candidates. In fact, there is now a significant body of evidence that shows judicial elections without party affiliation does little to solve the problems of partisanship.³¹

So in 1913, a distinctly 20th century method of judicial selection was proposed: merit selection. Attributed to Albert M. Kales, one of the founders of the American Judicature Society, it took a while for this idea to percolate.³² In 1934, California’s voters agreed to end judicial elections and have a commission approve gubernatorial appointments to the bench, followed by periodic retention elections.³³ Missouri adopted the first true merit selection system in 1940. Under what came to be known as “the Missouri Plan,” an independent commission recruits and vets candidates based on qualifications, not party affiliation or connection. The

commission proposes a slate of finalists to the governor, who can only choose someone from that list. Then, periodically, judges appointed under this system run unopposed in retention elections, where voters retain a say by deciding whether the judge should serve another term. But it should be noted there is a fair amount of variety among merit selection systems. Some state merit selection schemes do not employ retention elections.³⁴

Proponents of the reform effort in Missouri promised a more modern and capable judiciary, a message frame that would later be employed successfully in other states. As a contemporary newspaper editorial argued, merit selection would “keep Judges from many political pressures, raise efficiency in the courts and attract candidates who will not now run for the bench because it means becoming involved in party politics, machine patronage and spoils.”³⁵

Business interests, working with state bar associations, played a significant role in the spread of merit selection.³⁶ Opposition came mostly from plaintiffs’ lawyers, organized labor, and big city political machines. From 1940 through the mid-1980s, merit selection spread to 24 states, predominantly in the South, the Great Plains, and Rocky Mountain West. It did not fare as well in states with strong labor unions and large cities.³⁷

The last state to implement a commission-based appointment system was Rhode Island in 1994, following a series of scandals involving supreme court justices.³⁸ Since then, all merit selection campaigns have fallen short. As explained earlier, over the past three decades voters have rejected merit selection ballot measures in six states: Florida, Louisiana, Michigan, Ohio, South Dakota, and Nevada (twice).³⁹ In other states, merit selection proposals have failed to get past the legislative approval stage. Meanwhile, existing merit selection systems have faced new pressures from politicians and interest groups looking to weaken their insulation from politics. In some merit selection states, there have even been calls for a return to contested elections.

What seems clear, looking back on two and a half centuries of experimentation, is that the debate over the best way to select judges is far from settled. University of Indiana Law School Professor Charles Geyh — a leading scholar on fair courts issues — takes the long view:

Consensus on the optimal method of judicial selection has been elusive. Many have asserted that this is because there is no perfect method of judicial selection — or, more harshly, because there is no good method of judicial selection. A more charitable explanation may be that the objective of a good selection system — an optimal balance between judicial independence and accountability — is an ever-moving target that generates perennial calls for reform.⁴⁰

Today’s Crisis in State Judicial Selection

Today’s crisis in state judicial selection has its roots in the partisan battles of the 1980s and 1990s. In a handful of states that selected judges through partisan elections, notably Texas, Mississippi, and Alabama, two competing interest groups realized the value of financing

judicial election campaigns. On one side were the plaintiffs' lawyers. They had a stake — both philosophical and financial — in judges who favored liberal access to the courts for people injured by businesses or doctors, and who supported generous damage awards. On the other side were medical professionals, insurance companies, and manufacturers. They wanted judges with a pro-business orientation: ones who would clamp down on “frivolous” litigation and “excessive” jury verdicts.

By the early 1990s, conservative opinion leaders and Republican Party candidates orchestrated an effective national campaign to advance “tort reform.” They asserted that the nation faced a litigation crisis that threatened the economy. News stories about large jury verdicts — like the \$2.86 million award to a woman burned and disfigured by a cup of McDonald's coffee — helped fuel arguments that the courts were beset with frivolous lawsuits. The proposed solution was a grab bag of laws making it harder for people to sue for civil damages and capping the money a winning litigant could receive.

Tort reform was a central issue in the midterm elections of 1994, when Republicans captured Congress for the first time in a generation and made sweeping gains in the statehouses. In many states, newly elected governors and state legislators acted quickly to enact tort reform measures.

But when these new laws were challenged, they were struck down by several state supreme courts. They based their rulings on provisions in state constitutions guaranteeing access to the courts and ensuring a remedy for wrongs committed.⁴¹ Viewed broadly, these rulings were consistent with a trend toward the “rediscovery of state constitutions,” in the words of G. Alan Tarr, a political scientist at Rutgers University, as social reform groups frustrated with an unsympathetic U.S. Supreme Court “began to look to state courts as a new arena in which to pursue their goals.”⁴² As legal historian Emily van Tassel explains, this shift served to “raise the profile of state court judges and make control over state judgeships seem more significant to a greater range of interest groups than in the recent past.”⁴³

The reversals in the tort reform cases were pivotal, causing the business lobby to focus its attention on the need for “business friendly” judges. Leading business groups, including the U.S. Chamber of Commerce and the National Association of Manufacturers, raised money from their members to target judges for defeat. By 2000, spending on judicial races began to soar. A front-page headline in the June 5, 2000 edition of *The New York Times* took note of the new trend: “Fierce Campaigns Signal a New Era for State Courts.”⁴⁴

The surge in campaign spending. The first *New Politics of Judicial Elections* report called 2000 “a watershed year for big money, special interest pressure, and TV advertising in state supreme court campaigns.” Tallying the data, it found that supreme court campaigns raised a staggering \$45.6 million in the 2000 election cycle: 61 percent higher than the amount raised in 1998 and double the amount raised in 1994. In four highly contested states — Alabama, Michigan, Ohio, and Illinois — “an unprecedented tidal wave” of campaign spending shattered records. The report found that lawyers and business interests were largely behind this huge wave of campaign giving.⁴⁵

In an initial foray in 2000, the Chamber announced it would invest up to \$10 million in supreme court races to counter what it saw as pro-plaintiff bias. Emboldened by its successes, it ramped up a more ambitious national strategy. As the Chamber's president, Thomas Donahue, reflected in a 2002 speech:

Flush with billions of dollars in fees from tobacco and asbestos litigation, a small group of class-action trial lawyers is hellbent on destroying other industries, and nobody is immune. Our approach is simple — implement a multi-front strategy of challenging these unscrupulous trial lawyers every time they poke their head out of the ground.... On the political front, we are going to get involved in key state supreme court and attorney general races as part of our effort to elect pro-legal reform judicial candidates.... We're clearly engaged in hand-to-hand combat, and we've got to step it up if we're going to survive.⁴⁶

In the ensuing decade, the cost of winning — or keeping — a seat on a state high court escalated as money poured in from both sides of the tort wars. From 2000-09, supreme court candidates raised a total of \$206.9 million, more than double the \$83.3 million raised from 1990-1999. Almost every state that selected its supreme court justices through contested elections saw record-breaking spending.⁴⁷ And the campaign spending arms race even trickled down to some lower court elections.⁴⁸

One hotly-contested race in 2004, for a seat on the Illinois Supreme Court, shattered the national record for a two-candidate race. Supreme court justices in Illinois are elected from districts, not statewide. Special interests zeroed in on the Fifth District, in the mostly rural southern part of the state, because it was home to Madison County, considered a mecca for class actions and large jury verdicts. The American Tort Reform Association, a pro-business lobby, called the county's court a "judicial hellhole." Although the ideological balance of the high court was not in play, business trade associations, insurance companies and medical groups made large contributions to support the Republican candidate, Lloyd Karmeier. Plaintiffs' lawyers largely funded Democrat Gordon Maag's candidacy. Altogether, the two campaigns raised and spent an astounding \$15.1 million. The winner, Karmeier, reflected after his victory: "That's obscene for a judicial race. What does it gain people? How can people have faith in the system?" Karmeier later courted controversy when he voted to overturn billion-dollar class action judgments against two large corporations which backed him in his 2004 campaign.⁵⁰

Another state that saw a costly judicial arms race was Alabama, which elects its judges in partisan election contests. In 1994, all nine members of the Alabama Supreme Court were Democrats.⁵¹ By 2004, every seat had flipped to Republican with the help of "a select club of state and national special interests [that] emerged to bankroll Supreme Court elections and fundamentally reshape the court."⁵² For the decade 2000-09, Alabama had the highest campaign spending on judicial races of any state: nearly \$41 million in contributions to candidates and over \$2.6 million in independent spending for TV ads.⁵³ These numbers are especially striking when one considers that in 2000 Alabama was the nation's 23rd most populous state, and its largest media market (Birmingham) ranks 45th.⁵⁴

Pennsylvania has also had several big money judicial contests. Under the state's hybrid system, candidates first run for a state supreme court seat in a contested partisan election. Then, after serving a ten-year term, a justice can seek retention in an uncontested election. Because control of the Pennsylvania Supreme Court was at stake, spending in judicial races set records. From 2000-09, Pennsylvania ranked second, after Alabama, in total spending: \$22.6 million.⁵⁵ Since then, the stakes have only gotten higher. In the 2015 election, where the Democratic candidates swept three open seats, total spending exceeded \$16.5 million, setting a new record for spending in a judicial election in a single state.⁵⁶

Since the Supreme Court's *Citizens United* ruling in 2010, which allowed unlimited independent spending in elections, special interest groups have generally been more inclined to fund their own parallel campaigns instead of contributing directly to a candidate. In the 2013-14 election cycle, outside spending by interest groups, including political action committees and social welfare organizations, accounted for nearly 30 percent of total spending,⁵⁷ nearly doubling the record share, pre-*Citizens United*, of 16 percent in 2003-04.⁵⁸

In the nearly two decades of this campaign arms race, from 1994 to 2014, spending on judicial races exceeded \$420 million. Much of that staggering sum went to fund television advertising.

Electoral retribution for controversial judicial decisions. During much of the 20th century, judicial races tended to be low-profile, often described as “sleepy,” affairs. But every once in a while, they would flare into fiercely fought referendums on hot-button issues — usually involving crime. The 1986 retention election in California is a well-known example. Three California Supreme Court justices, including Chief Justice Rose Bird, faced a well-funded campaign primarily organized around their opposition to the death penalty, which was then overwhelmingly supported by the public. The state's Republican governor, George Deukmejian, also attacked Bird as anti-business. The three justices were ousted in a landslide, allowing Deukmejian to appoint more conservative replacements.

That same year, Justice William J. Brennan, Jr. expressed concern: “It cannot be denied that state court judges are often more immediately subject to majoritarian pressures than federal courts, and are correspondingly less independent than their federal counterparts.”⁵⁹ What would he think of the events that followed?

In 1996, a Tennessee justice named Penny White was targeted for defeat in another retention election. The campaign, led by a coalition of conservative groups, focused on a single murder case in which the court had voted unanimously to uphold a defendant's murder conviction, while ordering a new sentencing hearing to correct some procedural violations. White had signed a concurring opinion in the case, urging a more narrow interpretation of the “aggravating circumstances” required to impose a death sentence. The last-minute campaign, materializing with little warning, urged voters to “vote for capital punishment by voting NO ... for Supreme Court Justice Penny White.” After her defeat on Election Day, Don Sundquist, the state's Republican governor, sounded pleased: “Should a judge look over his shoulder to the next election in determining how to rule on a case? I hope so. I hope so.”⁶⁰

White's defeat seemed to presage a dangerous new chapter for the state courts. Speaking two days after the vote, U.S. Supreme Court Justice John Paul Stevens told the American Bar Association that judicial elections were "profoundly unwise." He added: "A campaign promise to be 'tough on crime' or 'enforce the death penalty' is evidence of bias that should disqualify the candidate from sitting in criminal cases." For its part, the ABA convened a special commission to consider these growing threats to a fair and impartial judiciary. And state bar associations stepped up their public education and outreach programs.

Ultimately though, Justice Stevens's warning went unheeded, and the new era of judicial campaigns continued its trajectory. With increasing frequency, judges and judicial candidates waged TV ad campaigns hawking their "tough on crime" stances. And a proliferation of independent groups, funded by businesses and others with a financial interest in judicial outcomes, waged effective wedge issue campaigns preying on public fears about crime. The fact that judges have a duty to follow the law, even if it means ruling in favor of an unpopular defendant, was beside the point.

Stephen Bright, one of the nation's leading opponents of the death penalty, warned as early as 1995 that judicial elections can have life or death consequences for those accused of serious crimes:

Decisions in capital cases have increasingly become campaign fodder in both judicial and nonjudicial elections. The focus in these campaigns has been almost entirely on the gruesome facts of particular murders, not the reason for the judicial decisions. Judges have come under attack and have been removed from the bench for their decisions in capital cases — with perhaps the most notable examples in states with some of the largest death rows and where the death penalty has been a dominant political issue. Recent challenges to state court judges in both direct and retention elections have made it clear that unpopular decisions in capital cases, even when clearly compelled by law, may cost a judge her seat on the bench, or promotion to a higher court. This raises serious questions about the independence and integrity of the judiciary and the ability of judges to enforce the Bill of Rights and otherwise be fair and impartial in capital cases.⁶¹

A 2015 Brennan Center report provides sobering confirmation of Bright's prophetic warning. It reviewed ten recent empirical studies on the impact of judicial elections on criminal justice outcomes. Among the key findings: "While these studies used varying methodologies and examined a variety of states, court levels, and methods of election, *all found that the pressures of upcoming re-election and retention election campaigns make judges more punitive toward defendants in criminal cases.*"⁶²

The highly emotional issue of crime continues to be a central issue in judicial races. The most recent *New Politics of Judicial Elections* report found that:

Ads discussing criminal justice issues — including describing a candidate as being tough or soft on crime, highlighting a candidate's history of putting criminals behind bars, or showcasing their support of victims' rights — made up an incredible 56 percent of all ads that ran [in the 2013-14] cycle....

Not only was criminal justice-themed messaging a bigger piece of the advertising pie this cycle, but half of these spots were sponsored by outside groups, many of which did not have an explicit criminal justice mission and received funding from businesses and plaintiffs' lawyers.⁶³

Other issues have also provided fodder for campaign attacks. One notable example is the campaign to oust three Iowa Supreme Court justices after the court's unanimous 2009 ruling in favor of marriage equality. The three justices who were up for a retention election in 2010 were defeated after a vitriolic campaign funded largely by out-of-state interests, mainly associated with the Christian Right.⁶⁴ Another Iowa justice faced a "no" campaign in 2012, but the effort to unseat him fell short.

But win or lose, in both contested election states and retention election states, judges increasingly face the threat of electoral retribution when they rule in ways that offend powerful interests. This has worrisome implications for the fairness and integrity of our state courts. As Charles Geyh persuasively argues:

If we accept the proposition that judges must be independent enough to respect the due process rights of parties, administer justice in situation specific contexts, and apply the law as they understand it to be written, then putting judges at risk of losing their jobs for making a choice in an isolated case summarized for voters in advertising campaigns is troublesome.⁶⁵

Uncertainty over campaign conduct rules. As judicial elections have grown more contentious and costly, judicial candidates have had to parry growing pressures to act more like politicians — and less like judges. In 2002, the U.S. Supreme Court made this task significantly harder. In *Republican Party of Minnesota v. White*,⁶⁶ it ruled 5-4 that states cannot prohibit a candidate for judicial office from "announcing his or her views on disputed legal or political issues." At issue were judicial ethics rules that regulate campaign conduct to protect the public's interest in fair and impartial courts. In an opinion written by Justice Antonin Scalia, the majority said that as long as a state opts to select judges via elections, the First Amendment allows judicial candidates to take stands on political and legal issues.⁶⁷

Bar leaders, good government advocates, and many judges criticized the ruling as hopelessly naïve. They maintained that judicial elections are *different*. Campaign conduct rules played a vital role, setting boundaries on judicial campaigns to protect the public's interest in a fair and unbiased judiciary.⁶⁸

Emboldened by *White*, judicial candidates challenged other campaign restrictions in the courts. And interest groups used *White* as a pretext to demand that judicial candidates answer detailed questionnaires on their views on issues like the death penalty or same-sex marriage. An American Bar Association commission — charged with drafting the Model Code of Judicial Conduct that influences ethics rules in all 50 states — revisited the restrictions on campaign speech and conduct in light of *White*. Rather than fully embrace the Court's deregulatory logic, they made modest tweaks to the Code and waited to see what the courts did next.

In *Caperton v. Massey* in 2009,⁶⁹ the Court confronted a fairly brazen attempt to influence a pending case through the use of large campaign contributions. Justice Brent Benjamin of the West Virginia Supreme Court refused to recuse himself from the appeal of a \$50 million jury verdict, even though the CEO of the lead defendant had spent \$3 million to support his campaign — more than 60 percent of the total amount spent to win the seat. The justice then cast the deciding vote in a 3-2 decision overturning the verdict. In a 5-4 opinion written by Justice Anthony Kennedy, the Court concluded that, given the “serious risk of actual bias,” the Constitution’s Due Process Clause required Benjamin to recuse himself from the case.⁷⁰ *Caperton* gave states the green light to adopt stricter rules requiring judges to recuse themselves from cases when they have received significant financial support from a litigant. The Brennan Center is encouraging states to take this important step.⁷¹

And last year, in *Williams-Yulee v. Florida Bar*,⁷² the Court considered Florida’s ban on the personal solicitation of campaign contributions by judicial candidates. The defendant in the case, who lost her race for a seat on a county court, signed a fundraising letter in violation of the ban. She was fined and reprimanded for the offense. In yet another 5-4 ruling, Chief Justice John Roberts upheld the ban. “A state’s decision to elect its judges does not compel it to compromise public confidence in their integrity,” he wrote.⁷³ Advocates of fair and impartial courts cheered the decision, which was a stark contrast with Justice Scalia’s uncompromising position in *White*. It effectively upheld measures in 30 states that forbid judicial candidates from making personal appeals for money.

The holdings in *Caperton* and *Williams-Yulee* suggest there may be openings for reformers looking to undo the damaging impact of *White* — or to reverse the case altogether. But the battle to preserve campaign conduct regulations that keep judicial elections from resembling normal elections is far from resolved.

The Emerging Response — and the Current Impasse Around Reform

As early as 1999, prominent members of the judiciary began to voice their concerns over the growth of campaign cash in judicial races. Two U.S. Supreme Court justices, Anthony Kennedy and Stephen Breyer, took the unusual step of appearing on an episode of the PBS news program *Frontline* to warn that rising campaign spending threatened the independence and neutrality of the judiciary. Kennedy expressed his concerns to host Bill Moyers:

[T]he campaign process itself does not easily adapt to judicial selection. Democracy is raucous, hurly-burly, rough-and-tumble. This is a difficult world for a jurist, a scholarly, detached neutral person to operate within. So, the whole problem of judicial campaigns is. . . difficult for us to confront. Now, when you add the component of this mad scramble to raise money and to spend money, it becomes even worse for the obvious reason that we’re concerned that there will be either the perception or the reality that judicial independence is undermined.⁷⁴

He added: “We weren’t talking about this 30 years ago, because we didn’t have money in [judicial] elections. Money in [judicial] elections presents us with a tremendous challenge, a tremendous problem and we are remiss if we don’t at once address it and correct it.”⁷⁵

Just a year later, in the weeks following the record-shattering 2000 cycle, chief justices from the 17 most populous states with judicial elections met in an unprecedented National Summit on Improving Judicial Selection, organized by the National Center for State Courts. The chiefs also brought teams of legislators, bar leaders and reformers to consider ways to address growing threats to the integrity of judicial elections.

The Summit’s goal — notably — was not to end judicial elections. In a joint statement issued at the conclusion of the Summit, styled a *Call to Action*, the participants explained why they decided to focus on the less ambitious goal of “improving” elections, rather than eliminating them:

As currently conducted in many states, judicial election campaigns pose a substantial threat to judicial independence and impartiality, and undermine trust in the judicial system. Unregulated issue advertisements and independent expenditures by special interests present a particularly grave and immediate threat. Many observers have concluded that moving to a wholly appointed judiciary is the best answer to these problems. But movement away from systems providing for contested election of judges has not occurred in most states. Too little attention has been given to incremental changes in the judicial election process to address some of the most serious threats to judicial independence and impartiality, and to appreciably enhance public trust in the courts.⁷⁶

The *Call to Action* set forth 20 concrete steps to make elections less partisan, shore up judicial campaign conduct rules, regulate campaign finance practices, and improve voter awareness and participation. “We are aware of the difficulties inherent in regulating election campaigns,” they explained. “But we reject the notion that nothing can be done.”⁷⁷

Some of the reforms endorsed by the chief justices have been tried in some places. Since 2000, Arkansas, North Carolina, and West Virginia moved to a nonpartisan election system. And four states adopted public financing for judicial races before the two largest systems, in North Carolina and Wisconsin, were undone. As explained earlier, while these reforms may have offered some improvements they have not fixed the partisanship and politicization plaguing judicial elections.

Meanwhile, other reformers stepped up their efforts to end judicial elections once and for all. Like Justice Stevens, they viewed judicial elections as unwise. They argued that subjecting judges to election campaigns — particularly as they were becoming “nastier, noisier and costlier”⁷⁸ — was incompatible with the independence and impartiality judges must maintain. How can judges raise money, urge the public to vote for them, and respond to attacks from interest groups without making implicit promises to voters?

Merit selection's failure to win broad public support. Over the past two decades, as concern over judicial campaigns mounted, politicians and civic leaders renewed their calls to amend state constitutions to establish a commission-based appointment system based on the Missouri Plan. In 2001, *The New York Times* reported: “momentum is growing to rein in aggressive politicking by judicial candidates, spurred on by last year’s elections, which were fiercer and more expensive than ever. The efforts around the country include proposals to replace elective systems for top state judges with appointive ones in big states like Pennsylvania and Michigan.”⁷⁹

The Pennsylvania effort seemed particularly promising. Tom Ridge, the state’s popular Republican governor, supported a constitutional amendment to replace partisan judicial election contests with a system based on the Missouri Plan. Seeing the measure as a way to cement his legacy as a reformer, he convened a series of summits around the state to win over key stakeholders. But Ridge’s campaign was cut short. A few months after starting the effort, he was named the nation’s first Secretary of Homeland Security.

To pass a constitutional amendment in Pennsylvania, implementing legislation must be passed by two consecutive sessions of the state legislature. The measure then has to be approved by the voters. But after Ridge’s departure, merit selection repeatedly failed to advance in the legislature despite the efforts of reformers. Even a rash of scandals involving three justices — one convicted of felony corruption and two others caught sending racist and pornographic emails — did nothing to move the legislation. Meanwhile, Pennsylvania’s judicial races have routinely become multimillion-dollar, brass-knuckle contests. Total spending in the 2015 election totaled \$16.5 million, topping the previous national record set in Illinois in 2004.⁸⁰

All five of Pennsylvania’s living former governors, both Democrat and Republican, along with current Democratic Gov. Tom Wolf, signed an extraordinary op-ed piece this March calling for merit selection. Speaking to recalcitrant legislators, they implored: “As leaders of this commonwealth, we are coming together across the political spectrum to urge you to support merit selection of statewide judges when the proposal comes before you.”⁸¹ But as The Marshall Project reports, “[the] proposal faces opposition from the trial lawyers’ association, unions, and groups focused on single issues like abortion. They and other opponents of the measure say there’s no proof that appointed judges are better suited for the job than elected judges, and that it’s important for voters to have a say in how the courts are run.”⁸²

As the Pennsylvania example shows, the process of amending state constitutions takes time. It takes resources. And it takes a broad coalition. But some crucial constituencies have been reluctant to support merit selection. Apart from the trial lawyers and unions who reliably oppose it, civil rights groups and minority bar associations have also expressed skepticism about merit selection, primarily because of concerns about judicial diversity when appointment power is ceded to an unelected, elite commission.

It should not surprise anyone that communities that have always had to fight for the right to vote — even now in an age of voter ID laws and other disenfranchising measures —

would be reluctant to relinquish that right when it comes to judges. A 2005 report by the Lawyers' Committee for Civil Rights Under Law looked at minority perceptions of the courts and judicial diversity. Among other things, it found: "Despite a lack of data on the effectiveness of elections in creating diversity, minority communities traditionally prefer the election model over an appointment system." This view is grounded in "suspicion of the appointment and merit selection process," based on the "concern ... that insiders will be less likely to select diverse candidates."⁸³

But recent data on judicial selection systems and diversity shows that appointive systems fare no worse than elective ones — they have both failed to produce judiciaries that reflect the populations they serve. A 2013 study in the *Indiana Law Review* found that "minority and female judges are no more or less likely to reach the bench through merit selection or judicial elections." The article noted that merit selection, unlike elections, "provides the opportunity to identify diversity as an institutional priority."⁸⁴ An American Judicature Society study in 2010 similarly concluded that "neither appointive nor elective methods were consistently more successful, or less successful, in diversifying state judiciaries," although it did find that appointive systems "placed more minorities on high courts than contested elections."⁸⁵

Meanwhile, the business community — once a reliable ally — has become more tentative about merit selection. In 2002, the Committee for Economic Development, a business-led policy group, convened a blue ribbon panel of CEOs and corporate general counsels worried about the growing politicization of judicial elections. In a report called *Justice for Hire*, the members expressed alarm over the trends in judicial elections:

In a growing number of states, judicial races are evidencing an "arms race mentality" of rising expenditures, heightened competition, and growing interest group activity. Judicial selection is thus becoming a political process that places pressure on lawyers, business organizations, and interest groups to get involved in the competition to elect judges who will be favorable to their positions.

The panel issued an emphatic call for a commission-based appointment system as the best way to guarantee fair and impartial state judiciaries.⁸⁶

But more recently, as the U.S. Chamber of Commerce and National Association of Manufacturers poured millions of dollars into successful races to elect business-friendly supreme courts in states such as Texas, Ohio, and Illinois, support for merit selection may be declining in the business community. A study of judicial politics in Texas found that "while there remains significant business interest support for merit selection of judges ... one sees an increasing willingness to enter the political fray and elect judges more sympathetic to their viewpoints."⁸⁷ Conservative opinion leaders and the *Wall Street Journal* have called for replacing merit selection commissions with direct election by the voters, cloaking these arguments in the mantle of democracy. One *Journal* editorial writer posited that "picking judges behind closed doors only takes things further from our democratic ideals."⁸⁸

Considerations for a Successful Judicial Selection System

One hundred years ago, most states chose their judges via partisan elections. Over the course of the past century, that changed. A number of states switched to nonpartisan elections which, for reasons set forth earlier, have not necessarily ended the problems they set out to cure. An even larger number of states embraced merit selection for some or all of their judges, retaining a popular check on judges through retention elections. Amazingly, after a century of various reform efforts spurred by concerns over the practice of electing judges, 87 percent of state court judges still face elections of one sort or another.⁸⁹

Those concerned about judicial elections have followed two different paths. Some have doubled down on pressing for merit selection in the belief that it can overcome its recent inertia and generate new interest. Others, who conclude that electing judges is ingrained in democracy (for better or worse), have decided to focus their efforts — as the chief justices at their 2000 summit did — on the more achievable goal of “improving judicial selection” (or as Charles Geyh describes it, “mak[ing] a bad system better in the interim”⁹⁰). But neither approach has done much to arrest the increasing politicization of judicial races.

Why can't there be a third path? Why can't people worried about the trends in state judicial selection work together to devise an ambitious — not merely incremental — reform that offers a way forward? If judicial elections were the answer to a particular set of problems in the 19th century, and merit selection performed the same function in the 20th century, why should we expect either to meet the needs of the current century? Has history stopped?

This year, the Brennan Center is launching a project — Rethinking Judicial Selection — melding an ambitious research agenda with convenings of scholars, researchers, stakeholders, and thought leaders to grapple with this question: What would a viable alternative selection method look like? The Brennan Center's Alicia Bannon has outlined the current challenges to appointive and merit selection systems, and elaborates on these values as well, in *Rethinking Judicial Selection in State Courts*.

Among the values the Center urges people to consider when examining proposals for reform are the following:

Safeguarding judicial independence. While there are many definitions to choose from, Wisconsin's Chief Justice Patience Drake Roggensack helpfully describes judicial independence as “impartial decision making, where the rule of law is applied even-handedly and the court does not respond to external pressures, such as court funding, special interest groups, political agendas, the press, campaign contributors, or an upcoming election or hoped-for appointment.”⁹¹ Justice Brennan recognized 30 years ago that state court judges, who for the most part can see their next election or appointment on the horizon, are “less independent” than federal judges who enjoy life tenure.⁹² So how might an improved selection method reduce undue political pressure on state judges?

One obvious place to start is judicial *reselection*. Judges in 47 states are periodically re-elected or reappointed. Back in 2003, an American Bar Association Commission on the 21st

Century Judiciary found it to be a significant threat to the fairness and impartiality of the state courts:

In the Commission’s view, the worst selection-related judicial independence problems arise in the context of judicial reselection. It is then that judges who have declared popular laws unconstitutional, rejected constitutional challenges to unpopular laws, upheld the claims of unpopular litigants, or rejected the claims of popular litigants are subject to loss of tenure as a consequence. And it is then that judges may feel the greatest pressure to do what is politically popular rather than what the law requires. Public confidence in the courts is, in turn, undermined to the extent that judicial decisions made in the shadow of upcoming elections are perceived — rightly or wrongly — as motivated by fear of defeat.⁹³

The Commission added: “the problems with reselection may be most common in contested reelection campaigns but are at risk of occurring in any reselection process — electoral or otherwise.”⁹⁴ It recommended that judges be appointed for a single long term, 15 years minimum, with retirement benefits provided to make the job appealing.⁹⁵

Ensuring accountability in the absence of elections. Charles Geyh describes judicial accountability as having “multiple forms”:

[I]nstitutional accountability mechanisms hold judges answerable collectively for their conduct as a separate branch of government, for example by subjecting court budgets to legislative oversight; behavioral accountability mechanisms hold judges to account for their conduct on and off the bench, for example by subjecting them to discipline for being abusive to litigants or accepting inappropriate gifts from lawyers who come before them; and decisional accountability makes judges answerable for their judicial rulings, for example by subjecting their decisions to appellate review.⁹⁶

While Shugerman and other historians remind us that judicial elections arose to protect judicial independence from interference by the other branches of government, they are embraced today largely as a means to enforce decisional accountability via the ballot box. University of Pittsburgh political scientist Chris Bonneau, a prominent critic of judicial selection reformers who favors a return to electing judges in partisan contests, makes that motivation apparent: “It is important to remember that efforts to maximize judicial ‘independence’ from the electorate can also maximize independence from the law and the Constitution. Without a mechanism for effectively holding judges accountable, judges are free to ‘go rogue’ and make decisions based solely on their political views.”⁹⁷

Bonneau is hardly alone. A growing body of political science literature in recent years has focused on justifying — or at least explaining — the need for judicial elections as a means of accountability. Michigan State University’s Melinda Gann Hall observes, “As a substantial body of empirical work on state supreme courts has shown, justices often have significant discretion in interpreting the law and, in the process of clarifying legal principles or extending established

rules to new situations, are required to call on their own personal values and experiences to decide the cases.”⁹⁸ She adds, “empirical judicial politics scholarship has discredited traditional notions that state supreme court justices are tightly constrained by law and lack a meaningful policy-making role. Thus, if judging is a political art as well as a legal science, some might reasonably conclude that judges, like other public officials with the power to shape public policy, should have their discretionary choices scrutinized by the electorate.”⁹⁹ Herbert Kritzer of the University of Minnesota Law School concurs: “when courts become involved in highly controversial issues or issues impacting major economic interests, it should not be surprising that there is a strong political response that gets played out in the arena of judicial selection and retention.”¹⁰⁰

These scholars do have a point. While no one argues that judicial independence should be “maximized,” the traditional understanding of judicial independence — which places a premium on insulating judges from political accountability for decisions rendered — rests on the assumption that judges, left to their own devices, will apply “the law” in a fair and impartial manner. Clearly, judges must sometimes exercise discretion where the law is not clear or evolving. But conceding this point does not obviate the need for independence. Nor does it follow that elections are the only effective mechanism to ensure accountability. If that were the case, why does virtually no other country have them?¹⁰¹

Bonneau’s vision of a popular check over judges who “go rogue” may make sense to those who view the courts primarily as policymakers. But the courts also play a crucial counter-majoritarian role. As Judith Resnik of Yale Law School reminds us, “democracies require that judges make rulings that are often unpopular in a variety of ways.”

One measure of unpopularity is that a court’s judgment would not likely be approved by a vote of the people, were the issue put on a ballot at the same time as the judicial decision is made. Another measure of a judgment’s unpopularity is that neither the executive nor the legislature would be willing to take the political heat entailed in making it, for persons identified with such a judgment would not likely retain office. Unpopularity can also be gauged by whether an issue is of sufficient moment that it can be used by politicians, as well as members of corporate, religious, ethnic, or other kinds of groups, as grounds for protest and mobilization.¹⁰²

It may be difficult to find common ground on this point. For instance, whether recent court rulings upholding the right of gay and lesbian couples to marry have usurped the role of legislature in “defining” marriage, or performed a traditional judicial function by interpreting what the Constitution’s guarantees of liberty and equality mean, is fundamentally in the eye of the beholder.

Charles Geyh urges reformers to take on this new wave of scholarship and avoid grounding the analysis in “the somewhat otherworldly premise that independent judges make rulings of law unsullied by extralegal influences.”¹⁰³ Given the courts’ varied roles — sometimes interpreting the law, sometimes making it — how can we ensure their democratic legitimacy without having to resort to elections?

Recruiting high-quality judges. Every judicial selection reform, when introduced, claims that it will attract more qualified candidates to the bench. Judicial elections were embraced as a cure for cronyism and favoritism. And merit selection — the branding speaks for itself — has always been framed as fostering a more competent and professional judiciary. As it happens, researchers have not found much difference in quality between elected and appointed judges.¹⁰⁴

Most experts agree that highly qualified judges share certain attributes. As the ABA's Commission on the 21st Judiciary recognized, this is partly a matter of mindset:

If judges are to be impartial, they must not only be independent but also possess the appropriate judicial temperament. They must be committed to the rule of law. They must be women and men of integrity, who are evenhanded, open-minded, and unyielding to the influence of personal bias. They must be strong-minded and tolerant of criticism, yet resistant to intimidation. Then, and only then, can we be certain that an independent judge will be a truly impartial judge.¹⁰⁵

And it is partly a matter of possessing certain capabilities and credentials: “the requisite intelligence, legal training, and experience.”¹⁰⁶ In most European countries, where judges are typically recruited in law school for a civil service career in the judiciary, the path to a judgeship requires high scores in competitive examinations, and specialized training over many years. For those who enter the judiciary after a career practicing law, judicial schools offer training programs and continuing education.¹⁰⁷

While there are important differences between the American and European models, those tasked with designing a model selection method for the 21st century should rely less on the selection process and look instead to the experience of other democracies to see whether training and credentialing programs can help to ensure quality judges.

Delivering a diverse judiciary. The nation is more diverse than ever, but state judiciaries remain significantly less diverse than the communities they serve. (The problem is one with some demographic urgency. According to Census Bureau projections, the U.S. will become a “majority-minority” country in 2044.)¹⁰⁸ As noted earlier, studies show that both merit selection systems and elective systems fall short when it comes to fostering a diverse bench. Not surprisingly, studies also show that lack of diversity contributes to communities of color having less confidence in the judicial system.¹⁰⁹

The ABA Commission spent considerable time on this question. It reported:

A multitude of witnesses testified before the Commission as to the relationship between the need for greater racial and ethnic diversity in the justice system and the institutional legitimacy of that system. For instance, polling data that reflect dramatically lower levels of public confidence in the courts among African American citizens signal a very serious problem that will only get more acute as our population becomes increasingly diverse, unless something is done about it now.¹¹⁰

The Brennan Center analyzed the challenge of improving judicial diversity in a 2010 report. Surveying existing research, the study found that “even after years of women and minorities making strides in the legal profession, white men continue to hold a disproportionate share of judicial seats compared with their share of the general population. The question of why this pattern persists does not have an easy answer; the dynamic is created by the intersection of a number of complex factors.”¹¹¹ While the factors differ somewhat in elective and appointive systems, the list includes implicit bias, lack of transparency in selection processes, inadequate recruitment, and fundraising hurdles, challenges that require a great deal of effort to address.

In the past, the judicial reform debate has sometimes failed to pay sufficient attention to the concerns of communities of color, or to adequately address concerns over how reform might affect diversity on the bench. At times, the conversation around reform has unfortunately placed reformers and minorities on opposite sides. This is no way to move forward.

To have any claim to legitimacy, a 21st century method of judicial selection must be more effective in delivering a judiciary that reflects our diverse communities. Reformers should explore ways to bring a diverse array of stakeholders into the selection process. It is necessary that the process be inclusive: The courts are too important to be left only to lawyers and a small group of interested parties.

Maintaining public trust and confidence in the courts. As the ABA’s Commission on the 21st Century Judiciary declared: “The importance of public confidence in the courts is difficult to overstate. The ability of the courts to serve their purpose in a constitutional democratic republic turns on the public’s acceptance and support. Without it, an otherwise sound judiciary cannot long endure.”

The two major movements to reform judicial selection — the 19th century push toward selection by the ballot box and the 20th century move to a commission-based appointive system — were fueled by public disapproval of the courts. Each mechanism promised to restore trust and confidence.

We may be at another such moment. Public opinion research suggests judicial elections undermine public confidence in the judiciary. In a 2014 survey commissioned by the National Center for State Courts, voters in states that elect judges in partisan elections were more likely to agree that judges “make decisions based more on their own beliefs and political pressure.” The pollsters reported: “this evidence underscores our belief that, at this time, public doubts about political influence and bias represent the greatest threat to public confidence in the courts.”¹¹²

Former Texas Supreme Court Chief Justice Thomas Phillips, who convened the chief justices’ 2000 summit, put it this way: “When judges are labeled as Democrats or Republicans, how can you convince the public that the law is a judge’s only constituency? And when a winning litigant has contributed thousands of dollars to the judge’s campaign, how do you ever persuade the losing party that only the facts of the case were considered?”¹¹³

Conclusion

As public concern over money and partisanship in judicial selection has grown, reformers have made scant progress. Merit selection has failed to win broad public support in states that still choose their judges in contested races, despite the tireless efforts of reformers. An alternative focus on the more realistic goal of “improving” judicial elections, through public financing, recusal reform, and other measures, has yielded some successes, but these incremental measures have done little to arrest the trend toward greater politicization in judicial races.

Perhaps what’s needed is to take a cue from the past. Going back to the founding of the Republic, Americans have periodically had to rethink the way we select our state court judges. It may be time once again to go back to the drawing board and develop a workable, *winnable* reform that meets the challenges of the 21st century. In so doing, we should consider how a retooled method of judicial selection advances five key values: safeguarding judicial independence; ensuring appropriate accountability in the absence of elections; recruiting high-quality judges; delivering a diverse judiciary; and maintaining public trust and confidence.

ENDNOTES

- 1 Roy A. Schotland, *Comment*, 61 LAW AND CONTEMP. PROBS. 149, 150 (1998), *available at* <http://scholarship.law.duke.edu/lcp/vol61/iss3/8/>.
- 2 *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999), *available at* <http://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/script.html>.
- 3 In a 2013 poll commissioned by Justice at Stake and the Brennan Center for Justice, voters were asked: “During a campaign, candidates running for judge often raise money for their campaigns by taking contributions from individuals, attorneys, businesses and interest groups that may later have a court case in front of an elected judge. How much influence do you think campaign contributions made to judges have on their decisions – a great deal of influence, some influence, just a little influence or no influence at all?” Fifty-nine percent answered “a great deal,” 28 percent “some,” and 8 percent “just little.” Only two percent answered “none,” and another two percent were not sure. Justice at Stake & Brennan Center for Justice National Poll (Oct. 2013), <https://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf>.
- 4 In a 2002 poll commissioned by Justice at Stake, 2428 state judges were asked: “How much influence do you think campaign contributions made to judges have on their decisions?” Four percent answered “a great deal of influence,” 22 percent said “some influence,” and another 20 percent said “just a little influence.” Thirty-six percent of respondents said “no influence at all,” while 16 percent answered “don’t know.” Two percent of respondents left the answer blank. Justice at Stake, *State Judges Frequency Questionnaire*, (Nov. 2001-Jan. 2002), http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf (last visited May 17, 2016). In a 1999 survey taken on behalf of the Texas Supreme Court and Texas Bar Association, 48 percent of Texas judges believed that campaign contributions significantly influence courtroom decisions. *See* REPORT OF THE TASK FORCE ON SELECTING STATE COURT JUDGES, CITIZENS FOR INDEP. CTS., CHOOSING JUSTICE: REFORMING THE SELECTION OF STATE JUDGES, in UNCERTAIN JUSTICE: POLITICS AND AMERICA’S COURTS 87 (Century Foundation, 2000).
- 5 JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE 4 (Charles Hall ed., 2010), *available at* <http://www.brennancenter.org/publication/new-politics-judicial-elections-2000-2009-decade-change>.
- 6 *See* AMERICAN BAR ASSOCIATION COALITION FOR JUSTICE, JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES 6-7 (2008), *available at* http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf.
- 7 The following 23 states have commission-based gubernatorial appointment systems for one or more levels of their court systems: Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New York, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, and Wyoming. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SELECTION & RETENTION OF STATE JUDGES: METHODS FROM ACROSS THE COUNTRY 3-5, *available at* http://iaals.du.edu/sites/default/files/documents/publications/selection_and_retention_of_state_judges_charts.pdf.
- 8 *See* AM. JUDICATURE SOC’Y, CHRONOLOGY OF SUCCESSFUL AND UNSUCCESSFUL MERIT SELECTION BALLOT MEASURES, *available at* http://www.judicialselection.us/uploads/documents/Merit_selection_chronology_1C233B5DD2692.pdf.

- 9 SCOTT GREYTAK ET AL., *BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2013-14*, at 4 (Laurie Kinney ed., 2015), *available at* <http://newpoliticsreport.org/report/2013-14/>.
- 10 See ADAM SKAGGS ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10: HOW SPECIAL INTEREST “SUPER SPENDERS” THREATENED IMPARTIAL JUSTICE AND EMBOLDENED UNPRECEDENTED LEGISLATIVE ATTACKS ON AMERICA’S COURTS*, at 23-26 (Charles Hall ed., 2011), *available at* <http://newpoliticsreport.org/report/2010-report/>.
- 11 See *Judicial Selection in the States: Kansas*, NAT’L CTR. FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/index.cfm?state=KS (last visited May 13, 2016).
- 12 The short-lived Wisconsin program was defunded in 2011 after just one election cycle. The more established North Carolina program was terminated in 2013 as part of a larger piece of legislation that included the state’s controversial voter ID law. See *Public Financing*, JUSTICE AT STAKE, http://www.justiceatstake.org/issues/state_court_issues/public-financing/.
- 13 See *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).
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- 30 The 15 states that select appellate judges via nonpartisan elections are: Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, West Virginia and Wisconsin. The 21 states that select some or all of their trial judges in this manner are Arkansas, California, Florida, Georgia, Idaho, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Washington, West Virginia and Wisconsin.
- 31 *See* SHUGERMAN, *supra* note 16, at 172. Shugerman also notes that nonpartisan judicial races have had perverse unintended consequences: “More recent studies show that the absence of party labels removes a signal for voters, and makes the order of names and the ethnic signal of the names more influential. Nonpartisan elections have been even more expensive than partisan elections, because the candidates needed to spend more to increase their name recognition and to overcome the absence of party labels to get their message out. Studies also suggest that candidates in nonpartisan races tend to campaign even more aggressively and negatively, and with more overt political stances, for the same reason.” *Id.* *See also* AMERICAN BAR ASSOCIATION COALITION FOR JUSTICE, *supra* note 6, at 6.
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- | | |
|------------|--------------|
| 1999-2000: | \$45,997,238 |
| 2001-2002: | \$29,738,006 |
| 2003-2004: | \$46,108,547 |
| 2005-2006: | \$33,238,379 |
| 2007-2008: | \$45,650,435 |
| 2009-2010: | \$27,022,287 |
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